

1998

Utah v. Kandt : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KFT NO. 980230

STATE OF UTAH, :
Plaintiff/Appellee : Case No. 980230-CA
v. :
DENNY DUKE KANDL : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF AGGRAVATED ASSAULT, A
THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §
76-5-103 (SUPP. 1998), AND A GROUP CRIMINAL ACTIVITY
ENHANCEMENT PURSUANT TO UTAH CODE ANN. § 76-3-203.1
(1995), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE
SANDRA PEPPER, PRESIDING

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Clerk of the Court

IN THE UTAH COURT OF APPEALS

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 Plaintiff/Appellee, : Case No. 980230-CA
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DENNY DUKE KANDT,	:	Priority No. 2
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a judgment and conviction of aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (Supp. 1998), and a group criminal activity enhancement pursuant to Utah Code Ann. § 76-3-203.1 (1995) (copies of these statutes are attached in Add. A).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF ISSUES PRESENTED ON APPEAL
AND STANDARDS OF APPELLATE REVIEW¹

1. Did defendant's trial counsel render ineffective assistance below when he:
 - a. failed to object to admission of any of the gang-related evidence;
 - b. failed to object to testimony about the possibility of future gang violence or retaliation; and
 - c. failed to call more than one alibi witness and defendant himself to testify?

Because the trial court ruled on this claim in the context of defendant's post-trial motion for a new trial, this claim presents a mixed question of law and fact on appeal. State v. Classon, 935 P.2d 524, 531 (Utah App.), cert. denied, 945 P.2d 1118 (Utah 1997). This Court must defer to the trial court's findings of fact, but reviews its legal conclusions nondeferentially for correctness. Id.; State v. Perry, 899 P.2d 1232, 1238-39 (Utah App. 1995), reh'g denied (Aug. 14, 1995).

2. Did the trial court properly admit evidence of both the victim's and the defendant's gang membership and the relationship of that information to the charged assault, pursuant to the parties' agreement?

The decision to admit or exclude evidence under rule 403, Utah Rules of Evidence, is reviewed on appeal for an abuse of discretion. State v. Finlayson, 956 P.2d 283, 291 (Utah App.), cert. granted, (Oct. 10, 1998); State v. Alonzo, 932 P.2d 606, 613 (Utah App. 1997), aff'd, 359 Utah Adv. Rep. 32 (Utah Dec. 29, 1998); State v. Jacques, 924

¹The State has reorganized defendant's points on appeal because the disposition of the claims lends itself more readily to the modified organization.

P.2d 898, 900 (Utah App. 1996).² However, as defense counsel's agreement invited any error in admission of the evidence, defendant is not entitled to appellate review of his claim. State v. Stevenson, 884 P.2d 1287, 1292 (Utah App. 1994), cert. denied, 892 P.2d 13 (Utah 1995).

3. Was the evidence sufficient to establish defendant's guilt of aggravated assault?

On appeal, this issue is reviewed with great deference to the jury verdict. State v. Jiron, 882 P.2d 685, 691 (Utah App. 1994), cert. denied, 892 P.2d 13 (Utah 1995). The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the jury's verdict. State v. Olsen, 869 P.2d 1004, 1012 (Utah App. 1994). "Where there is any evidence, including reasonable inferences that can be drawn from it, from which findings of all the elements of the crime can be made beyond a reasonable doubt, our inquiry is complete and we will sustain the verdict." Jiron, 882 P.2d at 691 (quoting State v. Goddard, 871 P.2d 540, 543 (Utah 1994)) (additional quotation omitted); see also State v. Hall, 946 P.2d 712, 724 (Utah App. 1997), cert. denied, 953 P.2d 449 (Utah 1998).

Reversal is not warranted unless the evidence is "so inconclusive or inherently

²Defendant does not recognize this well-established standard of review, but cites to a less-deferential standard applied to the admission or exclusion of gruesome photographs under rule 403. Br. of Appt. at 2, 11. Aside from the fact that this jurisdiction has never recognized gang-related evidence to be one of the "certain categories of relevant evidence" to which the less deferential test is applied (see State v. Dibello, 780 P.2d 1221, 1229 (Utah 1989); State v. Lafferty, 749 P.2d 1239, 1256 (Utah 1988)), this Court need not consider whether gang-related evidence warrants a different standard of review because the evidence was admitted below pursuant to the parties' agreement, and defendant fails to acknowledge the existence or challenge the validity of the agreement.

improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.” Jiron, 882 P.2d at 691.

Moreover, a claim of insufficient evidence will not be reviewed unless the appellant marshals the evidence supporting the jury’s verdict and demonstrates how the evidence, and the reasonable inferences therefrom, is insufficient to support the verdict. State v. Strain, 885 P.2d 810, 819 (Utah App. 1994); State v. Pilling, 875 P.2d 604, 607-08 (Utah App. 1994).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issue presented on appeal is contained in or appended to this brief, including:

Utah Code Ann. § 76-2-202 (1995);
Utah Code Ann. § 76-3-203.1 (1995); and
Utah Code Ann. § 76-5-103 (Supp. 1998).

STATEMENT OF THE CASE

Defendant was charged by information with aggravated assault, a second degree felony, in violation of Utah Code Ann. § 76-5-103 (Supp. 1998), and faced a group criminal activity enhancement pursuant to Utah Code Ann. § 76-3-203.1 (1995), based on the allegation that he committed the assault with two or more persons (R. 6-10). The day of trial, the prosecutor amended the information to reflect a third degree felony (R. 63-64). Following a two-day trial, a jury convicted defendant as charged (R. 125).

Defendant then sought to have the group criminal activity enhancement charge stricken (R. 130-31), and obtained private counsel (R. 143-45). Defendant's new counsel, who also represents defendant on appeal, filed a motion for a new trial, claiming: unfair prejudice from introduction of gang-related evidence, insufficiency of the evidence to support the verdict, and ineffective assistance of counsel for, among other things, failure to object to gang-related evidence, failure to call additional alibi witnesses, and failure to permit defendant to testify (R. 149-54). After briefing and argument, the district court denied the new trial motion (R. 235-39) as well as the motion to strike the enhancement (R. 186-88), then court imposed a sentence of no more than five years in prison for the aggravated assault with a three-year consecutive term for the enhancement (R. 159).

Defendant timely appealed, presenting to this Court the same express arguments noted above which were included below in his motion for a new trial.

STATEMENT OF FACTS³

Dino Hernandez had been a gang member for a number of years (R. 249: 7-8).⁴ Initially, he associated with Diamond Street gang, but after about a year, he turned to the Salt Lake Posse, with which he was associated on July 28, 1997 (id.).

³The facts are recited in a light most favorable to the jury's verdict. State v. Bryant, 965 P.2d 539, 541 (Utah App. 1998); State v. Payne, 964 P.2d 327, 329 (Utah App. 1998).

⁴Because each of the transcripts in this case have been given a single record number, citation herein to these documents will be to the number stamped on the cover of each transcript volume, followed by a colon and the internal page number (i.e., R. 249: 7).

On that day, Dino was driving on the west side of Salt Lake City at 5:30 p.m. when he received a page (R. 249: 11, 28). He noticed a nearby phone booth at a Pizza Hut near 700 North and Redwood Road and pulled into the parking lot (R. 249: 12). Because he was a gang member and all gang members are “potential targets”, he drove around the restaurant a couple of times to see if he saw anyone from a rival gang (R. 249: 13-14, 109). Seeing no one, he decided to stop and answer the page (id.). A few cars were parked facing the curb in front of the phone booth, which was attached to the outside of the building, so Dino parked behind them, parallel to the building, left his door open, and went to use the phone (R. 249: 12-14, 52).

He picked up the handset but had not completed the call when he saw three members of a rival gang approach him (R. 249: 14-15). They approached him so quickly that he was able to see only the one in front of the group before the beating began and recognized him as a member of the Diamond Street gang (R. 249: 14-15, 18). Dino was beaten into a near-fetal position, keeping himself upright on one knee but doubled over and protecting his face as he was hit and kicked by the trio (R. 249: 15-16). He felt several crushing blows to the back of his head from a hard, heavy object he thought might be a rock (R. 249: 17). Amid the yelling and the chaos of the thirty-to-sixty second beating, Dino heard defendant’s voice (R. 249: 17-18, 29-30). Having known defendant over several years and having had several prior confrontations with him, Dino was confident that it was defendant’s voice that he heard (R. 249: 6-7, 18-19).

When the beating ceased, Dino managed to drag himself into the Pizza Hut, where the employees called 911 and tried to stop the bleeding from the open wound on the back of his head (R. 249: 19-20, 54). Upon hearing about the phone call, Dino left and drove to a nearby friend's house (R. 249: 20). However, within ten minutes of arriving, he had someone drive him to the hospital because of the searing pain in his head (R. 249: 20). The wounds on Dino's head took 40 stitches to close, and his injuries forced him to quit his job and to stop driving (R. 249: 20-22, 27).

Dino quickly discovered that he had lost his pager during the assault (R. 249: 19). He began receiving calls at his house, as did several friends of his who had previously paged him, from one of the males who had assaulted him (R. 249: 19, 23). The caller bragged about who it was and what had happened (*id.*). Dino became concerned that his house might be targeted by the rival gang, and worry for his three young children prompted him to contact the local gang unit to ask the police to watch his house when they were patrolling (R. 249: 23). A couple of days later, two officers stopped by and Dino told them the details of the assault (R. 249: 24-25).

SUMMARY OF THE ARGUMENTS

Point I: Defendant fails to establish any of his three claims of ineffective assistance of trial counsel. His claim that counsel failed to object to evidence of future gang violence is inadequately briefed, permitting this Court to decline to reach the claim as it violates the appellate briefing rule.

Defense counsel made a well-reasoned decision to agree to admission of gang-related evidence to enable him to attack the victim's veracity by show-casing the victim's motive to lie and falsely implicate defendant, while still asserting defendant's alibi defense. Such reasonable trial strategy does not amount to ineffective assistance of counsel.

Defense counsel's use of a single witness to present the alibi defense was also a matter of legitimate trial strategy. Counsel had at least two other witnesses present at trial, indicating that he would be calling at least one of them. However, after presenting a single alibi witness, counsel decided not to call any others. The record shows that counsel was afraid that additional testimony might contradict and dilute the testimony already given, and the affidavits of the proposed witnesses contain sufficient inconsistencies to support this concern. Counsel may also have been concerned about the fact that all proposed witnesses, including defendant himself, would be subject to cross-examination. The State noted some of the evidence it was prepared to present on cross had the witnesses been called, and defense counsel may have felt the additional risk to the defense was not worth the additional testimony. On this record, counsel's decision not to adduce further alibi testimony appears to be well-reasoned trial strategy and does not amount to ineffective assistance.

Point II: Defendant's claim of error in the admission of gang-related evidence at trial fails because his counsel agreed to the admission in order to further his trial strategy

of using the victim's gang membership and history of gang involvement to challenge the victim's veracity and motives. That strategy was reasonable under the facts of this case (see Point I). Consequently, the invited error doctrine precludes appellate review of this claim.

