

1978

# the State of Utah v. Brent Leslie Dock : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

BRENT LESLIE DOCK,

Defendant-Appellant.

APPEAL FROM THE  
RENDERED BY THE  
COURT, IN  
OF UTAH.

RONALD J. YENGLER

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Salt Lake City, Utah 84143

Attorney for Appellant

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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:  
STATE OF UTAH, :  
Plaintiff-Respondent, :  
-vs- : Case No.  
BRENT LESLIE DOCK, : 15503  
Defendant-Appellant. :  
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BRIEF OF RESPONDENT  
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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of assault by a prisoner, a third degree felony, Utah Code Ann. § 76-5-102.5 (1953), as amended, in the Third District Court, Salt Lake County, State of Utah, the Honorable G. Hal Taylor, presiding.

DISPOSITION IN THE LOWER COURT

The defendant was charged by information with aggravated assault by a prisoner in violation of Utah Code Ann. § 76-5-103.5 (1953), as amended. The defendant was tried by a jury and on October 13, 1977, he was convicted of the lesser included offense, assault by a prisoner,

Utah Code Ann. § 76-5-102.5 (1953), as amended. The defendant was sentenced to an indeterminate term of not more than five years, to run consecutively with his current term.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the conviction below.

#### STATEMENT OF THE FACTS

The witnesses at trial presented conflicting facts; however, they were in agreement as to the general series of events.

On the night in question, the defendant, Brent Leslie Dock, was a prisoner in Cell No. A-314 in medium security at the Utah State Prison. During the early morning hours, Officer Donald F. Morrell was making a cell count when he kicked a Coke can that was lying in front of the defendant's cell (R.204). The defendant and the officer exchanged words at that time (R.204). The officer passed in front of the defendant's cell a short time later, and at that time the defendant threw the can (R.191,204). The defendant claimed he was merely throwing the can over the rail (R.191), and the officer testified that the can struck him (R.204). Words were

again exchanged at the defendant's cell (R.206), and the officer informed the defendant that he would be written up for hitting an officer (R.206).

Jack Manneh came on duty at 6:00 a.m. that same morning and was instructed by his supervisor to transport Dock to maximum security. At about 6:10 a.m., Officer Jack Manneh went to the defendant's cell to take him to maximum security (R.142). Officer Manneh was accompanied to the cell by Officer Wells (R.146), and Officer Morrell was at the control panel for the cell doors (R.147). The balance of the testimony is in great conflict. Officer Manneh testified that he spoke to the defendant before he entered the cell and before the doors were opened, and informed the defendant that he had been instructed to take him to maximum security as a result of the earlier incident with Officer Morrell (R.148). The officer then asked that the cell door be opened, and asked the defendant to go with him (R.149). At this time the officer testified that he heard breaking glass, and as he turned around he was attacked by the defendant with the broken glass (R.149).

The defendant testified that he had no conversation with Officer Manneh until he had entered the cell

(R.195). The defendant testified that he told Manneh he was not going, and that Manneh then attempted to drag him out of the cell and in the process slipped, broke the jar, and hit his head (R.195). The defendant testified that he resisted being transported (R.197), because he did not feel the officers were justified in moving him to maximum security.

Officer Wells, who accompanied Manneh to the cell, testified that Manneh conversed with the defendant before entering the cell (R.212). Wells also testified that he saw the broken glass in Dock's hand, and that Dock went toward Manneh (R.213). Wells grabbed Dock from behind, but did not observe the details of the scuffle between Manneh and Dock (R.213).

All parties agreed that at the time of the incident the lighting was fairly poor, but that there was some light (R.158,216).

Officer Manneh admitted and Officer Wells confirmed that he was not seriously injured by the events, and that he incurred only minor scratches on his neck and head (R.224,175).

#### ARGUMENT

#### POINT I

#### A GENERAL CRIMINAL INTENT IS REQUIRED UNDER



UTAH CODE ANN. §§ 76-5-103(1)(b) AND 76-5-102 (1953), AS AMENDED, AND THE JURY WAS PROPERLY INSTRUCTED AS TO THAT INTENT REQUIREMENT.

