

2008

Utah v. Karl Grant Losee : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

THE STATE OF UTAH,)	
)	
Plaintiff/Appellee,)	Case No. 20080650-CA
)	
vs.)	Appeal
)	
Karl Grant Losee,)	
)	Oral Argument Requested
Defendant/Appellant.)	

APPELLANT'S BRIEF

APPEAL FROM A FINAL ORDER OF THE THIRD DISTRICT COURT,
HONORABLE TERRY L. CHRISTIANSEN PRESIDING

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Appellant is currently incarcerated in connection with this case on appeal.

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APPELLANT'S BRIEF

JURISDICTION

This is an appeal from a final order of the Third District Court. The Utah Court of Appeals has jurisdiction of this matter pursuant to Utah Code Ann. Sections 78A-3-103(2)(e), and Rule 3(a), Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

- I. Did the trial court abuse its discretion by failing to exclude evidence of Mr. Losee's prior bad acts, which led to his conviction for aggravated burglary and aggravated assault, under rule 404(b) of the Utah Rules of Evidence? The admission of evidence under

rule 404(b) of the Utah Rules of Evidence is reviewed for abuse of discretion; however, “admission of prior crimes evidence itself must be scrupulously examined by trial judges in the proper exercise of that discretion.” State v. Decorso, 993 P.2d 837, 843 (Utah 1999).

- II. Did the trial court incorrectly sentence Mr. Losee by failing to apply the Solicitation statute applicable to Mr. Losee at the time of his sentencing? In other words, because the Solicitation statute was amended after Mr. Losee was charged but before he was sentenced, was he entitled to be punished for a Second Degree Felony? Whether defendants are entitled to a lesser sentence when the legislature reduces the penalty for the crime charged before sentencing is a question of law. State v. Yates, 918 P.2d 136, 138 (Utah App. 1996).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Art.1, Section 10.

Utah Constitution, Art. 1, Section 18.

Rule 401, Utah Rules of Evidence.

Rule 402, Utah Rules of Evidence.

Rule 403, Utah Rules of Evidence.

Rule 404(b), Utah Rules of Evidence.

Utah Code Ann. 76-1-103.

Utah Code Ann. 76-3-203.

Utah Code Ann. 76-4-203.

Utah Code Ann. 76-4-204.

Utah Code Ann. 76-5-202.

STATEMENT OF THE CASE

This appeal is taken from the final order and judgment of the Third District Court, the Honorable Terry L. Christiansen presiding. (Second Supplemental Index of Record (hereinafter, "Index of Record"), pp. 508-9.)

Mr. Losee was charged November 13, 2006 by information with one count of Solicitation to Commit Criminal Homicide, Aggravated Murder, a First Degree Felony. (Index of Record, pp. 1-5.) An Amended Information with the same charge was filed December 19, 2006. (Index of Record, pp. 241-43.) A Second Amended Information alleging the same charge was filed April 1, 2008. (Index of Record, pp. 361-63.) A Motion in Limine seeking to suppress evidence of Mr. Losee's prior crime was filed by Mr. Losee on March 14, 2007. (Index of Record, pp. 112-14.) The State filed a

Memorandum in Opposition to Defendant's Motion in Limine on June 1, 2007. (Index of Record, pp. 168-89 and 517-38.) Mr. Losee's Reply to State's Memorandum in Opposition to Defendant's Motion in Limine was filed June 15, 2007. (Index of Record, pp. 190-96.) Judge Christiansen filed on July 31, 2007, a Memorandum Decision regarding the evidentiary issues raised in the Motion in Limine. (Index of Record, pp. 205-12.)

A four-day jury trial was held April 1, 2008 through April 4, 2008. (Index of Record, pp. 413-14, 433-35, 439-40, and 441-42.) The jury found Mr. Losee guilty of Solicitation to Commit Homicide, Aggravated Murder. (Index of Record, p. 576; and Trial Transcript, Vol. 4, page 66, lines 4-6.) On July 15, 2008, Mr. Losee was sentenced to five years to life in prison, to run consecutively to the five years to life sentence he was already serving. (Index of Record, p. 571; and Sentencing Transcript, page 39, lines 12-15.)

A timely notice of appeal was filed July 16, 2008. (Index of Record, p. 511-12.)

STATEMENT OF RELEVANT FACTS

Oral argument was held June 21, 2007 regarding Mr. Losee's Motion in Limine seeking to exclude evidence of Mr. Losee's prior crimes. (Index of Record, p. 572.) The trial court took the matter under advisement and

eventually filed a written Memorandum Decision allowing the admission of the evidence Mr. Losee sought to exclude. (Index of Record, pp. 205-212.) At trial, defendant's counsel renewed his objection to evidence of Mr. Losee's prior crimes. (Trial transcript, Vol. 2, p. 15, lines 9-21.)

Because this evidence was ruled admissible, the State spent some time in its opening argument going into the details of Mr. Losee's prior bad acts and related crimes, telling the jury that during a prior incident on May 9, 2006, Mr. Losee fired "at least 14 rounds from his firearm into [Becky Underwood's] door." (Trial transcript, Vol. 1, pp. 18-19, lines 14-14.) The jury also was told Mr. Losee held Ms. Underwood "hostage and at gunpoint for over an hour." (Trial transcript, Vol. 1, p. 19, line 15.) During opening argument, the jury also was shown a photograph of the bullet holes left in the door to Ms. Underwood's apartment as a result of Mr. Losee's prior criminal acts. (Trial transcript, Vol. 1, pp. 19-20, lines 23-1.)