Point III: There was ample evidence adduced at trial to support the jury's determination that defendant was guilty at least as an aider or abettor, if not as a principal, in the assault on the victim. The evidence concerning the fact that the victim and defendant had known each other for years and had clashed in the past, independent of any mention of gang activity, supported the victim's positive identification of defendant's voice during the assault and suggested a possible motive for his participation. Defendant's possession and use of the victim's pager, lost at the scene of the assault, to contact various friends of the victim to brag about his identity and the assault supports findings that defendant was present at the assault and harbored the requisite intent. Other evidence which suggested that defendant drove the trio to the scene, made no attempt to prevent the assault, then immediately left with the group provides added support for the jury's determination. Consequently, there was sufficient evidence upon which the jury could find that defendant intentionally aided and encouraged, if not actively participated in, the assault, justifying a guilty verdict.

ARGUMENTS

POINT I

DEFENDANT FAILS TO ADEQUATELY BRIEF ONE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND THE RECORD REFLECTS THAT THE REMAINING TWO CLAIMS OF COUNSEL'S FAILURE TO ACT WERE A MATTER OF TRIAL STRATEGY

In Point III of his brief, defendant attacks his trial counsel's effectiveness on three grounds. First, he argues that his counsel was ineffective for failing object to admission of all gang-related information at trial. Br. of Apl't. at 22. Second, defendant faults his counsel's failure to object to any testimony related to the victim's fear of possible future gang violence or retaliation. Id. at 22-23. Third, defendant claims his trial counsel failed to adequately present his defense because he did not call additional witnesses or defendant himself to corroborate the testimony of one defense witness that defendant was with her at the time of the assault. Id. at 23. However, defendant fails to carry his burden of establishing any of these claims on appeal.

A. Standard of Review

To succeed on a claim of ineffective assistance, appellant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the trial's outcome. State v. Winward, 941 P.2d 627, 635 (Utah App. 1997) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 693, 104 S. Ct. 2052, 2064, 2067 (1984)); State v. Perry, 899 P.2d 1232, 1239 (Utah App. 1995). To show deficient performance, defendant must prove that counsel's representation "fell below an objective standard of

reasonableness." State v. Classon, 935 P.2d 524, 531 (Utah App.), cert. denied, 945 P.2d 1118 (Utah 1997); see also State v. Finlayson, 956 P.2d 283, 293 (Utah App. 1998), cert. granted, (Oct. 10, 1998). This requires that defendant identify the specific acts or omissions that "'fall outside the wide range of professionally competent assistance.'" Classon, 935 P.2d at 532 (quoting State v. Frame, 723 P.2d 401, 405 (Utah 1986)). Defendant's claim may not be purely speculative, but must be a demonstrative reality. State v. Severance, 828 P.2d 1066, 1070 (Utah App. 1992). Because of the extremely broad deference afforded to trial counsel's choices concerning trial strategy (id.; Perry, 899 P.2d at 1239), appellant must demonstrate "'that counsel's actions were not conscious trial strategy,'" Winward, 941 P.2d at 635 (quoting State v. Garrett, 849 P.2d 578, 579 (Utah App. 1993) (additional quotations omitted)), and "'that there was a 'lack of any conceivable tactical basis' for counsel's actions.'" Id. (quoting State v. Moritzsky, 771 P.2d 688, 692 (Utah App. 1989)).

To establish the requisite prejudice, defendant must show that the alleged errors were so serious as to deprive defendant of a fair trial. Classon, 935 P.2d at 532. This requires a showing that a "reasonable probability" exists that the trial would have had a different result absent counsel's errors. Finlayson, 956 P.2d at 293; Classon, 935 P.2d at 532. A "reasonable probability" is a probability that is "'sufficient to undermine confidence in the reliability of the outcome.'" Classon, 935 P.2d at 532 (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068); see also Finlayson, 956 P.2d at 294.

B. Defense Counsel's Failure To Object To Admission Of Gang-Related Evidence Was A Matter Of Legitimate Trial Strategy

A review of the record defeats defendant's first claim--that his trial counsel failed to object to admission of all gang-related evidence. At the hearing on defendant's motion for a new trial, the parties addressed defendant's ineffective assistance claims. The prosecutor reminded the trial judge that the parties had discussed the matter of gang-related evidence with her in her chambers prior to trial (R. 255: 28-29) (a copy of the exchange is attached in Add. B). The parties informed the judge that they had agreed that both sides would be inquiring at trial into the matter of gang membership (R. 255: 29). Add. B. Defendant's trial counsel intended to highlight the victim's gang affiliations and his grudge against defendant in order to attack the victim's credibility and establish a motive for the victim to falsely accuse defendant of this crime (*id.*). Add. B. The prosecutor felt that if gang membership were to be made an issue, then the State should be permitted to adduce evidence of defendant's membership in Diamond Street gang (*id.*). Add. B.

The parties informed the trial court in the pre-trial conference of their agreement on the gang evidence issue and, based on that agreement, the parties and the court extensively discussed gang-related questions with the jury venire (R. 250: 45-46, 65-66, 71-75, 91, 96-104, 109-10, 116-19, 134-37, 144, 164-65), the prosecutor made references to gang-related matters in his opening statement to diffuse the possible impact of the

information when defendant discussed it (R. 250: 167-68, 171-72; 255: 30), and both sides adduced gang-related evidence at trial without objection (R. 249: 7-10, 40-43, 44-45, 83-89). Add. B.

In rejecting defendant's claim of ineffective assistance on this issue, the trial court stated:

While in hindsight the things that former counsel did might have appeared to have been mistaken strategy, I think it very clearly was part of his trial strategy; in other words, that the victim was a gang member who was assaulted by rival gang members but we weren't there.

And in fact, that was said in conversation between counsel and I. I don't recall at what stage of the proceedings it was, it may have been when we were discussing witnesses or it may have been during voir dire process or at some other point, but that was raised because counsel both made it clear to me that part of the defendant's trial strategy was to allow that [gang] evidence in because their defense was he wasn't there, so it didn't really matter.

It also appears to me that had that not been part of the trial strategy, much of that clearly went to motive, to explain an otherwise unexplainable assault.

(R. 255: 46-47) (a copy of the ruling is attached in Add. B).⁵

Defense counsel's agreement to the arrangement was consistent with a reasonable trial strategy. State v. Hall, 946 P.2d 712, 717 (Utah App. 1997), cert. denied, 953 P.2d 449 (Utah 1998). He was able to use the information to his best advantage as part of a

⁵The actual pre-trial discussion on gang evidence does not appear in the record, there was no evidentiary hearing below involving defendant's claims of ineffective assistance, and defendant has sought no remand pursuant to rule 23B, Utah Rules of Appellate Procedure. However, the memories of both the prosecutor and the trial court as stated during the motion hearing below are not disputed by defendant.

well-reasoned tactic designed to attack the victim's veracity by show-casing his motive to lie and to implicate defendant falsely, while still asserting defendant's alibi defense. See People v. Cox, 809 P.2d 351, 372 (Cal. 1991) ("[E]vidence of gangs [is] a twin sword which could be utilized by the defense in attacking the credibility of the victim."), cert. denied, 502 U.S. 1062 (1992).

Defense counsel's strategy was apparent in his opening statement:

Well, now, wait a minute, you say, how can that be? Already we have a conflict. The victim's going to be saying that Denny did it to him. Denny's friends will be saying, No, he was with us all the time. Somebody is telling a lie here and that's what you'll be asked to listen to today as you listen to every single witness who gets on that witness stand, look at them, use all of your experience of human nature concerning truth or lie, as each witness is on that stand and ask, Who's telling the truth here? Who's telling a lie?

What motivation would anyone have to tell the truth here or a lie? Well, the evidence will show that Dino [the victim] testified under oath at a prior hearing and at the prior hearing, he admitted to being a gang member, he admitted prior confrontations with Denny, in which a friend of the victim, a friend of Dino's, threw a rock through-at Denny's house.

Dino, the victim, will testify that he held a grudge against Denny. Consider that and consider-ask motivation when Dino gets on the stand."

(R. 250: 176-77) (counsel's opening statement is attached in Add. C).

As the trial developed, defense counsel acted on that strategy. At trial, the victim admitted being a member of a gang called the Salt Lake Posse and testified to his history of gang involvement (R. 249: 7-10). Aside from the affiliation of both defendant and the victim with rival gangs, the gang-related evidence dealt primarily with the victim. Defendant's trial counsel questioned the victim at length about a prior gang-related

confrontation between the victim and defendant in which defendant was the victim (R. 249: 40-43). Defense counsel established that the victim had a gang-related "grudge" against defendant and against defendant's gang (R. 249: 43), and implied throughout the trial that the victim had falsely identified defendant to effectuate that "grudge" (R. 249: 41-43, 107-08; 250: 176-77, 231). This theme was joined with trial counsel's attack on the victim's "voice only" identification of defendant and defendant's use of an alibi witness to establish that he was not at the scene of the assault (R. 249: 28-30, 93-124; 250: 230-31). Finally, in closing, defense counsel suggested that Dino "may be retaliating" or using this as "a way to get back at Denny" because of the admitted grudge (R. 250: 231).

While defendant's appellate counsel might not agree with former counsel's conscious trial strategy—in fact, he fails to even acknowledge it—nothing in the record establishes that it was unreasonable or fell below "an objective standard of reasonableness".

C. Review Of Defense Counsel's Failure To Object To Evidence Of Future Gang Violence Is Not Warranted Because Of Inadequate Briefing

Defendant separately attacks his trial counsel's failure to object to evidence implying the possibility of future gang violence. Br. of Aplt. at 22-23. However, the argument fails to comply with this Court's briefing rule.