The basic premise in criminal law is, that in a crime not involving strict liability, there must be both an act and an intent. Utah Code Ann. § 76-2-101 (1953), as amended. It is commonly recognized that there are two types of criminal intent: specific and general.

The appellant in this case was charged by information with Aggravated Assault by a Prisoner, a second degree felony, in violation of Utah Code Ann. § 76-5-103.5 (1953), as amended (R.5). The following sections of the Utah Code are at issue in this appeal:

"(1) Assault is:

(a) An attempt, with unlawful force or violence, to do bodily injury to another; or

(b) A threat accompanied by a show of immediate force or violence, to do bodily injury to another.

(c) Assault is a class B misdemeanor." Utah Code Ann. § 76-5-102 (1953), as amended.

"Any prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree." Utah Code Ann. § 76-5-102.5 (1953), as amended.

"(1) A person commits aggravated assault if he commits assault as defined in section 76-5-102 and:

(a) He intentionally causes serious bodily injury to another; or

(b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.

(2) Aggravated assault is a felony of the third degree." Utah Code Ann. § 76-5-103 (1953), as amended.

"(1) Any prisoner, not serving a sentence for a felony of the first degree, who commits aggravated assault is guilty of a felony of the second degree.

(2) Any prisoner serving a sentence for a felony of the first degree who commits aggravated assault is guilty of:

(a) A felony of the first degree if no serious bodily injury was caused; or

(b) A capital felony if serious bodily injury was intentionally caused." Utah Code Ann. § 76-5-103.5.

The case at bar was submitted to the jury under Section 76-5-103(1)(b), as it applies to Section 76-5-103.5 (R.13). The trial court also instructed on the lesser included offense, simple assault by a prisoner, Section 76-5-102.5 (R.46). The appellant's claim is that by failing to instruct the jury as to specific intent, the trial court committed prejudicial error.

There are two factors relevant to this claim that warrant immediate attention. Initially, the trial judge did instruct as to general intent (R.48), and during the course of his instructions he quoted from the appropriate statutes. Secondly, the Utah Supreme Court has already, in dicta, determined that Section 76-5-103(1)(a), requires a specific intent, and that Section 76-5-103(1)(b), requires merely a general intent. State v. Howell, 554 P.2d 1326 (Utah 1976). In a decision filed on April 24, 1978, State of Utah in the Interest of Lawrence Vernon McElhaney, No. 15380, the Utah Court affirmed unanimously the Howell position that:

" . . . under § 76-5-103(1)(b) UCA as amended, no culpable mental state is specified and thus under § 76-5-102, UCA as amended, intent, knowledge, or recklessness shall suffice to establish criminal responsibility."

Section 76-5-103(1)(a), is clearly inapplicable to the case at bar since there was no evidence introduced at trial to show that Officer Manneh suffered any serious injury, and serious injury is required for a violation of Section 76-5-103(1)(a). Section 76-5-103 is worded in the disjunctive, and in contrast to Section 76-5-103(1)(a), Section 76-5-103(1)(b), requires merely that the assailant

"use a deadly weapon or such means or force likely to produce death or serious bodily injury." There is no intent requirement expressed for Section 76-5-103(1)(b). At the close of the State's case in chief, the appellant moved to dismiss the information on the basis that no serious injury had been inflicted upon the victim (R.178), and that the assault was no more than a simple assault. The court denied the motion, ruling that as a matter of law it is not necessary for serious bodily injury to have occurred to constitute a violation of Section 76-5-103(1)(b). The court also stated that whether or not the broken container was a weapon likely to cause serious bodily injury was a question for the jury (R.178).

In his brief, the appellant has cited several Utah cases to support his theory that specific intent is an element of both simple and aggravated assault. At page 10 of his brief, the appellant cites State v. Nielsen, 514 P.2d 535, 30 Utah 2d 119 (1973), for the proposition that specific intent is an element of simple assault. The case makes no reference to specific intent, and holds in part:

" . . . in the prosecution for assault with a deadly weapon with intent to do bodily harm, the actual infliction of bodily harm need not be shown in order to make out the offense." 514 P.2d at 536.