During the trial, the jury was presented with detailed evidence regarding Mr. Losee's prior bad acts of May 9, 2006. The jury heard Ms. Underwood describe that May 9, 2006 episode. (Trial transcript, Vol. 2, p. 18, beginning at line 8.) The jury also listened to portions of the harrowing 9-1-1 call made by Ms. Underwood during Mr. Losee's crime on May 9, 2006. (Trial transcript, Vol. 2, pp. 26-28.)

Ms. Underwood told the jury that on May 9, 2006 she invited to her home a man named Ryan Crocker. (Trial transcript, Vol. 2, p. 23, lines 14-20.) Mr. Losee, who Ms. Underwood said fancied himself as her boyfriend, showed up during dinner, uninvited. Ms. Underwood invited Mr. Losee into her home. (Trial transcript, Vol. 2, p. 21, line 20 and pp. 23-24, lines 25-4.) According to Ms. Underwood, Mr. Losee got upset sometime after he “drank a couple of wine coolers and his whole demeanor changed.” So, she asked him to leave. (Trial transcript, Vol. 2, p. 24, lines 12-17.) Eventually, Ms. Underwood decided to go to bed. “Next thing I heard was gunshots through my front door.” (Trial transcript, Vol. 2, p. 25, lines 8-11.) Portions of the audiotape of Ms. Underwood’s 9-1-1 call were played for the jury. (Trial transcript, Vol. 2, pp. 26-28.) On these tapes, the jury heard Ms. Underwood talking to the 9-1-1 operator. (Trial transcript, Vol. 2, p. 26, lines 20-22.) On the recording, a terrified Ms. Underwood tells the operator, “I’ve got somebody breaking into my front door.” (Transcript of 9-1-1 Call, p. 2, lines 5-6.) An angry male voice, not identified at this point, but presumably Mr. Losee, is heard to say, “You’re a fucking whore.” (Transcript of 9-1-1 Call, p. 2, line 20.) Ms. Underwood exclaims, “He’s got a loaded gun.” (Transcript of 9-1-1 Call, p. 2, line 24.) The male voice can be heard responding, “I’m going to fucking kill you. ... You’d better bring a

fucking army because she's going down." (Transcript of 9-1-1 Call, p. 3, lines 1-2.) Later, Ms. Underwood exclaims, "He's got a gun that he's shooting with." (Transcript of 9-1-1 Call, p. 3, lines 20-21.) The male voice again, "You're going to die." (Transcript of 9-1-1 Call, p. 4, line 17.) Ms. Underwood identifies the male speaker as Karl Losee. (Transcript of 9-1-1 Call, pp. 4-5, lines 24-4.) Ms. Underwood later exclaims, "He's pointing the fucking gun at me." (Transcript of 9-1-1 Call, p. 5, lines 12-13.) The operator asks, "Is he threatening to kill officers and you?" Ms. Underwood answers, "Just me right now, and my other friend that's here." (Transcript of 9-1-1 Call, p. 6, lines 14-17.) Male voice: "If they come in the door they're going to fucking die." (Transcript of 9-1-1 Call, p. 7, lines 2-3.) Male voice to Ms. Underwood: "I'm shooting through you too. ... You're going to die." (Transcript of 9-1-1 Call, p. 7, lines 12-16.) Male voice, again: "You're going to fucking die." Ms. Underwood, "What did I do?" Male voice, "You screwed a fucking guy. You're a fucking cunt." (Transcript of 9-1-1 Call, p. 8, lines 17-24.) Later still, a scared Ms. Underwood tells the operator, Mr. Losee is "[h]ere with me with a gun pointed right here at me." (Transcript of 9-1-1 Call, p. 11, lines 15-17.) Male speaker: "Don't tell me what I will and will not do. You whining motherfucker. I'm going to shoot you in the back." (Transcript of 9-1-1 Call, p. 12, lines 21-22.)

After listening to the 9-1-1 tape with the jury, Ms. Underwood continued testifying about the May 9, 2006 incident. She told the jury that Mr. Losee fired his gun “directly above my head. ... There were powder burns all over my face.” (Trial transcript, Vol. 2, p. 29, lines 15-19.)

At trial, Andre Pendleton testified that Mr. Losee asked him to arrange for Ms. Underwood’s murder. (Trial transcript, Vol. 2, p. 68, lines 2-5.) This solicitation allegedly occurred sometime in the fall of 2006. (Trial transcript, Vol. 2, pp. 59-60, lines 25-1.) Mr. Pendleton testified that a message was to be delivered to Ms. Underwood when she was killed: “You shouldn’t have fucked over the little man.” (Trial transcript, Vol. 2, p. 71, lines 16-19.) Mr. Pendleton also testified he heard Mr. Losee use this jailhouse nickname to refer to himself. (Trial transcript, Vol. 2, p. 71, lines 22-25.) Mr. Pendleton also testified he received a map from Mr. Losee, with directions to Ms. Underwood’s house. (Trial transcript, Vol. 2, p.67, lines 14-15.)