Rule 24(a)(9), Utah Rules of Appellate Procedure, requires that defendant's brief include an argument which "shall contain the contentions and reasons of the appellant

with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on." Defendant's argument consists of three sentences and no citation to legal authority. Br. of Aplt. at 22-23. Defendant summarily claims that trial counsel should have moved to strike testimony and sought admonishment of the jury because the evidence of future gang violence was "inflammatory" and not reasonably justifiable. Id. However, defendant does not establish a legal basis for such a motion or otherwise justify his position. Because the argument fails to meet the briefing requirements of rule 24(a), this Court should not address the issue. See State v. Haga, 954 P.2d 1284, 1287 n.3 (Utah App. 1998); see also State v. Thomas, 961 P.2d 299, 305 (Utah 1998) (finding that a claim consisting of citation to constitutional provisions and a single case without any analysis of what the authority requires and how the facts of the case apply to the cited authority constitutes inadequate briefing).⁶

⁶The evidence consisted of testimony that: 1) the victim delayed reporting the incident out of a fear of possible retaliation by Diamond Street involving his house and his three children; and 2) the victim did not testify voluntarily because he was afraid of being labeled a "snitch" and being targeted by gang members (R. 249: 23-27). Fear of retaliation is relevant and admissible as it goes to the issue of credibility. United States v. Abel, 469 U.S. 45, 49, 105 S. Ct. 465, 467 (1984); United States v. Keys, 899 F.2d 983, 987 (10th Cir.), cert. denied, 498 U.S. 858 (1990); see also United States v. Santiago, 46 F.3d 885, 890 (9th Cir.), cert. denied, 515 U.S. 1162 (1995). In this case, the testimony was the victim's own explanation of his reporting delay, of his ultimate reason for calling the police, of his earlier hesitancy to speak to police either at Pizza Hut or at the hospital, of his reluctance to testify, and of his hesitation on the stand in identifying his assailants (R. 249: 18, 20, 23-26, 46). Moreover, by explaining why he did what he did and the timing of his actions, it also properly completed the story from the victim's point of view. See State v. Wright, 893 P.2d 1113, 1116-17 (Utah App. 1995) (finding it reasonable for the jury to believe the victim's testimony that she delayed reporting out of a fear that

D. The Absence of Additional Witnesses To Corroborate Defendant's Alibi Was A Matter Of Legitimate Trial Strategy

Defense counsel called Michelle Garcia as his sole witness to present an alibi: that defendant was with Garcia and several other people during the afternoon, evening and night of July 29, 1997, first at the courthouse, then at Garcia's house (R. 249: 93-101). Defendant now faults his trial counsel for failing to develop the alibi defense through use of additional witnesses, including himself. Br. of Aplt. at 23-24. In support, he points to affidavits of Amanda Garay, Rosie Amaro, and himself, filed in support of the new trial motion below, which noted the willingness of these individuals to testify at trial and the general content of their proposed testimony (R. 177-85). Id. at 23. However, defendant fails to establish that his counsel's decision not to call additional witnesses was anything but a legitimate trial strategy. State v. Tennyson, 850 P.2d 461, 468 (Utah App. 1993) (so long as this Court may articulate some plausible strategic explanation for counsel's behavior, counsel will be assumed to have acted competently).

That defense counsel considered calling additional witnesses is clear from the record. At the hearing on defendant's motion for a new trial, the prosecutor noted that defense counsel had told him that Rosie Amaro "just failed to show up for court", which is why defense counsel did not call her to testify (R. 255: 35). Add. B. Amanda Garay

defendant might retaliate against her or her children). Finally, the evidence countered defendant's claim that the victim had a motive to lie about defendant's involvement. As the prosecutor pointed out, if the victim had falsely or maliciously targeted defendant, he would have wanted to actively pursue charges (R. 250: 237-38).

was present at trial and defense counsel identified her in his opening statement as one of defendant's potential witnesses (R. 249: 175-76; 255: 35). Add. B. Counsel thereafter chose not to call her, and later told the prosecutor that it was because "he was concerned that she would contradict Michelle Garcia's testimony and by contradicting her testimony, would dilute the value of Ms. Garcia's testimony." (R. 255: 35). Add. B. Finally, defense counsel and defendant discussed the possibility of calling more witnesses in an unrecorded conversation at the close of defendant's case (R. 249: 124-25). Defense counsel then represented to the court that the defense would call no additional witnesses and rested his case, offering no basis for his considered decision (id.). Defendant offered no comment or objection and did nothing to suggest that he was acting solely on counsel's recommendation but did not agree with his counsel's statement (id.).

In ruling on defendant's new trial motion, the trial court explained:

I do recall during the course of the trial that [defense counsel] indicated there was a second witness [in addition to Ms. Garcia, who testified] that he would be calling and that once Ms. Garcia testified, he changed his mind.

Now, I'm not part of his thinking process on that. I can only assume he made that determination after listening to her [Ms. Garcia's] testimony and knowing what he knew about the status of the evidence at that point. He didn't fail to have other witnesses available, in fact, they were here and he made a determination, after hearing Ms. Garcia testify, that he would not call the others.

I don't think any of that rises to the level of ineffective assistance of counsel. I think he had a pre-conceived idea of how he wanted this case to go and as I started out by saying, in hindsight, we may disagree with that. It was his strategy and he had every opportunity to pursue that for [defendant's] benefit.

(R. 255: 47). Add. B. Defendant points to no record evidence which contradicts the memories of the prosecutor and the trial court that defense counsel had other witnesses prepared to testify as to defendant's alibi.

Further, counsel's strategic decision not to call more witnesses is supported by the discrepancies apparent on the face of those potential witnesses' affidavits. Comparison of the affidavits reveals differences in the proposed testimony of all the defense witnesses which the jury might have felt undermined the credibility of the alibi defense (copies of the affidavits are attached in Add. D). Specifically:

- Garcia names at least three people who were together at the courthouse after the Molina hearing who Garay does not mention (R. 177-78; 249: 96); Amaro specifically says that one of those three was not present (R. 184);

- Garcia testified that five people left the courthouse in Amber Lloyd's car (R. 249: 97); Garay claims that five people left the courthouse in Garay's car (R. 178);

- Garcia testified twice that they left the courthouse at 5:30 or 5:45 p.m. (R. 249: 97-98, 117-18); Amaro claims that they left at 6:00 p.m. (R. 184);

- Amaro does not identify Garcia as being with the group at the courthouse after the Molina hearing or with the group that left with defendant (R. 183-84).

These differences weaken the alibi defense by bringing into question the accuracy of the alibi witnesses' memories, with Amaro's affidavit seriously undermining Garcia's credibility by making no mention of her presence. These differences likely weighed heavily in defense counsel's decision not to call further alibi witnesses in an attempt to present the strongest alibi available.

Finally, as the prosecutor pointed out during the new trial hearing, the witnesses would have been open to cross-examination had they taken the stand (R. 255: 40). The questioning would have included inquiries into each witness' relationship with defendant and the Diamond Street gang to undermine their veracity and expose their biases (*id.*).⁷

The record suggests that counsel's decision not to call to the stand Anthony Wallace—the attacker defendant saw—was also a matter of trial strategy. During trial, defense counsel consulted with defendant before representing on the record that defendant has decided not to call Anthony Wallace to the stand, indicating that counsel was aware of the option and consciously chose not to exercise it (R. 249: 79). At the hearing on defendant's motion for a new trial, the prosecutor explained that had Wallace been called to testify, the prosecutor was prepared to question Wallace and/or call Detective Rich Montenez to the stand (R. 255: 35-36). Detective Montenez could testify that Anthony Wallace told him that defendant had asked Wallace to lie about defendant not being at the scene of the assault, and that Wallace was not anxious to perjure himself when he testified (R. 255: 36). It is reasonable to believe under these facts that defense counsel consciously chose to avoid the risks involved in having Wallace take the stand.

As for defendant's failure to testify, defendant has not demonstrated that his counsel's decision fell below an objective standard of reasonableness or was anything

⁷The prosecutor revealed to the trial court that he believed Garay was defendant's girlfriend and that some of the witnesses had long associations with Diamond Street, although he did not expound upon what proof he might have elicited (R. 255: 37, 40).

other than trial strategy. Defendant's brief claims only that he "was willing to testify at trial[.]" not that he was prevented from doing so (Br. of Appt. at 23), and nothing in the record suggests that he would have testified absent contrary advice from his counsel.

Defendant's affidavit additionally claims that his trial counsel did not "fairly discuss[]" the reasons behind his advice that defendant not testify (R. 180). Add. D. However, defense counsel consulted with defendant during trial immediately prior to announcing that defendant would not be taking the stand (R. 255: 36). Defendant gave no indication any time prior to the filing of the post-trial motion that he did not fully understand or concur with his counsel's decision. This is insufficient to establish that trial counsel performed deficiently. See State v. Newman, 928 P.2d 1040, 1045 (Utah App. 1996) (the mere fact that defendant did not testify does not establish ineffective assistance of counsel).

While the decision could have been made for any number of legitimate tactical reasons, one of the more obvious ones would have been to avoid a potentially harmful cross-examination of defendant. The record shows defendant to be a long-time gang member with a history of confrontations with this victim (R. 155-56 [psi]; 249: 8, 15, 83-87). Had he expressly denied his gang membership—as he has done in his pleadings—the State was prepared to attack that testimony (R. 151, 155-56; 255: 37). On this record, it

appears that defense counsel weighed the risks and made a reasoned determination that the risks of having defendant testify outweighed the possible benefits.⁸

E. The Cumulative Error Doctrine Does Not Apply

Defendant's argument includes an assertion that the cumulative effect of his trial counsel's deficient performance requires a new trial. Br. of Aplt. at 23-24. However, because defendant has failed to establish any errors of counsel that prejudiced his right to a fair trial, the cumulative error doctrine does not apply. Parsons v. Barnes, 871 P.2d 516, 516 (Utah) (refusing to apply the cumulative error analysis where defendant failed to establish any of his eight claims of ineffective assistance) (citing Bundy v. DeLand, 763

⁸Defendant also fails to establish prejudice from his failure to testify. Defendant's argument requires this Court to assess the probable impact of his likely testimony. See State v. Arguelles, 921 P.2d 439, 441 (Utah 1996). His affidavit claims that he would have testified "as to [his] whereabouts and the fact that [he] was not involved in the assault of Dino Hernandez." (R. 181). More specifically, he claims that he would have testified that he "was not present at the scene of the assault of Dino Hernandez" (R. 180). Add. D.

He does not, however, give sufficient detail of his proposed testimony to permit this Court to assess its probable impact on the trial. For example, without further detail, this Court cannot know whether his testimony would match the testimony of Michelle Garcia, Amanda Garay, Rosie Amaro, or none of them. Even assuming his testimony would have echoed Garcia's testimony, it would have been cumulative, and defendant offers no basis for believing that the jury would have found him to be a credible witness when it rejected Garcia's testimony. It would also have opened defendant up to cross-examination. Because defendant's claim of prejudice requires this Court to engage in speculation, the claim does not represent the required "demonstrative reality," and it necessarily fails. See Arguelles, 921 P.2d at 441; State v. Severance, 828 P.2d 1066, 1070 (Utah App. 1992).

P.2d 803, 806 (Utah 1988) (additional citations omitted), cert. denied, 513 U.S. 966 (1994).

POINT II

DEFENDANT'S CLAIM OF ERROR IN ADMISSION OF GANG-RELATED EVIDENCE FAILS WHERE THE RECORD SHOWS THAT TRIAL COUNSEL INVITED ANY ERROR BY HIS PRE-TRIAL AGREEMENT TO THE PARTIES' USE OF THE EVIDENCE

The first point in defendant's brief challenges the trial court's admission of all the evidence relating to gangs, including the victim's and defendant's membership in rival gangs and the relationship of gangs to the parties' actions.⁹ Br. of Aplt. at 10-19. However, defendant fails to recognize the dispositive fact that the evidence was admitted pursuant to the agreement of both parties below.