In State v. Nemier, 148 P.2d 327, 106 Utah 307 (1944), the defendants effected an escape from the state prison by threatening guards with deadly force. The defendants were charged under Utah Code Ann. § 103-7-12 (1943), repealed, which states as follows:

"Every convict undergoing a life sentence in the state prison who, with malice aforethought, commits an assault upon any other convict, or upon the warden or any guard or any other person whomsoever, with a deadly weapon or instrument of any kind, or by means of force, or by administering any poisonous or deleterious substance which will likely produce great bodily injury, is punishable with death." (Emphasis added.)

It is significant that the statute itself required a specific intent, and that the mandatory penalty under the statute was death. The Utah Court stated at 331:

"By the nature of an assault it does not require an intent in all events to kill or do great bodily injury, but an assault committed with malice aforethought, does require something more than the mere wish to vex or annoy the person assaulted. It is not necessary for

us to here determine what intent is necessary under all possible circumstances in order to commit the offense charged. . . ."  
(Emphasis added.)

In State v. Potello, 132 Pac. 14, 42 Utah 396 (1918), cited by the appellant on page 9 of his brief, the information charged "specific and felonious intent to do great bodily harm" (132 Pac. at 15). The case does not say that specific intent is an element of simple or aggravated assault. The holding in the case is that if an information includes a charge of specific intent, the information cannot be amended after a plea has been entered. In a proceeding for a writ of habeas corpus, the Tenth Circuit Court in Green v. Turner, 409 F.2d 215 (1969), cited Potello, supra, and noted that "a conviction under the felony statute requires proof of an intent to do bodily harm." 409 F.2d at 216. The statement was dicta, however, and no mention is made of the type of proof or intent required.

In short, there are no Utah cases which suggest that specific intent is an element of either simple assault or aggravated assault.

The California court, in People v. Rocha, 92 Cal. 172, 3 Cal.3d 893 (1971), noted at 176, that "traditionally, simple assault and assault with a deadly weapon have been referred to as 'general intent' crimes." See also People v.

Hood, 462 P.2d 370 (Cal. 1969). In People v. Morrow, 74 Cal.Rptr. 551 at 558 (1969), the court stated:

" . . . the trial judge took the position well authenticated in California law that the crime of assault by means of force likely to produce great bodily injury does not require separate proof of an intent to injure; the jury may infer such intent from the evidence as to what was done by a defendant."

Other jurisdictions have considered the intent requirement for aggravated and simple assault. The North Carolina court found that intent was not an element of assault with a deadly weapon inflicting serious injury. State v. Curie, 198 S.E.2d 28, 19 N.C. 17 (1973). In that same opinion, the court at page 30 took note of State v. Lattimore, 158 S.E. 741, 201 N.C. 32 (1931), where the court stated:

"It is true that an act may become criminal only by reason of the intent with which it is done, but the performance of an act which is expressly forbidden by statute may constitute an offense in itself without regard to the question of intent."

A Florida Court rejected the idea that intent is required in simple assault, or that specific intent is required for aggravated assault with a deadly weapon, and stated:

"Contrary to appellant's contention, the gist of the crime of aggravated assault is found in the character of the weapon with which the assault is made, and the crime requires only a general and not a specific intent." Bass v. State, 232 S.2d 25 (Fla. App. 1970).

In State v. Wingate, 215 N.W.2d 90, 191 Neb. 388 (1974), the appellant, who had been convicted of forcible assault on a police officer with a deadly weapon, contended that the trial court erred in failing to instruct the jury that intent was an essential element of the crime charged. The court replied that "[I]ntent is not an essential element and there was no error in failure to instruct." 215 N.W.2d at 91.

The Utah Supreme Court, in an appeal based on Utah Code Ann. § 76-7-6 (1953), repealed, where the defendant had been found guilty of assault with a deadly weapon with intent to do bodily harm, addressed the intent issue in the following manner: "It is true that the State was unable to prove directly what was in the defendant's mind relative to doing harm to the victim;" and went on in a later sentence to say: "It seems almost too obvious for comment that the intent to do bodily harm would reasonably be inferred from the 'slashing' at another person with a hunting knife." Chief Justice Crockett also commented that



it is the "elementary rule that a person is presumed to intend the natural and probable consequences of his acts." State v. Peterson, 453 P.2d 696 at 697, 22 Utah 2d 377 (1969).