On July 15, 2008, based on his first degree felony conviction in this case, Mr. Losee was sentenced to five years to life in prison, to run consecutively to the five years to life sentence he was already serving. (Index of Record, p. 571; and Sentencing Transcript, page 39, lines 12-15.)

SUMMARY OF THE ARGUMENT

Under Rule 404(b) of the Utah Rules of Evidence, evidence of prior bad acts is not admissible to prove the character of a person to show he acted in conformity with that character. Sometimes, evidence of prior bad acts may be admissible for other purposes, but only if that evidence is relevant to the case at hand, and only if the probative value of that evidence is not substantially outweighed by its prejudice to the defendant. Thus, under rule 404(b), evidence of prior bad acts cannot be admitted unless it can be shown such evidence is offered for a proper, noncharacter purpose, is relevant under Rules 401 and 402 of the Utah Rules of Evidence, and is not overly prejudicial under Rule 403 of the Utah Rules of Evidence.

In this case, graphic details of Mr. Losee's prior crimes of aggravated burglary and aggravated assault were improperly allowed by the trial court. The evidence was not of a proper, noncharacter kind, was not relevant to the case at hand, and was substantially more prejudicial to the defendant than it was probative of any element of the crime being adjudicated. The highly inflammatory evidence regarding Mr. Losee's prior crimes robbed Mr. Losee of a fair trial. It was an abuse of the trial court's discretion to allow

this evidence, and without such evidence, it is likely Mr. Losee would not have been convicted.

Secondly, because the aggravated murder statute was amended after the occurrence of Mr. Losee's alleged solicitation for the murder of Ms. Underwood, but before he was sentenced, he is entitled to be punished under the new penalty as a result of that amendment. Because the amendment changed the penalty for Mr. Losee's alleged solicitation from a first degree felony to a second degree felony, Mr. Losee is entitled to be punished under the terms of a second degree felony. It makes no difference that the solicitation statute was later amended, after Mr. Losee's trial but before his sentencing, to re-classify Mr. Losee's crime as a first degree felony, because application of such an ex post facto law is barred by the constitutions of the United States and the State of Utah.

ARGUMENT

I. EVIDENCE OF MR. LOSEE'S EARLIER CRIMES SHOULD NOT HAVE BEEN ADMITTED BECAUSE SUCH EVIDENCE WAS NOT OFFERED FOR A PROPER, NONCHARACTER PURPOSE, WAS NOT RELEVANT TO THE CASE AT HAND, AND WAS UNFAIRLY PREJUDICIAL TO MR. LOSEE.

Details of Mr. Losee's prior crimes is exactly the kind of overwhelmingly unfair evidence the rules of evidence seek to exclude from a

jury's attention, because it is the kind of evidence that "tends to skew and corrupt the accuracy of the fact-finding process." State v. Shickles, 760 P.2d 291, 295 (Utah 1988).

Such evidence, according to Dean Wigmore, "is objectionable not because it has no appreciable probative value but because it has too much." Id. (Citing, with approval, 1A J. Wigmore, "Evidence in Trials at Common Law," Section 58.2, at 1212 (Tillers rev. 1983).)

An "abuse of discretion" standard of review applies to evidentiary rulings under rule 404(b). Decorso, at 843. However, "admission of prior crimes evidence itself must be scrupulously examined by trial judges in the proper exercise of that discretion." Id.

Because Mr. Losee's prior crimes were so spectacularly horrifying, the facts surrounding those crimes could do nothing but skew and corrupt the jury's efforts in the trial below.

Whether evidence of prior bad acts is admissible is subject to rule 404(b) of the Utah Rules of Evidence. The rule provides, in relevant part:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

When analyzing whether particular evidence is admissible under rule 404(b), a court must undertake a three-part analysis. First, the court must determine whether such evidence is being offered for a proper, noncharacter purpose. Second, the court must determine whether such evidence is relevant (under Rules 401 and 402 of the Utah Rules of Evidence). Finally, the court must determine whether the evidence should be excluded because it is more prejudicial than probative (Rule 403 of the Utah Rules of Evidence). State v. Decorso, 993 P.2d 837, 843 (Utah 1999). See also, State v. Shickles, 760 P.2d 291 (Utah 1988); State v. Featherson, 781 P.2d 424, (Utah 1989); and State v. Bradley, 57 P.3d 1139 (Utah App. 2002).

a. Evidence of Mr. Losee's prior crimes was not offered for a proper, noncharacter purpose.

“If the court determines that the evidence is being offered only to show the defendant's propensity to commit crime, then it is inadmissible and must be excluded.” Id.

The trial court's analysis in this case is off the mark in finding that evidence of Mr. Losee's previous crime is admissible for the noncharacter purpose of motive. At first blush, the trial court's reasoning seems persuasive. (But see, State v. Webster, 32 P.3d 976 (Utah App. 2001), wherein the court applied the reasoning of Decorso to the State's claimed need for prior crimes evidence to show defendant's identity and intent. The

Webster court found the State's claims wanting, and concluded that the admission of prior crimes evidence was harmful error, in part because the court had not engaged in a scrupulous examination of the prior crimes evidence before allowing it into evidence.)