The "invited error" doctrine prevents a party from setting up or taking advantage of an error at trial and then complaining of that error on appeal. State v. Stevenson, 884 P.2d 1287, 1292 (Utah App. 1994), cert. denied, 892 P.2d 13 (Utah 1995); State v. Perdue, 813 P.2d 1201, 1205 (Utah App. 1991). In this case, defendant's trial counsel sought to admit gang-related evidence pertaining to the victim in order to challenge the victim's veracity, and agreed to admission of the gang evidence related to defendant in order to further his legitimate strategy (see Point I, supra for a discussion of the

⁹Defendant's claim appears to be based on rule 403, Utah Rules of Evidence, inasmuch as that is the sole rule recited by defendant both below and on appeal (R. 149-54). Br. of Aplt. at 14. However, the exact basis of the claim is unimportant where the claim is disposed of under the "invited error" doctrine.

legitimacy of the strategy). Counsel discussed the agreement with the court prior to trial, made no objection to gang-related voir dire questions, raised no objection to gang-related evidence during trial, and actively used it in his examination and cross-examination of witnesses and in his closing argument. Through his own actions, defendant's trial counsel invited whatever error the trial court might otherwise have made in admitting the evidence. Accordingly, the invited error doctrine precludes appellate review of this issue. Perdue, 813 P.2d at 1205.

POINT III

THE VERDICT WAS SUPPORTED BY AMPLE EVIDENCE PLACING DEFENDANT AT THE SCENE OF THE ASSAULT AND ESTABLISHING HIS CULPABILITY AS AN AIDER OR ABETTOR, IF NOT AS A PRINCIPAL, IN THE OFFENSE

In his second point on appeal, defendant claims that he was found to be both present at and guilty of the assault based solely on his association with the Diamond Street gang. Br. of Aplt. at 18. He challenges the sufficiency of the evidence of his criminal responsibility, arguing that without the allegedly inadmissible gang-related evidence, the remaining evidence established only his "possible" presence at the scene of the assault. Id. at 19-20. He claims that the only remaining evidence is third- and fourth-party hearsay evidence concerning the victim's pager lost at the scene of the assault, and that this evidence is insufficient to establish defendant's presence. Id. at 19. Defendant claims that even if the pager evidence shows that he was present during the assault, it

does not establish that he participated in or aided and abetted the assault.¹⁰ Id. at 19-20.

However, the evidence establishes more than defendant's mere presence at the scene and is sufficient to support the jury's verdict.

On appeal, this issue is reviewed with great deference to the jury verdict. State v. Jiron, 882 P.2d 685, 691 (Utah App. 1994). The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the jury's verdict. State v. Olsen, 869 P.2d 1004, 1012 (Utah App. 1994). "'Where there is any evidence, including reasonable inferences that can be drawn from it, from which findings of all the elements of the crime can be made beyond a reasonable doubt, our inquiry is complete and we will sustain the verdict.'" Jiron, 882 P.2d at 691 (quoting State v. Goddard, 871 P.2d 540, 543 (Utah 1994)) (additional quotation omitted); see also State v. Hall, 946 P.2d 712, 724 (Utah App. 1997). Reversal is not warranted unless the evidence is "so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." Jiron, 882 P.2d at 691.

Additionally, defendant bears the burden of marshaling the evidence supporting the jury's verdict and demonstrating how the evidence, and the reasonable inferences therefrom, are insufficient to support the verdict. State v. Strain, 885 P.2d 810, 819 (Utah

¹⁰Defendant does not contest that the victim was assaulted with a hard object, and that the object did serious damage to the victim's head, requiring forty stitches. Further, trial counsel conceded that serious bodily injury had occurred (R. 249: 174-75).

App. 1994); State v. Pilling, 875 P.2d 604, 607-08 (Utah App. 1994). As a threshold matter, defendant has entirely failed to meet this burden. He notes that the non-gang-related evidence consisted of testimony suggesting that defendant had the victim's pager and the victim's voice identification of defendant which "indicated that the victim heard Mr. Kandt talking and nothing more." Br. of Appt. at 19-20. These assertions are wholly insufficient to permit review of his claim on appeal. See State v. Gallegos, 851 P.2d 1185, 1189-90 (Utah App. 1993) ("Failure to marshal the evidence waives an appellant's right to have his claim of insufficiency considered on appeal."); State v. Peterson, 841 P.2d 21, 25 (Utah App. 1992) (no review of a claim of insufficient evidence for which defendant made no attempt to marshal the evidence). Defendant's failure becomes clear upon a review of the properly marshaled evidence.

There was no direct evidence that defendant himself struck a blow or wielded the object which inflicted the serious bodily injury to the back of the victim's head. However, defendant could still be found guilty of the aggravated assault under an aiding and abetting theory. The jury instruction given in this case, which defendant does not challenge on appeal, stated:

Every person, acting with the mental state required for the commission of the offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

(R. 115). This instruction directly quotes Utah law that an agent, aider or abetter is as culpable as a principal in the commission of a crime. Utah Code Ann. § 76-2-202 (1995) (attached in Add. A); State v. McCardell, 652 P.2d 942, 945 (Utah 1982).

As with his other claims, defendant fails to acknowledge that the gang-related evidence was admitted pursuant to the parties' agreement. See Points I and II, supra. That evidence helped to support the victim's positive identification of defendant's voice, placing defendant at the scene, and provided a likely motive for the assault.¹¹ Defendant claims that evidence of motive was irrelevant. Br. of Aplt. at 18. However, his trial counsel found it important enough to develop and argue (R. 249: 31-43; 250: 226, 231, 233). Further, motive is often relevant to establishing a crime. State v. Pearson, 943 P.2d 1347, 1351 (Utah 1997) (approving admission of evidence which was relevant and important to motive and intent); State v. Johnson, 774 P.2d 1141, 1143-44 (Utah 1989) (approving of admission of evidence that was relevant to establishing defendant's motive to commit murder); Utah R. Evid. 404(b) (admission of evidence of "other crimes, wrongs or acts" may be relevant to show "motive. . .").

Even assuming, arguendo, that the gang-related testimony should have been omitted, defendant fails to acknowledge the evidence of the multiple prior confrontations between himself and the victim, which explained, in part, why the victim was positive

¹¹The victim repeatedly reported that he was "jumped" and beaten by three people (R. 249: 14-18, 25, 45-46, 70). There was a lot of noise and confusion, a lot of yelling and screaming, and he heard defendant's voice (R. 249: 17-18, 29-30).

about his voice identification and provided a motive for the assault. This evidence can be explained without any mention of gang involvement, making it a valid consideration for the jury in any event.

At one point in the trial, the victim implied that defendant retrieved the victim's pager at the assault scene and later called various friends of the victim bragging about who he was and the assault on the victim (R. 249: 19, 23). Defendant minimizes the importance of this testimony, claiming that it was "third and fourth party hearsay" supporting only the claim that he was present at the assault. Br. of Aplt. at 19. He does not, however, challenge the admission of the testimony. This information not only suggests defendant's presence at the assault, but his willingness to be recognized as being part of the event, suggesting that he possessed the same intent as the others who were present.

There was additional evidence placing defendant's car at the scene of the assault and suggesting that defendant drove the trio to the Pizza Hut. Detective Howell testified that defendant owned a gray-silver or silver-gray car around the time of the assault (R. 249: 83-85), and Melissa Koontz testified that near the time of the assault, she noticed a blue-gray car drive to the Pizza Hut and three men get out, two of whom were blacks (Dino positively identified his other attackers as two black members of Diamond Street; defendant is white) (R. 249: 62-63, 66-67, 89). As the trio did nothing except attack Dino

and leave, the jury could reasonably believe that their only purpose for being at the Pizza Hut was to attack Dino.

The jury credited the evidence establishing that defendant was present at the assault. Nothing in the evidence provides any basis for the jurors to reasonably believe that defendant did anything other than encourage, if not participate in, the assaultive acts of the others. Nothing suggests that one of the three was hesitant in approaching Dino, tried to stop the others' attack, tried to warn Dino or help him, or in any manner attempted to terminate his participation in the event. Even defendant failed to suggest such an interpretation of the evidence, instead urging the jury to believe that he was not even present. Even if the jury concluded that defendant did nothing more than drive the car, stand "lookout," watch as the others assaulted Dino, took Dino's pager, then bragged about the assault to others, the jury could reasonably find defendant guilty of aiding and abetting. Utah Code Ann. § 76-2-202 (1995) (establishing guilt if a defendant encourages or intentionally aides another's criminal conduct with the requisite intent); State v. Murphy, 26 Utah 2d 330, 489 P.2d 430, 432 (1971) (defendant was a "principal" where he drove a codefendant to a jewelry store, waited in the car while the codefendant robbed the store and killed the store owner, then drove the codefendant away).

The evidence established that all three individuals intentionally aided and encouraged, if not actively participated in, the assault, whether it be by using their feet and fists or by yelling their encouragement to the others. When properly marshaled and

viewed in a light most favorable to the jury's verdict, there was sufficient evidence from which the jury could convict defendant.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED this 4th day of March, 1999.

JAN GRAHAM
Attorney General

A handwritten signature in cursive script, reading "Kris C. Leonard". The signature is written in black ink and is positioned above the printed name and title of the signatory.

KRIS C. LEONARD
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed by first class mail, postage prepaid, to Randall Gaither, attorney for appellant, 321 South 600 East, Salt Lake City, Utah 84102, this 4th day of March, 1999.

KC Leonard

Addenda

Addendum A

76-2-202. Criminal responsibility for direct commission of offense or for conduct of another.

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

History: C. 1953, 76-2-202, enacted by L. Wildlife Resources Code, § 23-20-23.
1973, ch. 196, § 76-2-202. Obstructing justice, § 76-8-306.

Cross-References. — Aiding violation of

76-3-203.1. Offenses committed by three or more persons — Enhanced penalties.

- (1) (a) A person who commits any offense listed in Subsection (4) in concert with two or more persons is subject to an enhanced penalty for the offense as provided below.
- (b) "In concert with two or more persons" as used in this section means the defendant and two or more other persons would be criminally liable for the offense as parties under Section 76-2-202.
- (2) (a) The prosecuting attorney, or grand jury if an indictment is returned, shall cause to be subscribed upon the complaint in misdemeanor cases or the information or indictment in felony cases notice that the defendant is subject to the enhanced penalties provided under this section. The notice shall be in a clause separate from and in addition to the substantive offense charged.
- (b) If the subscription is not included initially, the court may subsequently allow the prosecutor to amend the charging document to include the subscription if the court finds the charging documents, including any statement of probable cause, provide notice to the defendant of the allegation he committed the offense in concert with two or more persons, or if the court finds the defendant has not otherwise been substantially prejudiced by the omission.
- (3) The enhanced penalties for offenses committed under this section are:
- (a) If the offense is a class B misdemeanor, the convicted person shall serve a minimum term of 90 consecutive days in a jail or other secure correctional facility.
- (b) If the offense is a class A misdemeanor, the convicted person shall serve a minimum term of 180 consecutive days in a jail or other secure correctional facility.
- (c) If the offense is a third degree felony, the convicted person shall be sentenced to an enhanced minimum term of three years in prison.
- (d) If the offense is a second degree felony, the convicted person shall be sentenced to an enhanced minimum term of six years in prison.
- (e) If the offense is a first degree felony, the convicted person shall be sentenced to an enhanced minimum term of nine years in prison.
- (f) If the offense is a capital offense for which a life sentence is imposed, the convicted person shall be sentenced to a minimum term of 20 years in prison.
- (4) Offenses referred to in Subsection (1) are:
- (a) any criminal violation of Title 58, Chapter 37, 37a, 37b, or 37c, regarding drug-related offenses;
- (b) assault and related offenses under Title 76, Chapter 5, Part 1;
- (c) any criminal homicide offense under Title 76, Chapter 5, Part 2;
- (d) kidnapping and related offenses under Title 76, Chapter 5, Part 3;
- (e) any felony sexual offense under Title 76, Chapter 5, Part 4;
- (f) sexual exploitation of a minor as defined in Section 76-5a-3;
- (g) any property destruction offense under Title 76, Chapter 6, Part 1;
- (h) burglary, criminal trespass, and related offenses under Title 76, Chapter 6, Part 2;
- (i) robbery and aggravated robbery under Title 76, Chapter 6, Part 3;
- (j) theft and related offenses under Title 76, Chapter 6, Part 4;

