

2008

Utah v. 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,)	
)	
Defendant/Appellant.)	

APPELLANT'S REPLY 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 REPLY BRIEF

ARGUMENT

I. EVIDENCE OF MR. LOSEE'S EARLIER CRIMES WAS NOT PROPERLY ADMITTED FOR CONTEXTUAL, MOTIVATIONAL OR REBUTTAL PURPOSES.

Allowing the jury to hear the spectacularly horrifying details of Mr. Losee's prior aggravated assault and aggravated burglary involving Becky Underwood ("Ms. Underwood") was overwhelmingly unfair to Appellant Karl Losee ("Mr. Losee" or "Appellant"). The Rules of Evidence seek to exclude just such details because those details provide 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). As Mr. Losee noted in his opening brief, such evidence "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).)

The State argues the trial court was correct when it admitted evidence of Mr. Losee’s May, 2006 break-in and assault, because such evidence was admitted for proper, noncharacter reasons. The trial court focused on motive. The state now argues that evidence was properly admitted “to show context for the instant crime, to establish motive, and to rebut claims of fabrication.” Br. Appellee 10. The State also argues the evidence was relevant to the case at hand, and that the “probative value of this evidence was not substantially outweighed by any potential for unfair prejudice.” Id.

Mr. Losee addressed admissibility of the prior crimes evidence in detail in his opening brief, and now summarily addresses those issues again, focusing on the issues of context and rebuttal, which are raised in Appellee’s brief.

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).

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

The trial court found Mr. Losee's prior acts were fueled by his animosity and extreme emotion toward Ms. Underwood. The trial court also found that Mr. Losee's emotion was lingering when Mr. Losee allegedly solicited Ms. Underwood's murder some five months later. The trial court 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.

However, a focus on Mr. Losee's emotional state during the commission of his prior crimes misses the point. As the court in State v. Featherson, 781 P.2d 424 (Utah 1989), 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). Thus, the statements allegedly made by Mr. Losee to Mr. Pendleton – “you shouldn’t have fucked over the little man” – are much more relevant to Mr. Losee’s state of mind at the time of the alleged solicitation than are his presumed state of mind and actions of May, 2006.

The State now argues the evidence of Mr. Losee’s prior crimes was admissible to give the jury a contextual basis for Mr. Losee’s alleged solicitation of murder.

Webster’s defines “context” as “the whole situation, background, or environment relevant to a *particular event*.” Webster’s New World Dictionary, 2d College Ed. (1986) (emphasis supplied). The State quotes State v. Morgan, 813 P.2d 1207, 1210 n. 4 (Utah App. 1991), for the proposition that evidence of prior crimes is admissible “to paint a picture of the context in which events transpired.” Br. Appellee 17. The State also quotes State v. Pierce, 722 P.2d 780, 782 (Utah 1986): “a defendant’s prior bad acts can be discussed ‘to show the general circumstances surrounding’ the *crime at issue*.” Br. Appellee 17 (emphasis supplied). The Webster’s formulation of “context” fits neatly with the meaning as used in Morgan and Pierce. The focus of an analysis of relevant, admissible contextual

information is thus on events surrounding the crime charged, which in this case means the events surrounding Mr. Losee's alleged solicitation to commit murder.

To admit evidence of an unrelated, dissimilar heat-of-the-moment act such as Mr. Losee's assault and burglary at Ms. Underwood's home five months earlier as "context" regarding his alleged cold, calculated contractual act of solicitation is the strain beyond recognition the meaning of context.

Mr. Losee's wildly emotional, horrifying acts in May, 2006 provide no context for his alleged solicitation because those acts simply are not relevant to, are not part and parcel of, the alleged solicitation five months later. To argue evidence of such emotionally driven gunplay, and the terrified victim's 9-1-1 call provide context for a months-later calculated, contractual arrangement of murder-for-hire is akin to the argument that a night of drunken love-making in the spring is the contextual explanation for an early-winter marriage proposal. Both the gunplay and the drunken night are only tangentially related snapshots that offer no real explanation for the contracts proposed months later.

In discussing Mr. Losee's motives for his alleged solicitation, the State argues Mr. Losee "later concluded that his perceived girlfriend had betrayed and rejected him when she established a relationship with another

man.” Br. Appellee 18. This is a motive the State could have pursued to explain Mr. Losee’s alleged solicitation, the context the State could have provided. Such feelings may explain *why* Mr. Losee would have done what the State said he did. But detailed evidence that a highly emotional, perhaps drunk, Mr. Losee terrorized the victim five months before his alleged act of solicitation of murder does nothing to explain *why* he might have later solicited her death. Evidence of the prior crimes provides no motive or context for the solicitation; it only shows he was a bad guy in May.