Here, the trial court found Mr. Losee's prior acts were fueled by his alleged animosity and emotion toward Ms. Underwood. The trial court also found that Mr. Losee's extreme emotion was still lingering by the time Mr. Losee allegedly solicited Ms. Underwood's murder some five months later. The trial court then ruled that Mr. Losee's prior bad acts "establish this emotional motive in a way no other evidence available to the State can." Memorandum Decision, pp. 4-5.

The trial court's own findings undermine its assertion the State had no other evidence regarding Mr. Losee's "emotional motive." The trial court presumed the testimony of Andre Pendleton, noting, "Defendant's parting message to Ms. Underwood – the last thing that Defendant wanted her to hear, [sic] was an emotionally-charged statement through which she would know who had killed her." Memorandum Decision at 5-6. This statement – that, according to Mr. Pendleton, Ms. Underwood was to be told, "you shouldn't have fucked over the little man" -- certainly can convey an emotional motive without the concurrent he's-a-bad-guy-who-already-

kidnapped-and-assaulted-Ms. Underwood-with-a-gun undertones of the prior bad acts evidence.

Furthermore, to focus on Mr. Losee's emotional state during the commission of his prior crimes is to miss the point. As the Featherson court noted, "[t]he relevant inquiry is whether the other acts have 'clearly probative value with respect to the intent of the accused *at the time of the offense charged.*'" Id. at 429-30 (citation omitted; emphasis in original). The Featherson court was discussing the issue of remoteness in time from the prior crime to the crime at issue in trial, but its point is equally relevant here. The statements allegedly made by Mr. Losee to Mr. Pendleton are much more relevant to Mr. Losee's state of mind at the time of the alleged solicitation for which he was being tried in this matter than are his state of mind and actions of May, 2006.

It is simply error to assign a proper, noncharacter motive to admission of evidence Mr. Losee's prior crimes.

b. Evidence of Mr. Losee's prior bad acts is simply not relevant to the case at trial.

"[U]nless the other crimes evidence tends to prove some fact that is material to the crime charged – other than the defendant's propensity to commit crime – it is irrelevant and should be excluded by the court pursuant

to rule 402.” Decorso, at 844. See also Featherson, at 426 (facts regarding prior crimes “must be material to the crime charged” before they are admissible).

“ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401 of the Utah Rules of Evidence. And, “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.” Rule 402 of the Utah Rules of Evidence.

Mr. Losee was on trial for his alleged solicitation of Ms. Underwood’s murder sometime in the fall of 2006, not his admitted aggravated burglary and aggravated assault which occurred in May, 2006. The earlier events have no bearing on the State’s proof of the elements of the solicitation of murder charge. To be guilty of solicitation, a defendant must (1) intend that a felony be committed when he (2) solicits, requests, commands, offers to hire, or importunes another (3) to engage in specific conduct the defendant believes would be a felony. Utah Code Ann. 76-4-203(1) (1993).

Furthermore, the solicitation must be “made under circumstances strongly

corroborative of the [defendant's] intent that the offense be committed. Utah Code Ann. 76-4-203(2) (1993).

The events of May, 2006 simply have no bearing on Mr. Losee's intent at the time he allegedly solicited Ms. Underwood's murder some five months later. Mr. Losee's earlier crimes do not have any bearing on the specific conduct sought by Mr. Losee when he sat in jail during the fall of 2006, and they can shed no light on whether or not he believed he was asking Mr. Pendleton commit a felony. Thus, the facts surrounding Mr. Losee's prior crimes of May, 2006 are not relevant, and are not admissible under rule 402.

c. Evidence of Mr. Losee's prior bad acts is prejudicial, and substantially outweighs any probative value to the State's solicitation case.

Evidence of prior crimes is not admissible if it is "*substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Decorso, at 844. Furthermore,

In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters *must be considered*, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Id., quoting State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988) (emphasis supplied).

It is undeniable that the evidence is strong regarding Mr. Losee's prior bad acts of May, 2006. Mr. Losee pleaded guilty to crimes of aggravated burglary and aggravated assault. Some of his most outrageous behavior was recorded in the 9-1-1 call made by Ms. Underwood. His behavior was witnessed by police. However, under the analysis of both Shickles and Bradley (which follows Shickles), even where there is strong proof of the prior crime, prior crimes evidence also must be strongly probative of the defendant's intent to commit the latter crime which is the subject at trial. Here, evidence of Mr. Losee's prior aggravated burglary and aggravated assault is not probative of his intent to commit the charged crime of solicitation of murder. Without such a connection, evidence of his prior crimes is inadmissible. (See, discussion of Shickles factors four and five, below.)

Furthermore, this factor is but one of six. When all the factors are looked at scrupulously, it becomes obvious the evidence of Mr. Losee's prior bad acts should have been excluded. Additionally, the trial court only seems to have looked closely at this factor and the second factor regarding similarities between the prior crimes and his crime. And, the trial court got

its analysis of the second factor wrong, assessing “commonality” instead of the similarities between the two criminal episodes.