(k) any fraud offense under Title 76, Chapter 6, Part 5, except Sections 76-6-503, 76-6-504, 76-6-505, 76-6-507, 76-6-508, 76-6-509, 76-6-510, 76-6-511, 76-6-512, 76-6-513, 76-6-514, 76-6-516, 76-6-517, 76-6-518, and 76-6-520;

(l) any offense of obstructing government operations under Part 3, Title 76, Chapter 8, except Sections 76-8-302, 76-8-303, 76-8-304, 76-8-307, 76-8-308, and 76-8-312;

(m) tampering with a witness or other violation of Section 76-8-508;

(n) extortion or bribery to dismiss criminal proceeding as defined in Section 76-8-509;

(o) any explosives offense under Title 76, Chapter 10, Part 3;

(p) any weapons offense under Title 76, Chapter 10, Part 5;

(q) pornographic and harmful materials and performances offenses under Title 76, Chapter 10, Part 12;

(r) prostitution and related offenses under Title 76, Chapter 10, Part 13;

(s) any violation of Title 76, Chapter 10, Part 15, Bus Passenger Safety Act;

(t) any violation of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;

(u) communications fraud as defined in Section 76-10-1801;

(v) any violation of Title 76, Chapter 10, Part 19, Money Laundering and Currency Transaction Reporting Act; and

(w) burglary of a research facility as defined in Section 76-10-2002.

(5) (a) This section does not create any separate offense but provides an enhanced penalty for the primary offense.

(b) It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

(c) The sentencing judge rather than the jury shall decide whether to impose the enhanced penalty under this section. The imposition of the penalty is contingent upon a finding by the sentencing judge that this section is applicable. In conjunction with sentencing the court shall enter written findings of fact concerning the applicability of this section.

(6) The court may suspend the imposition or execution of the sentence required under this section if the court:

(a) finds that the interests of justice would be best served; and

(b) states the specific circumstances justifying the disposition on the record and in writing.

History: C. 1953, 76-3-203.1, enacted by L. 1990, ch. 207, § 1; 1994, ch. 12, § 108.

Amendment Notes. — The 1994 amend-

ment, effective May 2, 1994, corrected the reference in Subsection (1)(a).

NOTES TO DECISIONS

ANALYSIS

Findings of fact.
Mental state of parties.

Findings of fact.

Even though the trial court did not make written findings of fact concerning applicability

of the enhanced penalty as it was obliged to do under this section, failure of defendant to object to the enhancement precluded consideration of the issue on appeal. *State v. Labrum*, 246 Utah Adv. Rep. 11 (Utah Ct. App. 1994).

Mental state of parties.

For this section to apply, a defendant must

UTAH CODE ANNOTATED

1998 Supplement

REPLACEMENT VOLUME 8B

1995 EDITION

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Edited by
The Publisher's Editorial Staff

LEXIS
Law Publishing
Charlottesville, Virginia

76-5-103. Aggravated assault.

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

- (a) intentionally causes serious bodily injury to another; or
- (b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

History: C. 1953, 76-5-103, enacted by L. 1973, ch. 196, § 76-5-103; 1974, ch. 32, § 10; 1989, ch. 170, § 2; 1995, ch. 291, § 5.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, added "under circumstances not amounting to a violation of

Subsection (1)(a)" to the beginning of Subsection (1)(b); substituted "A violation of Subsection (1)(a)" for "Aggravated assault" and "second degree" for "third degree" in Subsection (2); and added Subsection (3).

Addendum B

07-90-08-

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IN THE THIRD DISTRICT COURT - SALT LAKE CITY
SALT LAKE COUNTY, STATE OF UTAH

THIRD DISTRICT COURT
Third Judicial District

-000-

JAN 2 1999

STATE OF UTAH,
Plaintiff,
vs.
DENNY DUKE KANDT,
Defendant.

SALT LAKE COUNTY
By Susan Carlson Deputy Clerk
Case No. 971901021
DEFENDANT'S MOTION FOR
NEW TRIAL
(Videotape Proceedings)

-000-

BE IT REMEMBERED that on the 16th day of March, 1998, commencing at the hour of 9:36 a.m., the above-entitled matter came on for hearing before the HONORABLE SANDRA PEULER, sitting as Judge in the above-named Court for the purpose of this cause, and that the following videotape proceedings were had.

-000-

A P P E A R A N C E S

For the State: CY H. CASTLE
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District Attorney
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For the Defendant: RANDALL T. GAITHER
Attorney at Law
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FILED
Utah Court of Appeals
JAN 29 1999

ORIGINAL

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Julia D'Amore
Clerk of the Court

Q81230-10



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1 future threats and not to go into that.

2 And then the witnesses, including Mr. Kandt,
3 could come forward and testify and the very weak evidence
4 offered by the State could--could be held under scrutiny
5 of the due process of a fair trial, which didn't occur at
6 the last proceedings.

7 And we would respectfully ask the Court to
8 grant the motion for a new trial.

9 THE COURT: Thank you.

10 Mr. Castle, would you like to respond?

11 MR. CASTLE: I would, your Honor.

12 Your Honor, from the State's perspective, the
13 standard in which you need to judge whether a new trial
14 should be awarded is based on the standards articulated
15 in Strickland vs. Washington. I know Mr. Gaither
16 referred to that case, but did not refer to the standards
17 the Court articulated in terms of whether a new trial
18 should be awarded in this particular case.

19 And before I talk about those standards, your
20 Honor, I know that Mr. Gaither in his argument has
21 outlined his argument in--in terms of there was evidence
22 that was offered that should have been objected to that
23 prejudiced my client. And then he talks about how
24 counsel was ineffective and, your Honor, from my
25 perspective, really, they're one and the same.

1 The question to be asked is whether or not Mr.
2 Angerhofer was ineffective in his assistance of Mr. Kandt
3 during this trial.

4 Going back to the test articulated in
5 Strickland vs. Washington, there are two prongs; one
6 prong being, did counsel's performance fall below an
7 objective standard of reasonableness and whether
8 counsel's performance prejudiced the defendant. And Mr.
9 Kandt actually is required to satisfy both of those
10 standards and I would submit at this point, they--they
11 have not in any way satisfied those standards,
12 particularly, number one, they can't even get past the
13 first hurdle.

14 And as indicated in Strickland vs. Washington,
15 a strong presumption that defense--there is a strong
16 presumption against defense counsel's conduct falling
17 outside of the wide range of reasonable professional
18 assistance. This court will not second guess trial
19 counsel's legitimate, strategic choices, however flawed
20 those choices might appear in retrospect.

21 And in stating that standard, your Honor, I
22 need to go back to the trial and some conversations we
23 had in your chambers, conversations we had with the jury
24 was voir dired.

25 Your Honor, you'll recall that prior to the

1 trial starting, me and Mr. Angerhofer met with you in
2 your chambers. The purpose of that meeting was to
3 discuss this very issue about gang membership and what to
4 do about that.

5 And the reason for that is because it was clear
6 and I never contested the issue, that Mr. Dino Hernandez
7 was a gang member. He was a gang member of Salt Lake
8 Posse and he was a rival gang member of Diamond Street.

9 The reason that was important to Mr. Angerhofer
10 is because, for him, that was a source of impeachment
11 which he could pursue against Mr. Hernandez. He's a
12 rival gang member, he's biased, he has a motive for
13 dragging Mr. Kandt into this legal process. And Mr.
14 Angerhofer recognized that.

15 But what's good for the goose is good for the
16 gander, your Honor, and that's really why we were talking
17 about gang membership. If Mr. Angerhofer was going to
18 cross-examine Mr. Hernandez on his gang membership and
19 why he might be less than truthful, then it was only fair
20 that the State have the opportunity to explore the fact
21 that Mr. Kandt was--was a member of Diamond Street, which
22 is a rival gang.

23 And my opening statement and maybe you'll
24 recall that, would never have been given the way I gave
25 it had we not had that agreement. And my opening

1 statement, the fact there were no objections, represents
2 the agreement we had, I had with Mr. Angerhofer, the
3 agreement we talked about with the Court in your
4 chambers. The questions that I asked Mr. Hernandez were
5 questions asked based on that agreement, and that
6 agreement is evidenced by the fact that I asked those
7 questions and those questions were not objected to.

8 Now, one thing I did in the trial in terms of a
9 trial tactic is, I brought out right from the beginning
10 Mr. Hernandez' gang affiliation. The reason I did that
11 was simply to get it out of the gate before Mr.
12 Angerhofer did. That was a trial tactic on my part. And
13 in terms of the gang information that was provided, but
14 also as part of Mr. Angerhofer's trial strategy.

15 There's absolutely been no evidence, no
16 argument made that somehow, his trial strategy falls
17 below that reasonable professional assistance standard
18 articulated in Strickland vs. Washington. This was part
19 of his trial strategy.

20 I know in Mr. Gaither's brief, he indicated
21 that, particularly in his reply brief, that the reason
22 Mr. Angerhofer did what he did on cross-examination,
23 meaning bringing up the gang association, bringing up the
24 fact that Mr. Hernandez had been with a fellow gang
25 member when they threw a lug nut through Mr. Kandt's

1 window is because I started it. Well, that's not the
2 truth at all. It was something that was agreed on in the
3 beginning, it was part of Mr. Angerhofer's trial strategy
4 that for--the way for him to impeach Mr. Hernandez, to
5 question his motive, to question his bias, was to bring
6 out the fact he was a gang member and was a rival gang
7 member.

8 Your Honor, in terms of some of these other
9 questions that I asked Mr. Hernandez about his house
10 being shot up, it had to do with his reluctance to be a
11 witness in Court. The fact that he was subpoenaed and
12 required to be here, yes, he didn't have a choice but we
13 know a witness can take the stand and say, I'm just not
14 talking and the Court can hold that person in contempt
15 for a 30-day period and that's the only penalty imposed
16 upon that person.

17 What I was attempting to show the jury is that
18 there are legitimate reasons why Mr. Hernandez didn't
19 want to testify. It just didn't have to do with the fact
20 that he was hand served, that was the beginning. The
21 beginning of the fact that in his own mind, he faced some
22 real dangers by coming to Court and testifying. Even
23 though he's a rival gang member, he is violating a code
24 of conduct among all gang members about coming to court
25 and about testifying.