Likewise, evidence of his prior crimes does nothing to rebut Mr. Losee’s claim that the State’s chief witness against him – career criminal Andre Pendleton – fabricated his testimony for his own benefit. That Mr. Pendleton benefitted from his testimony against Mr. Losee is uncontroverted. He was booked into jail and charged with first degree felony possession of cocaine with intent to distribute in a drug free zone, and was allowed to plead to a third degree felony. His deal included release from jail to probation upon testifying in Mr. Losee’s case. Mr. Pendleton testified he received the benefit of his deal. (Trial transcript, Vol. 2, p. 60, lines 12-14; p.73, lines 23-24; p. 79, lines 3-6; and p. 93, line 20 to p. 94, line 22.) Evidence of Mr. Losee’s prior crimes cannot address Mr. Pendleton’s motives, cannot do away with the obvious motive of Mr. Pendleton to

fabricate a story regarding Mr. Losee, and thereby win his early release. Mr. Pendleton is a career criminal, with a vast knowledge of how the justice system works, and he sought to take advantage of the system by testifying against Mr. Losee. (Trial transcript, Vol. 2, p. 73, line 5; p. 74, line 17 to p.75, line 16; p. 82, line 6; and p. 92, lines 8-14.)

To properly address and rebut Mr. Losee's claim that Mr. Pendleton made up the solicitation story to essentially obtain his own "Get out of Jail Free" card, the State must address Mr. Pendleton's state of mind. The veracity of Mr. Pendleton's testimony cannot be verified or supported by evidence of Mr. Losee's violent May rampage. It is the behavior of Mr. Losee at the time he was allegedly soliciting a murder that must be used by the State to support Mr. Pendleton's testimony.

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

The State argues Mr. Losee's prior crimes are relevant to the solicitation charge. "Evidence of Defendant's earlier involvement with Becky [Underwood] and his past violent acts against her made it more probable that he had the motive and intent to solicit her murder. It made it more likely that Defendant was not just a random victim of [Mr.] Pendleton's retribution." Br. Appellee 20-21.

First, it is important to remember that Mr. Losee has never claimed to be a “random victim of [Mr.] Pendleton.” Instead, Mr. Losee has argued he was an easy target for the likes of Mr. Pendleton because of his notoriety. His May, 2006 crimes were fodder for the evening news on television, and were well-known to the jail population. (Trial transcript, Vol. 2, p. 61, lines 3-24; and p. 84, line 13 to p. 85, line 1.)

Second, Mr. Losee’s prior crimes are simply not relevant to the solicitation charge. “[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. “ ‘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.

Mr. Losee was on trial for his alleged solicitation of Ms. Underwood’s murder sometime in the fall of 2006, not his 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 do not have any tendency to make more probable any fact that is of consequence to the solicitation charge. Mr. Losee’s earlier crimes do not have any bearing on what he allegedly did while 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 that prejudice substantially outweighs any probative value to the State’s solicitation case.

Mr. Losee addresses the prejudicial nature of the prior crimes evidence at greater length in his opening brief. This section addresses the State’s contention that the probative value is not substantially outweighed by the prejudice suffered by Mr. Losee.

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 eventually pleaded guilty to crimes of aggravated burglary and aggravated assault that arose from the May incident. 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 State v. Bradley, 57 P.3d 1139 (Utah App. 2002), (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 analyzing the second Shickles factor the trial court assessed “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 his alleged solicitation of murder.

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 first criminal episodes and the alleged solicitation of murder at issue in this trial, minimizes the value of the prior crimes 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: "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 an emotional crime of opportunity, while the other is a crime of preparation and planning.

The State argues five months is a period short enough to support the admission of evidence of Mr. Losee’s prior crimes. But the cases relied on by the State all deal with similarly executed crimes, such that the commission of the second is so like the commission of the first that evidence of the similarities between the crimes can be used to show method or intent or lack of consent. No such similarities tie Mr. Losee’s May crimes to his alleged September solicitation.

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. See Decorso, at 843.

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 jailhouse snitch who had much to gain. 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 crimes. 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.

Without explanation, the State parrots this reasoning in its brief. The State goes on to argue that Jury Instruction No. 34 was sufficiently limiting to cure the overmastering hostility likely produced by the evidence of Mr. Losee’s May tirade, and the corresponding prejudice that resulted against him. But this reasoning begs the question, “If Mr. Losee’s May crimes were so outrageous as to rouse the jury to overmastering hostility toward him, wouldn’t that hostility also overmaster Instruction No. 34?” The answer, of course, is a resounding, “Yes!” Once the jury’s hostility is unleashed, any attempt to limit and control that hostility through a curative instruction is likely futile. In May, Mr. Losee shot several times through Ms. Underwood’s front door, eventually held her hostage, threatened to kill her using the most abusive and vulgar language, and fired a round over her head while close enough to produce powder burns on her head. Inflammatory evidence of such over-the-top behavior, once presented to the jury via playing of a video newscast and audio 9-1-1 tape, simply could not and would not be ignored by a jury.

