

1989

Utah v. Strieby : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 89-0124

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
-vs-	:	Case No. 890124-CA
ERLENE KAY STRIEBY,	:	Priority 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court
in and for Tooele County, State of Utah

The Honorable Kenneth Rigtrup

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STATE OF UTAH
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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES PRESENTED.....	1
STATUTES.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS:	
1. THE STATE'S CASE-IN-CHIEF.....	2
2. THE DEFENSE CASE.....	7
SUMMARY OF ARGUMENTS.....	11
ARGUMENT:	
I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.....	12
II. THE EVIDENCE PRESENTED AT TRIAL WAS NOT SUFFICIENT TO SUSTAIN THE TRIAL COURT'S VERDICT OF MANSLAUGHTER.....	16
III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.....	18
IV. THE TRIAL COURT'S ORDER OF RESTITUTION WAS ILLEGAL.....	20
CONCLUSION.....	22

TABLE OF CONTENTS (Cont.)

	<u>Page</u>
<u>Table of Cases</u>	
<u>Harris v. Harris</u> , 377 P.2d 1007 (Utah 1963).....	21
<u>People v. Catron</u> , 678 P.2d 1 (Ct. App. Colo. 1984)...	21
<u>State v. Goodman</u> , 91 Utah Adv. Rpt. 3 (S. Ct. 1988)..	12,17,18
<u>State v. Harman</u> , 767 P.2d 567 (Utah 1989).....	13,19
<u>State v. Knoll</u> , 712 P.2d 211 (Utah 1985).....	14
<u>State v. Peterson</u> , 681 P.2d 1210 (Utah 1984).....	21
<u>State v. Petree</u> , 659 P.2d 443 (Utah 1983).....	19
<u>State v. Walker</u> , 743 P.2d 191 (Utah 1987).....	17

Statutes and Other Authorities

Utah Constitution, Article I § 16.....	21
Utah Code Ann. § 76-3-201 (Supp. 1989).....	2,20
Utah Code Ann. § 76-3-201(3)(a)(i).....	20
Utah Code Ann. § 76-3-201(4)(d).....	21
Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1988).....	1

STATEMENT OF JURISDICTION

This is an appeal from a judgment of conviction of manslaughter, a second degree felony, and from an order denying appellant's motion for a new trial. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1988).

The District Court entered its judgment on January 12, 1989. Appellant subsequently filed a motion for a new trial on January 18, 1989, which was denied by the trial court on February 8, 1989. Appellant filed her timely notice of appeal on March 3, 1989.

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court erred in a bench trial in denying appellant's motion for judgment of acquittal made at the conclusion of the State's case-in-chief because the State had failed to prove beyond a reasonable doubt that appellant did not act in self-defense.

2. Whether the District Court's verdict of manslaughter was against the clear weight of the evidence on the issue of self-defense as the evidence did not establish the absence of self-defense beyond a reasonable doubt.

3. Whether the District Court erred in denying appellant's motion for a new trial based on an erroneous and unsupported conclusion that there was a cessation in hostilities sufficient to establish beyond a reasonable doubt that appellant did not act in self-defense.

4. Whether the District Court's order of restitution was legal.

STATUTES

Utah Code Ann. § 76-3-201.

STATEMENT OF THE CASE

On November 30, 1988, appellant was found guilty by the District Court, sitting without a jury, of manslaughter. Appellant was also found not guilty of second degree murder. On January 9, 1989, the District Court sentenced her to a term of imprisonment of not less than one year, nor more than 15 years. The District Court further ordered her to pay restitution to the decedent's family (her in-laws) in an amount to be set by the Board of Pardons at the time of release. On January 18, 1989, appellant filed a motion for a new trial, supported by an affidavit, based on certain findings made by the District Court at the time it rendered its verdict. On February 8, 1989, the District Court denied appellant's motion for a new trial. This appeal followed.

STATEMENT OF FACTS

1. The State's Case-in-Chief:

On the evening of July 8, 1988, in Tooele County, Sandy Magana heard someone crying, looked out the window of her condominium and saw Kay Strieby, the Appellant, sobbing hysterically. Mrs. Strieby came to Ms. Magana's door and asked her to call the paramedics because Chris Strieby, the decedent, had been shot. Mrs. Strieby told Ms. Magana that she shot the decedent because he was beating her and would not stop, but "just kept coming." (Tr. 126-32.)