1 And the reason the question was asked about his
2 home is because he had made the statement to the police,
3 I'm telling you this story about what happened, I just
4 want you to watch my house but I don't want to do
5 anything about this, I don't want to pursue it. And your
6 Honor, the person who pursued this case was me. I was
7 the one that decided not to give Mr. Hernandez a choice
8 and I think I was entitled to ask him those questions
9 that demonstrated his reluctance, why he didn't want to
10 come.

11 I mean we act like somehow this event occurred
12 in some sterile environment and it didn't. It occurred
13 because Mr. Hernandez and his friend, whether it was Mr.
14 Hernandez or his friend, threw that lug nut through Mr.
15 Kandt's window and Mr. Kandt was back to retaliate. That
16 is part of the gang culture, that's part of the gang
17 conduct.

18 And under Rule 404(b), I'm entitled to offer
19 evidence about motive. And what I was also trying to
20 present in this case and that's why it was relevant is
21 the motive that Mr. Kandt had in performing this assault
22 on Mr. Hernandez. And that's why that testimony was
23 offered, because Mr. Kandt, from the State's perspective
24 had a motive and that was one of retaliation.

25 Your Honor, you'll recall we spent a lot of

1 time with the jury prior to empaneling one, asking
2 questions about gang affiliation, gang membership,
3 whether or not that would affect their ability to make a
4 decision based on just the facts of the case and those
5 that admitted that they could not, we eliminated those
6 from the jury pool.

7 And I bring that up again because, your Honor,
8 that's further evidence that we had an agreement, me and
9 Mr. Angerhofer, with the Court, that we would be talking
10 about gang membership. That it was part of my strategy
11 in the case, but it was also part of Mr. Angerhofer's
12 strategy.

13 Now, I know Mr. Gaither, in looking at the
14 transcript that he provided to me, does not have the
15 information about the voir dire of the jury and it's
16 evident that he hasn't talked to Mr. Angerhofer either,
17 because had he had the portion of the voir dire
18 transcribed, he would have seen that we spent quite a bit
19 of time and you'll remember this, in talking with the
20 jury about gang membership; in fact, during the voir dire
21 of the jury, we had a fight outside with rival gang
22 members. And there was inquiry into that, whether that
23 was going to affect the ability of the jurors to be
24 objective, be unbiased and be fair in terms of hearing
25 the--the testimony.

1 I know that we were concerned about whether
2 that had affected them and we--we discovered that no, it
3 had not, that they were not aware of that fight that had
4 occurred outside.

5 So, your Honor, going back to that first
6 standard of Strickland, I would submit that what Mr.
7 Angerhofer did was part of his trial strategy. That's
8 why gang membership issues came up because that was also
9 part of his strategy, that's why he did not object.

10 So we're really not talking about whether Mr.
11 Angerhofer should have objected, we're not really talking
12 about whether these were errors that were committed that
13 you need to look at as a whole and decide whether Mr.
14 Kandt was given a fair trial, because that was part of
15 Mr. Angerhofer's strategy.

16 That's the question. That's the standard.
17 Does it fall below the objective standard of reasonable
18 assistance? That's the standard we're looking at. And I
19 would submit, your Honor, that it--it doesn't, that Mr.
20 Kandt has not, in any way, shown that what Mr. Angerhofer
21 did falls below that standard.

22 I mean it's easy now to look back, after Mr.
23 Kandt was convicted and say, oh, wait a minute. My
24 defense counsel didn't do his job; but as the courts have
25 said, as said in Strickland vs. Washington, State vs.

1 Tenneson, the Court can't second guess legitimate trial
2 tactics, even if--even if they look flawed at this point
3 in the proceeding.

4 Your Honor, with respect to the additional
5 witnesses that Mr. Gaither indicates that Mr. Kandt would
6 have called, now, in retrospect; Amanda (inaudible), your
7 Honor, it should be noted that she was here for the trial
8 and present and identified as one of Mr. Kandt's
9 witnesses during the trial. But her affidavit,
10 interestingly enough, contradicts Ms. Garcia's testimony
11 about who left in which car and where they went.

12 I should also mention that Mr. Angerhofer
13 represented to me the reason he was not calling her is
14 because he was concerned that she would contradict
15 Michelle Garcia's testimony and by contradicting her
16 testimony, would dilute the value of Ms. Garcia's
17 testimony.

18 As to Rosie Armaro, your Honor, Mr. Angerhofer
19 represented to me that she just failed to show up for
20 court. That's why he didn't call her.

21 As to Anthony Wallace, there was reference in
22 the memorandum as to that. You'll recall that Mr.
23 Angerhofer, after consulting with Mr. Kandt, represented
24 on the record that they had decided not to call him. Had
25 Mr. Wallace been called, I would have called Detective

1 Rich Montenez, your Honor. Mr. Montenez informed me
2 during the trial that Mr. Wallace had indicated to him
3 that Mr. Kandt had asked him to lie about him being at
4 the Pizza Hut when this assault occurred and that Mr.
5 Wallace was relieved he didn't have to be called because
6 he would have perjured himself.

7 As to Mr. Kandt, there was also discussion and
8 it can be seen on the videotape that Mr. Angerhofer had
9 with Mr. Kandt and that a representation made to the
10 court by Mr. Angerhofer that Mr. Kandt wouldn't testify.

11 And you know, for Mr. Kandt, it's not as easy
12 as he thinks it is. His testimony wouldn't be restricted
13 just to that affidavit he's filed with this case, I'd
14 have the opportunity to cross-examine, I'd have the
15 opportunity to cross-examination on each little motive
16 and that's related to his gang membership. I would have
17 the opportunity to cross-examine him on bias, that's
18 related to his gang membership. I'd be able to do all
19 that because I would be able to cross-examine on his
20 veracity.

21 And Mr. Kandt can't have his cake and eat it
22 too. He can't get up there and think he's not going to
23 be asked those questions, when they're very relevant to
24 his motive, to his bias and what he has become here in
25 this valley, he is a gang member. And had Mr. Kandt been

1 called, as well as these other witnesses, your Honor, my
2 strategy would have been different in terms of how I
3 would have handled them.

4 In fact, what would have happened, Mr. Howe's
5 testimony, Mr. Fritz' testimony would have been even more
6 relevant had Mr. Kandt taken the testimony (sic) and
7 denied his membership and somehow tried to tell the jury
8 the reason he has Diamond Street tattooed all over his
9 body is because his first name is Denny. That's a bunch
10 of baloney. He has that, tattoos on his body because
11 he's a member of Diamond Street; in fact, the information
12 the State has is that he is one of the leaders of Diamond
13 Street.

14 Your Honor, this case was based on the
15 testimony of Dino Hernandez, but it was based on the
16 testimony of an uncooperative witness, the State will
17 admit that, and the State will admit that Mr. Hernandez
18 gave several different stories.

19 He gave one story to the police. He gave one
20 story at the preliminary hearing. He gave another
21 slightly different story at trial and that's why
22 Detective Fritz was called, your Honor, to testify as to
23 what Dino was telling him shortly after the incident
24 occurred. When's his testimony going to be most reliable
25 or in terms of remembering what happened, it'll be most

1 reliable shortly after the event occurred.

2 And your Honor, under Rule 613 of the Rules of
3 Evidence, the State is allowed to bring other witnesses
4 in where one witness has made a statement to that witness
5 and then on the stand either doesn't remember it or
6 denies making that statement, and the reason Detective
7 Fritz was called to the stand was to testify as to what
8 Dino had said before. The State's allowed to impeach
9 its own witness and through the use of Detective Fritz,
10 what the State was doing was simply corroborating what
11 Mr. Hernandez had said before.

12 And in terms of identification, voice as well
13 as a face, is good enough. That's competent evidence.
14 To identify someone by the sound of their voice or by the
15 fact that he saw him.

16 And I should indicate, your Honor, that Mr.
17 Hernandez indicated at the preliminary hearing, that it
18 was Denny Kandt, there was no question in his mind at
19 that point, that's what he told the police officers and
20 then when he got to trial, he did what he did with Mr.
21 Lopez during the preliminary hearing and that is, you
22 know, I just remember a voice, I don't remember a face.

23 Your Honor, Mr. Hernandez was not a cooperative
24 witness. He was a witness up there trying to minimize
25 what might happen to him for testifying and the case that

1 I put forth to the jury was an effort to corroborate the
2 fact that this event occurred, that Mr. Kandt was
3 involved with Mr. Lopez and Mr. Wallace, that they were
4 guilty of an aggravated assault because they used some
5 dangerous weapon. It's true, we didn't ever figure out
6 really what it was, whether it was a rock or something
7 else; but the whole reason I called in the Pizza Hut
8 fellow was to indicate as corroborative evidence of the
9 nature of the injury that Mr. Hernandez suffered.

10 Your Honor, we also had a young woman testify
11 about seeing three people, two of which were black. Mr.
12 Lopez and Mr. Wallace, as established during the trial,
13 are both black. There was also discussions about a car,
14 a car similar in color as well as similar in size to Mr.
15 Kandt. That was testified to by Detective Howe as well
16 as this other civilian witness.

17 Your Honor, as to this area of argument Mr.
18 Gaither has indicated on the issue of being a snitch,
19 he's guessing as to why you asked me to move on. I don't
20 know why you asked me to move on. It's not because--
21 based on what you said later, it was because I could not
22 ask that question and you simply instructed me to ask
23 that at a different time. I don't think that was that
24 you were indicating somehow that was improper, but simply
25 directing me to do it later on if I so chose to do.

1 Your Honor, with respect, going back to the
2 witnesses that Mr. Kandt wished he would have called,
3 your Honor, all of those witnesses could have been cross-
4 examined based on bias, motive to lie, motive to be here
5 for Mr. Kandt. All of them except for Rosie are
6 associated with Mr. Kandt. They're not just his friends,
7 they are associates of his gang. That presents a unique
8 issue, a unique issue for cross-examination because it
9 goes back to what I said a couple times, I said a couple
10 of times during the trial as well as today; there is a
11 code of conduct among gang members that's unique to that
12 association and the State at least would have petitioned
13 the Court for the opportunity to cross-examine them on
14 their bias, that being their association with Diamond
15 Street gang members including Mr. Kandt and my
16 understanding is that Amanda Gurule was and still might
17 be Mr. Kandt's girlfriend.

18 So to say that somehow these witnesses would
19 have changed the outcome is simply speculative based on
20 the fact that their affidavits are inconsistent with Mr.-
21 -with Ms. Garcia's testimony and the fact that Anthony
22 Wallace had admitted to Detective Rich Montenez what the
23 plan was in terms of his testimony.

24 Your Honor, I'd ask the Court to deny the
25 motion. Mr. Kandt has not satisfied either of the two

1 standards required under Strickland vs. Washington and
2 the Utah case law concerning trial strategy. That's what
3 this simply was, trial strategy on Mr. Angerhofer's part.

4 He took advantage of the fact that Mr.
5 Hernandez was a gang member both on cross-examination as
6 well as in his closing argument, that this was something
7 motivated simply because of the rivalry between the two
8 groups.