To deny the prejudicial effect of Mr. Losee's criminal acts of May, 2006, is to look at those actions while wearing blinders. Mr. Losee's frightening acts 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 acts clearly would have provoked an emotional response from the jury, arousing its instinct to punish or otherwise diverting the jury from the task of determining Mr. Losee's mental state at the time of the alleged solicitation of murder. See, State v. Maurer, 770 P.2d 987 (Utah 1989). See also, State v. Pendergrass, 586 P.2d 691 (Mont. 1978) (admission into evidence of the harrowing audiotape of a rape victim's 9-1-1 call was reversible error in violation of rule 403).

The prejudice to Mr. Losee by admission of evidence regarding his prior crimes substantially outweighs the minimal probative value the evidence had to the solicitation charge against Mr. Losee.

II. A BRIEF NOTE ABOUT PLAIN ERROR AND THE SETTLED NATURE OF THE LAW OF YATES AND THE PROHIBITION AGAINST EX POST FACTO LAWS (OR, WHY, EVEN IF THE VERDICT IN THIS CASE IS UPHELD, MR. LOSEE IS ENTITLED TO THE LESSER SECOND DEGREE PENALTY AFFORDED BY THE AMENDED AGGRAVATED MURDER STATUTE).

Mr. Losee addressed the sentencing issues in detail in his opening brief, but now takes the opportunity afforded here to respond briefly to the issues raised by the State in its brief.

Mr. Losee asserts that because the legislature amended the aggravated murder statute after Mr. Losee's offense, but prior to his sentencing, he is entitled to the lesser penalty afforded by the amended statute, which rendered his offense a second degree felony. Mr. Losee asserts this is true even though his counsel failed to 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.

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.

State v. Holgate, 10 P.3d 346, 350 (Utah 2000).

The State asserts Mr. Losee is not entitled to the sentence required for a second degree felony conviction because the State claims the error was not obvious. Mr. Losee “points to no settled appellate precedent requiring a court to impose a lesser sentence than that sentence mandated both at the time of the crime’s commission and at the time of sentencing.” Br. Appellee 34-35. This argument attempts to divert this Court’s attention from the obvious: both the law of State v. Yates, 918 P.2d 136 (Utah App. 1996) and the prohibition against the imposition of ex post facto punishments are long-settled propositions that apply to the courts and laws of this state.

Although Yates was decided in 1996, its ruling rested on long-standing law in Utah:

Defendants are entitled to the benefit of the lesser penalty afforded by an amended statute made effective prior to their sentencing. Belt v. Turner, 483 P.2d 425, 426 (1971). The Utah Supreme Court articulated this principle twenty-five years ago: “A new policy having been adopted by the legislature concerning the punishment for the offense we are here concerned with ... should inure to the defendant's benefit even though the offense had been committed and the plea thereto made prior to the amendatory legislation.” Id. The Supreme Court has subsequently affirmed a defendant's right to a lesser sentence when the legislature reduces the penalty for the crime charged in the interim between commission of the offense and sentencing. Additionally, the criminal code itself suggests defendants are entitled to any lesser penalties that the legislature has determined appropriate for their crimes: 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.
Utah Code Ann. Section 76-1-103(2) (1995).

(emphasis in original) (some citations omitted).

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

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.

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).

Because the limitation on punishment was effective before Mr. Losee was tried, he was entitled to be sentenced for a second degree felony. This remains true even though the criminal solicitation statute itself was amended and again, by the time Mr. Losee was sentenced, classified Mr. Losee's alleged solicitation as a first degree felony. Utah Code Ann. 76-4-204(1)(a) (2008).

This is so because of the prohibition against the imposition of ex post facto laws that increase punishment. Because application of the amended criminal solicitation statute to Mr. Losee's case would increase his punishment, it violates the prohibition 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. What this means was explained by the Utah Supreme Court more than 25 years ago: "An ex post facto law is one that punishes as a crime an act previously committed, which ... makes more

(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.

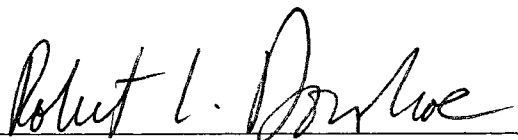
burdensome the punishment for a crime, after its commission.” State v. Norton, 675 P. 2d 577, 585 (Utah 1983) (citations omitted).

Because the amended aggravated murder statute afforded Mr. Losee a lesser penalty, the later amendment to the criminal solicitation statute was one that made “more burdensome the punishment” for Mr. Losee’s crime. Thus, the April 2008 amendment to criminal solicitation statute is barred by the prohibition against ex post facto laws from being applied to Mr. Losee’s sentence.

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. In the alternative, if the verdict is upheld, Appellant asks this Court to remand his case for sentencing as a second degree felony as mandated by the amended aggravated murder statute.

DATED this 29th day of December, 2011.


Robert L. Donohoe
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of December, 2011, I caused to be delivered via mail, first-class postage prepaid, true and correct copies of the foregoing to:

Jeanne B. Inouye
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Karl Grant Losee
Offender # 175833
Utah State Prison
P.O. Box 250
Draper, Utah 84020

A handwritten signature in cursive script, appearing to read "Robert L. Doshier", is written over a horizontal line.