Mr. Losee’s prior crimes and the crime at trial are dissimilar as two crimes can be. It is not enough to conclude, as the trial court did, “that these separate crimes were perpetrated against the same victim, for arguably a common reason and outcome[, thus] complet[ing] the commonality element.” Memorandum Decision at 7. In Decorso the similarity relied on was the court’s earlier finding that the prior crime and the instant crime were so alike as to be “signature-like.” Id. at 845. In Bradley, the court found “a significant similarity between” the prior sex abuse crimes against a different victim, who was a sibling to the victims in the instant trial, and “those perpetrated against” those sibling victims. Id. at 1147. That finding was based upon the defendant’s use of “a similar methodology and plan” in abusing both prior and current victims. Id.

As these cases make clear, to support admission of prior bad acts, the instant crime and the prior bad acts must be so strikingly similar in nature that evidence of the former is evidence of the latter. There is simply no such similarity between Mr. Losee’s prior acts and the actions which led to the charge of solicitation against him.

The prior crime was a crime of extreme emotion, occurring in an impassioned and drunken state without any clearheaded forethought. There most certainly was not any of the deliberate and calculating effort to commit a murder that is the hallmark of solicitation. Solicitation regards a business-like, contractual arrangement which requires much thought and planning before it can be consummated.

Third, the interval of time elapsed between Mr. Losee's dissimilar criminal episodes – the prior crimes aggravated burglary and aggravated assault and the alleged solicitation of murder at issue in this trial – minimizes the probative value of the evidence. The five months that elapsed between Mr. Losee's violent, frightening May, 2006 outburst and the alleged quiet, business-like solicitation of September sap the former of any reasonable relationship to the latter. As already noted above, the Featherson court weighed in on this very issue: "Remoteness refers to the time between the prior crime and the offense for which the accused is on trial, but the test for remoteness is not a mechanical application. The relevant inquiry is whether the other acts have 'clearly probative value with respect to the intent of the accused *at the time of the offense charged.*'" Id. at 430 (emphasis in original). Thus, it doesn't matter so much how much time has passed, as *how* that time has passed.

As noted by the Bradley court, “proximity in time [combined with similarity] to the prior bad acts make evidence of the prior acts “highly probative.” Id. at 1147. Here, no such link exists. Time has severed almost completely the prior crimes from the charged crime. There is no common scheme between the prior crimes and the charged crime; there are precious few common facts between the prior crime and the charged crime (the key victim is the same); there is no relationship between the alleged motives (drunken jealousy vs. revenge); the intent is different (angrily and emotionally terrorizing a victim he “loves” vs. killing a victim with whom Mr. Losee’s relationship has been severed); one is a crime of opportunity (have scooter and gun, will travel), while the other is a crime of preparation and planning (hence, the alleged drawing of a map to help a hired killer find the victim).

Fourth, the prosecution did not need the evidence of Mr. Losee’s prior crimes to try to prove the solicitation charge. Where “[t]here was sufficient evidentiary proof to show that all the elements of the charged crimes had been satisfied[,] [i]ntroduction of all prior misconduct and convictions was unnecessary.” Featherson at 431.

Here, the State could show sufficient facts to make out the elements of the charged crime of solicitation of murder. Mr. Pendleton provided

testimony regarding Mr. Losee's intent that Ms. Underwood be murdered. Mr. Pendleton also provided testimony that Mr. Losee solicited him to kill Ms. Underwood, or find somebody else to hire to kill her. Mr. Pendleton's testimony could be used by the State to show the solicitation of Ms. Underwood's murder was made under circumstances strongly corroborative of Mr. Losee's intent the murder actually be consummated. The map Mr. Pendleton produced also supports the State's case on the elements of solicitation.

Fifth, the court is required to look into the efficacy of the alternative proof. As discussed above, the alternative proof available to the State is enough to make out the elements of the case. The trial court failed to explore the State's need for prior crimes evidence, or the efficacy of that alternative evidence to the State's case. This failure to address the issue of alternative evidence is, accordingly, a failure to meet its mandate to "scrupulously examine" the admissibility of prior crimes evidence.

Further, the requirement that the availability and efficacy of alternative evidence be explored by the trial court when assessing the admissibility of prior crimes evidence cannot mean the State is entitled to that evidence simply because it doesn't have a good case without it. That

would make the prohibition of unfairly prejudicial evidence a barren prohibition at best.

There is alternative proof in the solicitation case against Mr. Losee. The State may have been unsure of its alternative proof against Mr. Losee because, after all, its evidence comes primarily from a pair of jailhouse snitches who had much to gain, earning better deals regarding their own crimes for their testimony against Mr. Losee. But any perceived weaknesses in the State's solicitation case against Mr. Losee should not allow the State to essentially retry him for the prior crime. This is exactly the kind of intermingling of prior and instant case that "tends to skew and corrupt the accuracy of the fact-finding process." Shickles, *supra*.

Under the final Decorso factor, the trial court was to have explored the degree to which evidence of Mr. Losee's prior acts would "rouse the jury to overmastering hostility" toward Mr. Losee. The court failed to scrupulously explore this issue, superficially noting that while Mr. Losee's actions of May, 2006 "were undeniably extreme ... these acts were no less extreme than the actions which led to the charge of Solicitation to Commit Aggravated Murder." Memorandum Decision, at 7.