9 And would ask that you deny the motion.

10 THE COURT: Thank you.

11 Mr. Gaither, your rebuttal?

12 MR. GAITHER: Thank you.

13 I would submit that the statements made by the
14 prosecutor concerning Mr. Kandt and that he has become
15 and is known as a gang member and that he is believed by
16 some to be a leader of a certain gang essentially again
17 indicates the approach taken by the prosecution in this
18 case and I would submit the--the real issues were lost by
19 this gang evidence.

20 The fact that Mr. Kandt's vehicle, he would
21 have testified that the color of his vehicle wasn't the
22 color that was observed by these persons; the fact that
23 he was just not there, he was not present and did not--
24 couldn't have participated in--in this assault of Dino
25 Hernandez.

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IN THE THIRD DISTRICT COURT - SALT LAKE CITY
SALT LAKE COUNTY, STATE OF UTAH

Third Judicial District

-000-

JAN 2 1999

STATE OF UTAH,)
)
Plaintiff,)
)
vs.)
)
DENNY DUKE KANDT,)
)
Defendant.)

SALT LAKE COUNTY
By Sunny Carlson Deputy Clerk
Case No. 971901021
DEFENDANT'S MOTION FOR
NEW TRIAL
(Videotape Proceedings)

-000-

BE IT REMEMBERED that on the 16th day of March, 1998, commencing at the hour of 9:36 a.m., the above-entitled matter came on for hearing before the HONORABLE SANDRA PEULER, sitting as Judge in the above-named Court for the purpose of this cause, and that the following videotape proceedings were had.

-000-

A P P E A R A N C E S

For the State: CY H. CASTLE
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FILED
Utah Court of Appeals
JAN 29 1999

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Julia D'Alencastro
Clerk of the Court

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1 evidence that the State has, requires that this matter
2 be--that my client be awarded a new trial and we would
3 request that, your Honor.

4 THE COURT: Thank you.

5 MR. GAITHER: Thank you.

6 THE COURT: Counsel, I had an
7 opportunity to review your memos before the hearing today
8 and I appreciate receiving those and having an
9 opportunity to do so.

10 Based upon my review of the memoranda and also
11 your argument, I'm going to deny the motion for a new
12 trial.

13 While in hindsight the things that former
14 counsel did might have appeared to have been mistaken
15 strategy, I think it very clearly was part of his trial
16 strategy; in other words, that the victim was a gang
17 member who was assaulted by rival gang members but we
18 weren't there.

19 And in fact, that was said in conversation
20 between counsel and I. I don't recall at what stage of
21 the proceedings it was, it may have been when we were
22 discussing witnesses or it may have been during voir dire
23 process or at some other point, but that was raised
24 because counsel both made it clear to me that part of the
25 defendant's trial strategy was to allow that evidence in

1 because their defense was he wasn't there, so it didn't
2 really matter.

3 It also appears to me that had that not been
4 part of the trial strategy, much of that clearly went to
5 motive, to explain an otherwise unexplainable assault.

6 In terms of the witnesses who did not testify,
7 there was one witnesses--one witness, I believe, Ms.
8 Garcia, who did testify for Mr. Kandt. I don't recall
9 specifically her testimony. I do recall during the
10 course of the trial that Mr. Angerhofer indicated there
11 was a second witness that he would be calling and that
12 once Ms. Garcia testified, he changed his mind.

13 Now, I'm not part of his thinking process on
14 that. I can only assume he made that determination after
15 listening to her testimony and knowing what he knew about
16 the status of the evidence at that point. He didn't fail
17 to have other witnesses available, in fact, they were
18 here and he made a determination, after hearing Ms.
19 Garcia testify, that he would not call the others.

20 I don't think any of that rises to the level of
21 ineffective assistance of counsel. I think he had a pre-
22 conceived idea of how he wanted this case to go and as I
23 started out by saying, in hindsight, we may disagree with
24 that. It was his strategy and he had every opportunity
25 to pursue that for Mr. Kandt's benefit.

1 And so based upon all of that, the motion for a
2 new trial is denied.

3 I'm going to ask Mr. Castle to prepare an order
4 consistent with that.

5 Is there anything else that we need to address
6 today that you're aware of, Counsel?

7 MR. CASTLE: Your Honor, in Mr.
8 Gaither's memorandum, he did bring up the issue of the
9 group enhancement. I simply raise that because it was in
10 his memo.

11 I know we talked about it at the time of
12 sentencing, we talked about it at the time the verdict
13 was rendered, but there it is again. So I don't know
14 what you want to do with it, I don't know what Mr.
15 Gaither wants--

16 THE COURT: I've already made my
17 ruling.

18 MR. CASTLE: Okay.

19 THE COURT: Anything else, Mr.
20 Gaither?

21 MR. GAITHER: Your Honor, nothing
22 else.

23 That--that issue was raised because we didn't
24 want to indicate there was any waiver of the objections
25 that were made and I would incorporate the objections and

Addendum C

97-90-008-

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT,
DIVISION II, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,)
Plaintiff,)
vs.)
DENNY DUKE KANDT,)
Defendant.)

JAN 21 1998
By S. Owin
Case No. 971901021 PS
PARTIAL TRANSCRIPT OF
JURY TRIAL
(Videotape Proceedings)

BE IT REMEMBERED that on the 29th day of
October, 1997, and the 30th day of October, 1997, the
above-entitled matter came on for hearing before the
HONORABLE SANDRA PEULER, sitting as Judge in the above-
named Court for the purpose of this cause, and that the
following videotape proceedings were had.

A P P E A R A N C E S

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FILED
Utah Court of Appeals
JUL 28 1998
Julia D'Alessandro
Clerk of the Court

970230-61



1 subpoenaed here to tell you what has happened. Because
2 the law is such that when there is a violation of the
3 law, the person who's violated the law, has to answer for
4 the consequences.

5 After all the evidence has been presented, I
6 will return here and speak to you again and when I do
7 that, I'm going to ask you to carefully consider all of
8 the evidence that you've heard and base your decision
9 just on that evidence, base your decision just on the law
10 that the Court has given you, to set aside any bias you
11 might have in considering that evidence, and when I
12 return, I will be asking you to find Denny Kandt guilty
13 of aggravated assault, and that's what he's been charged
14 with.

15 He's been charged with either being the one who
16 struck Dino Hernandez in the head with this object or
17 being someone that was there, who was aiding and
18 abetting others to do the same.

19 Thank you.

20 THE COURT: Thank you, Mr. Castle.

21 And Mr. Angerhofer, do you wish to make an
22 opening statement at this time?

23 MR. ANGERHOFER: Yes, please.

24 May it please the Court, learned Counsel,
25 ladies and gentlemen of the jury. The prosecution has

1 painted a pretty grim picture of the crime--or the gang
2 scene in Salt Lake City and I'm not here to dispute that,
3 I'm not--this case today is not about cleaning up the
4 streets of Salt Lake, getting rid of the gang problem.
5 That's not the issue and that's not going to happen any
6 time soon.

7 If that was the case, it would be really easy
8 to solve our gang problem in Salt Lake; however, you'll
9 remember, as the Judge asked you as we were selecting you
10 for the jury, if you could independently, impartially and
11 without bias, reach a decision in this case after
12 considering all of the evidence and not being influenced
13 one way or the other by the mention of whether witnesses
14 or the defendant are members of a gang. That is not the
15 issue here, being a member of a gang is not a crime.
16 Aggravated assault, however, is a crime.

17 And with that, the State has to show two things
18 beyond a reasonable doubt: That a crime was committed,
19 in other words, that the victim was assaulted, that he
20 sustained injuries. We don't dispute that, the medical
21 evidence will show that he did in fact require stitches,
22 he was taken to the hospital. There's no dispute there.

23 What this case focuses on, though, is who did
24 it? Who inflicted the wound? Who assaulted Dino
25 Hernandez? That is what we're asking you to do here

1 today.

2 Listen to the evidence--you'll hear conflicting
3 evidence, by the way. Juries often do. As you listen to
4 each person that testifies, I would ask that you consider
5 their credibility, consider what they have to say and ask
6 particularly if they're telling the truth, for when you
7 go back into the jury room, you'll be asked to weigh
8 everything that you've heard today and come to a
9 conclusion, guilt or innocence of this defendant.

10 Not whether or not a crime has been committed,
11 not whether Dino has sustained an injury, we know that.
12 Not whether or not the gang problem exists in Salt Lake.
13 We know that. Not whether any particular member, the
14 defendant, witness or whoever is a member of a gang. We
15 know that, and that's not an issue, that's not a crime.

16 What we have to ask, though, as you listen to
17 the evidence, it will show that the defendant, Denny, was
18 not present at the crime scene on the day this crime
19 occurred. This crime occurred on--on July 28th, 1997,
20 around 5:30, 6:00 o'clock p.m. at the Pizza Hut. That's
21 been well established, it'll come out today, you'll see
22 the evidence before it.

23 But you'll also find evidence, Michelle Garcia,
24 a friend of Denny's, Amanda Garay, a friend of Denny's,
25 they were both here with Denny at the courthouse on that

1 day, between 3:00 o'clock and 5:30 p.m. From 5:30 p.m.,
2 all three of them went to Michelle's and Amanda's house,
3 watched a movie called Happy Gilmore. And you believe or
4 not believe.

5 They didn't get out--then--then Denny had to go
6 home, it's 10:00, 10:30 at night, she left, and Denny was
7 not out of their sight from about 3:00 o'clock in the
8 afternoon until about 10:30 at night. Well, if the crime
9 occurred at 5:30--and by the way, the evidence will show
10 that the defendant--or the victim, rather, Dino, checked
11 in to L.D.S. Hospital about 6:40 p.m. on the 28th; so,
12 some time between 5:30 p.m. to 6:40 p.m., he was
13 assaulted, went to the hospital, got his treatment.
14 Denny was nowhere near, the evidence will show he was
15 some place else.

16 Well, now, wait a minute, you say, how can that
17 be? Already we have a conflict. The victim's going to
18 be saying that Denny did it to him. Denny's friends will
19 be saying, No, he was with us all the time. Somebody is
20 telling a lie here and that's what you'll be asked to
21 listen to today as you listen to every single witness who
22 gets on that witness stand, look at them, use all of your
23 experience of human nature concerning truth or lie, as
24 each witness is on that stand and ask, Who's telling the
25 truth here? Who's telling a lie?

1 What motivation would anyone have to tell the
2 truth here or a lie? Well, the evidence will show that
3 Dino testified under oath at a prior hearing and at that
4 prior hearing, he admitted to being a gang member, he
5 admitted prior confrontations with Denny, in which a
6 friend of the victim, a friend of Dino's, threw a rock
7 through--at Denny's house.

8 Dino, the victim, will testify that he held a
9 grudge against Denny. Consider that and consider--ask
10 motivation when Dino gets on the stand. Why are you
11 telling us the things you're saying? Listen to his
12 testimony.

13 The evidence will show that as Dino checked
14 into the hospital, he told one story. He said that prior
15 gang members were trying to get him back into a gang that
16 he used to belong to but no longer was in the gang. That
17 was the day of the assault.