The appellant contends that by failing to instruct the jury on specific intent, the trial court committed reversible error. It is a commonly recognized fact that the sufficiency of jury instructions is to be determined by reading them as a whole. In the case at bar, the court instructed the jury on aggravated assault by a prisoner (Section 76-5-103.5) and the lesser included offense, assault by a prisoner (Section 76-5-102.5) (R.38-48). It is the sufficiency of these instructions that the defendant is challenging on this appeal. The instructions included both a statement as to what the jury must find in respect to each offense and a recitation of the appropriate statutes. Instruction 21 contains this instructions on general intent: "You are instructed that in every crime or public offense there must be union or joint operation of the act and intent. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. As used in these instructions the term intentionally means that an individual does something making it his

conscious objective or desire to engage in the conduct or cause the result." (Emphasis added.) (R.48). The court also instructed the jury to consider all the instructions as a whole (R.52).

The New Mexico Supreme Court has decided numerous cases on the sufficiency of jury instructions in the past decade. In State v. Puga, 510 P.2d 1075, 85 N.M. 204 (1973), the defendant was convicted of two counts of robbery under a New Mexico statute that did not specifically require intent. The defendant contended that intent was an element of robbery, and that the instructions to the jury were insufficient as to intent. The court held that even though intent was not mentioned in the statute that it was an element of the crime, and that an instruction given in the language of the statute was sufficient if the words informed the jury of any intent element. In State v. Fuentes, 511 P.2d 760, 85 N.M. 274 (1973), the court stated that "instructions which are phrased in the terms of a statute which require an intent are sufficient." 511 P.2d at 762.

The Utah Supreme Court has previously grappled with the problem presented by a statute which, although not expressing an intent requirement, clearly required intent as an element of the crime. State v. Gallegos, 396 P.2d 4

16 Utah 2d 102 (1964). The trial court in Gallegos, supra, based its instruction for manslaughter on a statute (Utah Code Ann. § 76-30-5, repealed) that failed "to expressly require an 'intention to kill or do great bodily harm or do an act knowing the natural and probable consequences thereof will be death or serious bodily injury.'" 396 P.2d at 415. The court approved the instruction even though the word "intentionally" was not expressly defined.

Solely for the purpose of argument, if the trial court did err in not instructing as to intent for the crime of aggravated assault, in this case where the defendant was convicted of the lesser included offense, the error was not prejudicial where the instruction for the lesser included offense was properly given. Walker v. People, 248 P.2d 287, 126 Colo. 135 (1952); State v. Gibbons, 364 P.2d 611, 228 Or. 238 (1961).

In summary, the appellant's claim that the trial judge's failure to instruct on specific intent resulted in prejudicial error fails on four grounds. First, specific intent is not an element of aggravated assault as it is defined in Section 76-5-103(1)(b), or simple assault. The case was submitted to the jury on the basis of Section 76-5-103(1)(b), which this Court

stated in Howell, supra, required only a general intent. It should be noted that the jury rejected the aggravated assault charge. It is a matter of common law that the mens rea requirement for simple assault is general and not specific. Rocha, supra. Secondly, the trial judge did instruct as to general intent (R.48), and jury instructions are to be considered as a whole. Third, the judge's instructions were based on the statute defining the charges. Fuentes, supra. Finally, it is an accepted principle that a person is presumed to intend the natural and probable consequences of his act. Gallegos, supra.

## POINT II

THE INSTRUCTIONS REQUESTED BY DEFENDANT ON SELF-DEFENSE AND DEFENSE OF HABITATION WERE NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE, AND WERE PROPERLY REFUSED BY THE TRIAL JUDGE.

It is commonly recognized that a defendant in a criminal case is entitled to inconsistent theories of defense, State v. Mitcheson, 560 P.2d 1120 (Utah 1976), but he must present some evidence during the course of the trial to support the theory in order to have the jury instructed as to the theory. A question frequently address<sup>ed</sup>

by courts is how much evidence must be presented to support a jury instruction. The Utah Supreme Court has discussed the problem in several cases. In State v. Castillo, 457 P.2d 618, 23 Utah 2d 70 (1969), the Court stated that:

" . . . if all reasonable men must conclude that the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether a defendant accused of a crime acted in self-defense, tendered instructions thereon are properly refused."  
(Emphasis added.) 457 P.2d at 620.