To deny the prejudicial effect of Mr. Losee's criminal acts of May, 2006, is to look at those actions while wearing blinders. State v. Maurer, 770

P.2d 981 (Utah 1989), is instructive regarding the prejudicial effect of evidence likely to create an emotional response in the jury.

In that case, the defendant, who was charged with murder, wrote a callous, profane letter to the victim's father 38 days after the murder. The court noted, "because of its shocking display of lack of remorse by defendant and repulsiveness of expressions toward the victim and her father, the balance of the letter may well have been highly inflammatory in the eyes of the jury." *Id.* at 983. The court ruled that a large portion of the letter should not have been admitted under rule 403, noting that the inadmissible parts of the letter "contained little or no relevance to the central issue and that any relevance ... was clearly outweighed by the danger of 'unfair prejudice, confusion of the issues, [and] misleading the jury.' ...

[A]dmission of the entire letter was clearly erroneous." *Id.* The court explained later in the decision: "the principle issue for the jury to determine was his state of mind at the time of the killing. The State had several witnesses to establish that. ... The balance of the letter, which expresses defendant's vindictiveness and complete lack of remorse, reflected little or nothing on *his state of mind at the time of the killing.*" *Id.* at 986 (emphasis supplied). In reversing the defendant's conviction, and remanding for a new trial, the Maurer court noted the letter was addressed by the prosecution in

its opening and closing arguments, and concluded: “These remarks, together with the letter, clearly could have provoked an emotional response from the jury and provoked its instinct to punish or otherwise divert the jury from its task to determine the mental state of defendant at the time of the killing.” Id. at 987.

The same may be said of the instant case, wherein Mr. Losee’s frightening actions of May, 2006 reflected little or nothing on his state of mind at the time of his alleged solicitation for murder, and evidence of those actions of May, 2006 clearly could have provided an emotional response from the jury, provoking its instinct to punish or otherwise diverting the jury from the task of determining Mr. Losee’s guilt on the solicitation charge.

State v. Pendergrass, 586 P.2d 691 (Mont. 1978), cited with approval by the Maurer court, is also instructive. In that case, the harrowing audiotope of a rape victim’s 9-1-1 call was admitted over defendant’s objection. In ruling the admission of the tape was reversible error in violation of rule 403, the court explained:

The tape was highly prejudicial to defendant. ... [I]t contained emotional and nearly incoherent outpourings of the victim in the immediate aftermath of a violent crime. These utterances necessarily induced a feeling of outrage against the defendant and sympathy for the victim. Undue prejudice against defendant was created and a fair trial climate was destroyed by this tape.

Id. at 694.

Here, the trial court allowed the jury to hear, over Mr. Losee's objection, a portion of the highly emotional 9-1-1 call by Ms. Underwood not regarding the crime which the jury was to decide, but regarding Mr. Losee's *prior* crimes. In other words, the 9-1-1 call played in the trial below was utterly lacking any of the relevance of the 9-1-1 tape played in Pendergrass, while carrying all of the emotional baggage which "necessarily induced" in the jury a feeling of outrage against Mr. Losee and sympathy for the victim. Such feelings surely prejudiced Mr. Losee and destroyed any hope he had of a fair trial climate.

There is no question the prejudicial weight of Mr. Losee's prior crimes substantially outweighs the minimal probative value the evidence had to the solicitation charge against Mr. Losee. Because Mr. Losee's prior crimes were so dissimilar to the alleged solicitation in the instant case, because the interval between the prior crimes and the instant crime severed almost any connection between the two, because the State had available effective alternative proof, and because evidence of Mr. Losee's prior crimes was substantially more prejudicial than it was minimally probative of solicitation to commit murder, evidence of his prior crimes should not have been admitted. To admit this evidence was an abuse of the trial court's discretion.

II. EVEN IF THIS COURT UPHOLDS THE VERDICT REACHED BY THE JURY, MR. LOSEE IS ENTITLED TO THE LESSER PENALTY AFFORDED BY THE AMENDED AGGRAVATED MURDER STATUTE BECAUSE THE AMENDMENT WAS MADE EFFECTIVE SUBSEQUENT TO MR. LOSEE'S COMMISSION OF THE OFFENSE AND PRIOR TO HIS SENTENCING

Because the legislature amended the aggravated murder statute after Mr. Losee's offense, but prior to his sentencing, Mr. Losee is entitled to the lesser penalty afforded by the amended statute. State v. Yates, 918 P.2d 136, 138 (Utah App. 1996) (citations omitted). Whether a defendant is entitled to a lesser sentence when the legislature reduces the penalty for the crime charged prior to sentencing presents a "question of law" which this court reviews "for correctness, according no deference to the trial court's conclusions." Id.

Mr. Losee was charged November 13, 2006 by information with one count of Solicitation to Commit Criminal Homicide, Aggravated Murder, a First Degree Felony. The allegation remained the same when an Amended Information was filed December 19, 2006, and a Second Amended Information was filed April 1, 2008, on the first day of trial.

The aggravated murder statute under which Mr. Losee was originally charged defined aggravated murder as a "capital felony." Utah Code Ann.