18 Two days later, the evidence will indicate that
19 Dino was talking to a Detective Vu and a Detective
20 Rivera. He told them--let me get it right here, 'cause
21 it changes it here--he will tell him--he told two days
22 later that Dino, the victim, threw the first punch at a
23 Mr. Lopes and then Mr. Lopes hits him with the rock.

24 And then about five days later, on August 5th,
25 Dino, the victim, states to a Detective Thomas this time,

1 a different detective, but within the weak, that Anthony
2 Wallace threw the first swing at him and that again, it
3 was Lopes that hit him.

4 At the only time which he's put under oath at a
5 prior hearing, Dino, the victim, will say he doesn't know
6 who hit him with a rock.

7 So, we have at least three, maybe four
8 different stories. As you listen to whatever story Dino
9 tells today, ask yourself, motivation and whether or not
10 he's telling the truth or lying, for that is critical.
11 We have opposing stories here, contradicting stories.
12 Your job is to determine who's telling the truth.

13 Thank you.

14 THE COURT: Thank you, Mr.
15 Angerhofer.

16 Mr. Castle, will you call your first witness.

17 MR. CASTLE: Thank you, your Honor.

18 Dino Hernandez.

19 THE COURT: Will you come forward,
20 please, to where my clerk is and I'll ask her to
21 administer the oath.

22 (Further proceedings previously transcribed.)

23 THE COURT: Get on and off in 20
24 minutes?

25 MR. CASTLE: Could I approach the

Addendum D

RANDALL GAITHER, #1141
Attorney for DENNY DUKE KANDT
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

**IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
DIVISION I**

STATE OF UTAH,	:	AFFIDAVIT OF AMANDA GARAY
	:	IN SUPPORT OF MOTION FOR A
Plaintiff,	:	NEW TRIAL OF THE DEFENDANT,
	:	DENNY DUKE KANDT
vs.	:	
DENNY DUKE KANDT,	:	Judge PEULER
	:	
Defendant.	:	Case No. 971901021 FS

State Of Utah)
 :ss
County Of Salt Lake)

I, AMANDA GARAY, being first duly sworn upon my oath deposes and states as follows:

1. I am a resident of Salt Lake County, State of Utah and I am employed at the Salt Lake County Records Office.

2. I know and am acquainted with Denny Kandt.

3. On July 28, 1997, I was in Court in the Third Judicial District Court and Denny Kandt was present at the hearing.

4. After Court, Amber Lloyd, Anabell Martinez, Denny Kandt and I talked with Mr. Molina's mother outside the Third Judicial District Court courtroom for a considerable period of time. Then Denny Kandt, Amber Lloyd and Anabell Martinez left in my Mercury Sable and left for Michelle Garcia's residence.

5. Myself, Michelle Garcia, Amber Lloyd, Anabell Martinez and Denny Kandt ~~went~~ *a.g.* went from Court directly to Michelle AMANDA GARAY's house in the Rose Park area of Salt Lake City.

6. After leaving the ~~residence~~ *court a.g.* we watched a video and played Monopoly. We played Monopoly until about 10:00 p.m. or 10:30 p.m. During this time, Denny Kandt was present either at Salt Lake District Court, in the car or at the residence and never left to go to any other location in Salt Lake County. *Other persons were present including Michelle's sisters. a.g.*

7. I was willing to testify if called as a witness on behalf of Denny Kandt and I am still willing to testify to the fact that Denny Kandt could not have been at the place where Mr. Hernandez was assaulted.

8. I was present at the trial but was not called to testify.

DATED this 14^m day of January, 1998.

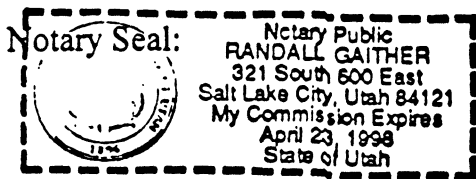
Amanda Garay
AMANDA GARAY

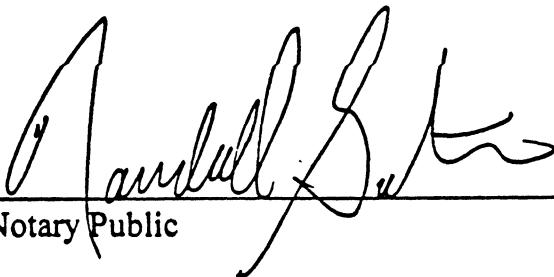
State Of Utah

)
:ss

County Of Salt Lake)

On the 14 day of January, 1998, personally appeared before me, AMANDA GARAY, having read the foregoing Affidavit, swears that the contents thereof are true according to the best of information and belief and has executed the same.



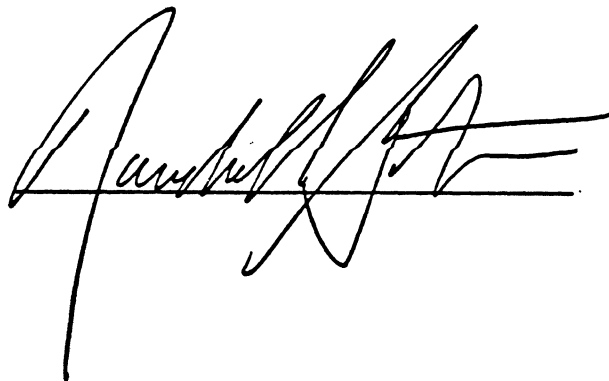

Notary Public

FAX/MAILING CERTIFICATE

I hereby certify that on the 14 day of January, 1998, a true and correct copy of the foregoing AFFIDAVIT was faxed/mailed First Class, postage prepaid to:

CY H. CASTLE
DEPUTY DISTRICT ATTORNEY
231 EAST 400 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

DATED this 14 day of January, 1998.



RANDALL GAITHER, #1141
Attorney for DENNY DUKE KANDT
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

**IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
DIVISION I**

STATE OF UTAH,	:	AFFIDAVIT OF DENNY KANDT
	:	IN SUPPORT OF MOTION FOR A
Plaintiff,	:	NEW TRIAL OF THE DEFENDANT,
	:	DENNY DUKE KANDT
vs.	:	
DENNY DUKE KANDT,	:	Judge PEULER
	:	
Defendant.	:	Case No. 971901021 FS

State Of Utah)
 :ss
County Of Salt Lake)

I, Denny Duke Kandt, being first duly sworn upon my oath deposes and states as follows:

1. I am the Defendant in the above entitled matter.
2. I was willing to testify in my defense and if I had been called to the stand, I would have testified that I was not present at the scene of the assault of Dino Hernandez.
3. I do not believe that my appointed counsel fairly discussed with me the reasons why he advised me not to testify at Trial. I was willing to testify before the jury and

subject myself to cross examination by the Prosecution.

4. If a new Trial is ordered in this matter I would testify as to my whereabouts and the fact that I was not involved in the assault of Dino Hernandez.

5. I do not believe that my prior attorney effectively developed my alibi defense and I, along with my father, had given him information as to other witnesses who I believe would have supported each other's testimony to corroborate the fact that I was not present and did not participate in the assault.

6. I request that the Court grant a new trial in this matter.

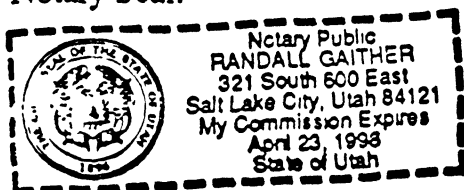
DATED this 13 day of January, 1998.

Denny Duke Kandt
DENNY DUKE KANDT

State Of Utah)
 :SS
County Of Salt Lake)

On the 13 day of January, 1998, personally appeared before me, Denny Duke Kandt, having read the foregoing Affidavit, swears that the contents thereof are true according to the best of information and belief and has executed the same.

Notary Seal:



[Signature]
Notary Public

FAX/MAILING CERTIFICATE

I hereby certify that on the 14th day of January, 1998, a true and correct copy
of the foregoing AFFIDAVIT was faxed/mailed First Class, postage prepaid to:

CY H. CASTLE
DEPUTY DISTRICT ATTORNEY
231 EAST 400 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

DATED this 14 day of January, 1998.

A handwritten signature in black ink, appearing to read "Andrew R. Smith", is written over a horizontal line.

RANDALL GAITHER, #1141
Attorney for DENNY DUKE KANDT
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

**IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
DIVISION I**

STATE OF UTAH,	:	AFFIDAVIT OF ROSIE AMARO
	:	IN SUPPORT OF MOTION FOR A
Plaintiff,	:	NEW TRIAL OF THE DEFENDANT,
	:	DENNY DUKE KANDT
vs.	:	
DENNY DUKE KANDT,	:	Judge PEULER
	:	
Defendant.	:	Case No. 971901021 FS

State Of Utah)
 :SS
County Of Salt Lake)

I, ROSIE AMARO, being first duly sworn upon my oath deposes and states as follows:

1. I am a resident of Salt Lake County, State of Utah and reside at the address of 1407 Utah Drive, Salt Lake City, Utah.
2. I know and am acquainted with Denny Kandt.
3. On July 28, 1997, my son, Armando Molina, was sentenced in Court in the Third Judicial District Court and Denny Kandt was present at the hearing and was

present with me and other people in Court.

4. After Court, Amanda Garay, Amber Lloyd, Laura Vasquez and Denny Kandt and others talked with me outside the Third Judicial District Court courtroom for a considerable period of time after court finished at about 5:30 p.m.. I then observed Denny Kandt, Amanda Garay, Amber Lloyd and Anabell Martinez leave the Courtroom. We all met in front of the courthouse and we talked in front of the Court fifteen or twenty minutes.

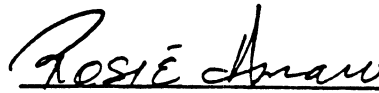
5. I talked to Denny Kandt and the girls he was with until about 6:00 p.m. on July 28, 1997, and then he appeared to have he left with the girls.

6. When Denny was talking to me outside of the courthouse, Anthony Wallace was not present.

7. I was contacted by Denny's family prior to his trial, and I was contacted by an investigator. However, I was never contacted to testify at trial.

8. I was willing to testify if called as a witness on behalf of Denny Kandt and I am still willing to testify to that effect.

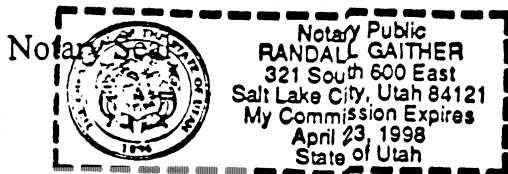
DATED this 17 day of January, 1998.



ROSIE AMARO

State Of Utah)
 :SS
County Of Salt Lake)

On the 17 day of January, 1998, personally appeared before me, ROSIE
AMARO, having read the foregoing Affidavit, swears that the contents thereof are true
according to the best of information and belief and has executed the same.





Notary Public

FAX/MAILING CERTIFICATE

I hereby certify that on the 14th day of January, 1998, a true and correct copy
of the foregoing AFFIDAVIT was faxed/mailed First Class, postage prepaid to:

CY H. CASTLE
DEPUTY DISTRICT ATTORNEY
231 EAST 400 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

DATED this 14th day of January, 1998.