The Castillo Court, supra, also stated that "the propriety of an instruction encompassing this principle is necessarily contingent on the applicability of self-defense in the case." 457 P.2d at 620. In State v. Johnson, 185 P.2d 738, 112 Utah 130 (1947), the Court held that where there was no substantial evidence on the defense of excusable homicide, there was no need to instruct the jury on that issue. "It is admitted 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." 185 P.2d at 743. The defense counsel in State v. Talarico, 193 Pac. 860, 57 Utah 229 (1920), was late in the submission of his request for a self-defense instruction, and the

trial court refused to give it. The Supreme Court held that even though the instruction was appropriate, the fact that it was not given was not prejudicial error under the circumstances. "While the theory of counsel, persistently and strenuously urged, was that of self-defense, it was nevertheless all theory and no evidence, all shadow and no substance." 193 Pac. at 861.

The request alone for an instruction on self-defense and defense of habitation is not sufficient to entitle the appellant to the instruction. Other jurisdictions have examined the conditions under which the instruction may be appropriate. The Washington Court in State v. Curie, 443 P.2d 808, 74 Wash.2d 197 (1968), stated that "in a prosecution for assault it is not improper to refuse an instruction on self-defense where there is nothing to justify a reasonable inference that the defendant acted in legitimate self-defense." 443 P.2d at 809. The New Mexico Court in State v. Romero, 385 P.2d 967, 73 N.M. 109 (1963), used the "reasonable doubt" standard, and concluded that where that standard was not met, refusal of the instruction was proper.

The issue in this case is whether or not the trial judge acted within the bounds of his discretion in

concluding that there was no "reasonable doubt" created, and that the instruction was improper. The only evidence that was presented at trial that might possibly support a self-defense instruction or an instruction on defense of habitation was the appellant's statement that he was afraid (R.195). There was no evidence presented to show that the entry into the cell was unlawful, or that it was violent or tumultuous. There was no evidence presented to show that defendant, as a reasonable man, feared that he was about to suffer bodily harm, or that his "house" would be harmed. There was no evidence presented to show that the defendant's reaction was reasonable, or that the guards had on prior occasions entered prisoners' cells for the purpose of harming the prisoners. Indeed, defendant's own testimony was not that he struck the officer in self-defense, but that the officer was injured in a fall (R.195). The defendant testified further that he resisted being taken from his cell because he did not want to go to maximum security and that he did not think the officer had any reason to take him there (R.197). In short, there was no evidence presented to support any of the instructions offered as to self-defense or defense of habitation.

Jury instructions very similar to those offered by the appellant were refused by the trial court in People v. Perez, 286 P.2d 979 (Cal.App. 1955), and the court found no error where there was no evidence that defendant was being assaulted, nor any evidence or inference that he believed bodily injury was about to be inflicted on him.

The defendant's request for an instruction under the theory of Utah Code Ann. § 76-2-405 (1953), as amended, is totally inappropriate, even under the broad interpretation of habitation by the Utah Court in State v. Mitcheson, supra. While it is conceivable that under proper circumstances a jail cell may be viewed as a "home," there was no evidence presented in this case to show that the officer's entry was unlawful or that there was an attack upon appellant's habitation by the officers.

The Utah Court in Castillo, supra, in finding that the self-defense instruction was properly refused, looked at the instructions as a whole and concluded that even if the self-defense instruction had been included, the result would have been the same. The trial judge in the case at bar was careful to instruct on the reasonable doubt standard (R.7, 11 20), to protect the interests of the appellant, and acted



properly in refusing the requested instructions on self-defense and defense of habitation.

#### CONCLUSION

Utah Code Ann. §§ 76-5-103(1)(b) and 76-5-102 (1953), as amended, require only a general criminal intent, not a specific intent as the appellant asserts. The trial court gave a proper instruction as to general intent, and when the instructions are considered as a whole, there was no prejudicial error. Where the defendant was convicted of the lesser included offense, he cannot claim prejudicial error as to the instruction given for the greater offense.

The appellant presented no substantial evidence to support his theories of self-defense and defense of habitation, and the trial judge acted properly in refusing the requested instructions thereon.

Respectfully submitted,

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