76-5-202(2) (2005). The criminal solicitation statute in effect at the time of Mr. Losee's alleged offense described the penalty to be applied to Mr. Losee's crime: "Criminal solicitation to commit ... a capital felony is a first degree felony." Utah Code Ann. 76-4-204(1) (1990). The aggravated murder statute was amended in 2007. That amendment created two definitions of aggravated murder. Under the first definition, it remained a capital offense. Under the definition applicable to Mr. Losee's offense, aggravated murder became "a noncapital first degree felony." Utah Code Ann. 76-5-202(3)(a)&(b) (2007).¹ Because of the amendment to the aggravated murder statute, Mr. Losee's crime became a first degree felony that was reclassified under the solicitation statute as "a first degree felony is a second degree felony." Utah Code Ann. 76-4-204(2) (1990). As a result of these amendments, which occurred before Mr. Losee was sentenced, Mr. Losee is entitled to be sentenced for a second degree felony, not the first degree felony under which he was sentenced.

¹ The relevant language of the amended statute is: (a) If a notice of intent to seek the death penalty has been filed, aggravated murder is a capital felony. (b) If a notice of intent to seek the death penalty has not been filed, aggravated murder is a noncapital first degree felony punishable by imprisonment for life without parole or by an indeterminate term of not less than 20 years and which may be for life." No notice of intent to seek the death penalty was ever filed in Mr. Losee's case.

This remains true even though the criminal solicitation statute itself was amended and took effect after Mr. Losee's April, 2008 trial but before he was actually sentenced on July 15, 2008. Effective May 5, 2008, the criminal solicitation statute was amended, at least in part, to reflect the changed language of the aggravated murder statute. The new solicitation statute again reclassified Mr. Losee's crime: "Criminal solicitation to commit ... a felony punishable by imprisonment for life without parole, is a first degree felony." Utah Code Ann. 76-4-204(1)(a) (2008).

However, this amendment to the criminal solicitation statute is inapplicable to Mr. Losee's case. Because application of the amended criminal solicitation statute to Mr. Losee's case would increase his punishment, it violates the prohibitions against ex post facto laws found in the Utah and United States constitutions. U.S. Const. Art. 1, Section 10; and Utah Const. Art. 1, Section 18.

"An ex post facto law is one that punishes as a crime an act previously committed, which ... makes more burdensome the punishment for a crime, after its commission." State v. Norton, 675 P. 2d 577, 585 (Utah 1983) (citations omitted).

Finally, even though counsel did not raise this sentencing issue below, this Court can address the matter of Mr. Losee's sentencing because the

failure of the trial court to make the proper sentence under applicable law is plain error. “As a general rule, claims not raised before the trial court may not be raised on appeal.” State v. Holgate, 10 P. 3d 346, 350 (Utah 2000).

However, the plain error doctrine creates an exception to this general rule:

The plain error exception enables an appellate court to ‘balance the need for procedural regularity with the demands of fairness.’ ‘At bottom, the plain error rule’s purpose is to permit [an appellate court] to avoid injustice.’ To demonstrate plain error, a defendant must establish that ‘(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for appellant, or phrased differently, our confidence in the [outcome] is undermined.

Id. Under Utah’s sentencing structure, the penalties for a first degree felony and a second degree felony differ substantially. The punishment for a first degree felony is an indeterminate sentence of five years to life in prison.

Utah Code Ann. Section 76-3-203(1). The punishment for a second degree felony is an indeterminate sentence of one to 15 years in prison. Utah Code Ann. Section 76-3-203(2). It is clearly an injustice for Mr. Losee to be punished under the harsher first degree felony requirement simply because the trial court failed to notice a change in the statute applying to his case, and because counsel failed to remind the court of this change. Fairness demands that this Court order a correction to Mr. Losee’s sentence to avoid such an injustice.

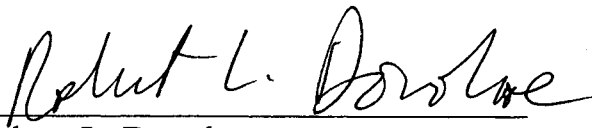
Failure to sentence Mr. Losee correctly is clearly an error. The change in the statute under which Mr. Losee was charged should have been obvious to the trial court, whose job it is to know and apply correctly the laws of the State of Utah. And, absent this error, it is highly likely the outcome for Mr. Losee would be more favorable: i.e., he would be sentenced to the shorter prison term.

It was plain error for the trial not to sentence Mr. Losee correctly, and justice and fairness demand this Court should order he be so sentenced.

CONCLUSION

For the reasons stated above, Appellant respectfully asks this Court to reverse the jury's finding Appellant was guilty of First Degree Solicitation to Commit Criminal Homicide, Aggravated Murder.

DATED this 22nd day of February, 2011.



Robert L. Donohoe
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of February, 2011, I caused to be delivered via mail, first-class postage prepaid, true and correct copies of the foregoing to:

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Robert L. Dondy

ADDENDUM I

CONSTITUTION OF THE UNITED STATES

Sec. 10. [Powers denied the states.]

[1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, as post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

[2.] No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[3.] No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreements or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ADDENDUM II

CONSTITUTION OF UTAH

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

ADDENDUM III

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ADDENDUM IV

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of

this state. Evidence which is not relevant is not admissible.

ADDENDUM V

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ADDENDUM VI

**Rule 404. Character evidence not admissible to
prove conduct; exceptions; other crimes.**

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,

ADDENDUM VII

76-1-103. Application of code — Offense prior to effective date.

(1) The provisions of this code shall govern the construction of, the punishment for, and defenses against any offense defined in this code or, except where otherwise specifically provided or the context otherwise requires, any offense defined outside this code; provided such offense was committed after the effective date of this code.

(2) Any offense committed prior to the effective date of this code shall be governed by the law,

statutory and non-statutory, existing at the time of commission thereof, except that a defense or limitation on punishment available under this code shall be available to any defendant tried or retried after the effective date. An offense under the laws of this state shall be deemed to have been committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.

1973

ADDENDUM VIII

76-3-203. Felony conviction — Indeterminate term of imprisonment.

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

(1) In the case of a felony of the first degree, unless the statute provides otherwise, for a term of not less than five years and which may be for life.

(2) In the case of a felony of the second degree, unless the statute provides otherwise, for a term of not less than one year nor more than 15 years.

(3) In the case of a felony of the third degree, unless the statute provides otherwise, for a term not to exceed five years.

2003

ADDENDUM IX

76-4-203. Criminal solicitation — Elements.

(1) An actor commits criminal solicitation if with intent that a felony be committed, he solicits, requests, commands, offers to hire, or importunes another person to engage in specific conduct that under

the circumstances as the actor believes them to be would be a felony or would cause the other person to be a party to the commission of a felony.

(2) An actor may be convicted under this section only if the solicitation is made under circumstances strongly corroborative of the actor's intent that the offense be committed.

(3) It is not a defense under this section that the person solicited by the actor:

- (a) does not agree to act upon the solicitation;
- (b) does not commit an overt act;
- (c) does not engage in conduct constituting a substantial step toward the commission of any offense;
- (d) is not criminally responsible for the felony solicited;
- (e) was acquitted, was not prosecuted or convicted, or was convicted of a different offense or of a different type or degree of offense; or
- (f) is immune from prosecution.

(4) It is not a defense under this section that the actor:

- (a) belongs to a class of persons that by definition is legally incapable of committing the offense in an individual capacity; or
- (b) fails to communicate with the person he solicits to commit an offense, if the intent of the actor's conduct was to effect the communication.

(5) Nothing in this section prevents an actor who otherwise solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense from being prosecuted and convicted as a party to the offense under Section 76-2-202 if the person solicited actually commits the offense.

1993

ADDENDUM X

76-4-204. Criminal solicitation — Penalties.

Criminal solicitation to commit:

- (1) a capital felony is a first degree felony;
- (2) a first degree felony is a second degree felony;
- (3) a second degree felony is a third degree felony; and
- (4) a third degree felony is a class A misdemeanor.

1990

76-4-204. Criminal solicitation — Penalties.

(1) Criminal solicitation to commit:

(a) a capital felony, or a felony punishable by imprisonment for life without parole, is a first degree felony;

(b) except as provided in Subsection (1)(c) or (d), a first degree felony is a second degree felony;

(c) any of the following offenses is a first degree felony punishable by imprisonment for an indeterminate term of not fewer than three years and which may be for life:

(i) murder, Subsection 76-5-203(2)(a);

(ii) child kidnapping, Section 76-5-301.1; or

(iii) except as provided in Subsection (1)(d), any of the felonies described in Title 76, Chapter 5, Part 4, Sexual Offenses, that are first degree felonies;

(d) except as provided in Subsection (2), any of the following offenses is a first degree felony, punishable by a term of imprisonment of not less than 15 years and which may be for life:

(i) rape of a child, Section 76-5-402.1;

(ii) object rape of a child, Section 76-5-402.3; or

(iii) sodomy on a child, Section 76-5-403.1;

(e) a second degree felony is a third degree felony; and

(f) a third degree felony is a class A misdemeanor.

(2) If, when imposing a sentence under Subsection (1)(d), a court finds that a lesser term than the term described in Subsection (1)(d) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) ten years and which may be for life;

(b) six years and which may be for life; or

(c) three years and which may be for life.

History: C. 1953, 76-4-204, enacted by L. 1990, ch. 189, § 2; 2008, ch. 179, § 2.

Amendment Notes. — The 2008 amendment, effective May 5, 2008, designated the opening phrase as (1); redesignated former (1) and (2) as (1)(a) and (1)(b); in (1)(a), added "or a

felony punishable by imprisonment for life without parole"; in (1)(b), added "except as provided in Subsection (1)(c) or (d)"; added (1)(c) and (1)(d); redesignated former (3) and (4) as (1)(e) and (1)(f); and added (2).

ADDENDUM XI

76-5-202. Aggravated murder.

(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(2) Aggravated murder is a capital felony.

2005

76-5-202. Aggravated murder.

(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the

death of another under any of the following circumstances:

(3) (a) If a notice of intent to seek the death penalty has been filed, aggravated murder is a capital felony.

(b) If a notice of intent to seek the death penalty has not been filed, aggravated murder is a noncapital first degree felony punishable by imprisonment for life without parole or by an indeterminate term of not less than 20 years and which may be for life.

2007