In response to Ms. Magana's call received by Tooele County Dispatch, Deputy Lynn Bush went to the Striebys' condominium in Stansbury Park. Deputy Bush found the decedent lying on the landing midway up the stairway leading to the second floor of the condominium.¹ A hat and a blue plastic cup were also on the landing and a gun was lying on a night stand in an upstairs bedroom. (Tr. 15-26.) Deputy Bush observed that Mrs. Strieby had numerous bruises on her face, including a swollen eye, a swollen lip and a mark on her forehead. She was also extremely upset. (Tr. 38-42.)

Detective Alan James and Sheriff Don Proctor took a taped statement from Mrs. Strieby following the shooting as she sat in the sheriff's car at the scene. Mrs. Strieby told Detective James and Sheriff Proctor that she and the decedent had been arguing since the previous day. On the morning of July 8, she got up early in order to be at work in Grantsville by 6:00 a.m. After work, she went home, did some housework and then went to the Strieby welding shop in Tooele to talk with the decedent. They argued, and the decedent told Mrs. Strieby she "was a cunt and not to come around him anymore ...". He gave her the "finger," and she left and drove to the Eagle's, a private club in Tooele, where she talked with friends and had a few drinks. She then returned to the Strieby welding trailer to pick up the decedent. She and the decedent argued again and the argument ended with him knocking

¹ The condominium stairway has one flight of stairs from the entryway up to the landing, a 180° turn at the landing, and a second flight of stairs from the landing up to the second floor. (Tr. 22.)

her down. Mrs. Strieby then called her friend, Charlotte Gourley, who came and took her home. (Ex. 14 at 2, 7-8.)²

Don McCord, the decedent's best friend, was at Strieby Welding drinking with the decedent on the day in question. According to McCord, the decedent had lied to Mrs. Strieby about spending the night with another woman. While the couple often argued, the argument that afternoon seemed more intense on the decedent's part, as well as Mrs. Strieby's. Mr. McCord testified that he and the decedent had been drinking all day and that the decedent had already drunk approximately two-thirds of a fifth of vodka when Mrs. Strieby returned to the trailer that afternoon. By that time, he and the decedent were drinking from a fresh half gallon of vodka. After Mrs. Strieby left, McCord and the decedent continued to drink their half gallon. (Tr. 68-71, 81-85.)

When Mrs. Strieby got home, she lay down to rest for a few minutes. When the decedent's nephew, Joey Gruenwald, and his friend, both of whom were staying at the condominium temporarily, came home, Mrs. Strieby asked them to drive to the trailer and bring the decedent home "before he gets too drunk." (Ex. 14 at 2.) Joey Gruenwald and his friend went to the trailer and found the decedent still drinking. They told him that they "wanted to drive him home because [they] didn't want him driving home drunk either." They finally convinced

² Exhibit 14 is a transcript of appellant's taped statement to Detective James and Sheriff Proctor.

him to go with them. They dropped him off outside the condominium and left for Salt Lake City without going inside. (Tr. 107-113.)

As soon as the boys left, the decedent entered the condominium and immediately began yelling obscenities at Mrs. Strieby, grabbing her and threatening to kill her. As Mrs. Strieby told Detective James:

I opened the door and the kids left and he just, just started hitting me and started calling me names and saying I did things I didn't.... [H]e said, "I'll kill ya." He said, "I'll beat you to death. No wonder your first husband beat you. You're a mouthy bitch."

Mrs. Strieby repeatedly pleaded with the decedent to leave her alone, and also asked him to give her a few days and she would move out. But he refused:

[H]e said, "I ain't giving you no time at all." . . . I said, "Chris you can't be like this," and he said he'd kill me, he'd beat me to death. He said, "If the beatin' you thought you got at dad's trailer was bad today, you wait until I get ahold of you again."

(Ex. 14 at 3, 4, 8.)

Mrs. Strieby pulled away from the decedent's grasp and ran away from him up the stairs. The decedent grabbed Mrs. Strieby by the leg and dragged her down the stairs on her back and neck. Mrs. Strieby again asked the decedent "please ... just leave me alone, I just, give me a couple a days," but the decedent was "grabbing" and "shaking" her, so she struggled free and ran upstairs. (Ex. 14 at 4; Tr. 163.) Although Mrs. Strieby was too shaken to recall exactly how she got the decedent's gun from their bedroom closet. She had it when he came at

her up the stairs. She begged him to quit beating her. The decedent kept coming:

He said. . . . "I'll kill you before you can pull the trigger." He told me to go in and pull the trigger. He could knock me down four times before I could pull the trigger. There wasn't enough dust to bury him....

(Ex. 14 at 4, 8.) Mrs. Strieby again pleaded with the decedent not to hit her again. He told her to "Pull the trigger you fucking bitch, cause it ain't loaded and I can make it up the stairs before you pull it anyway." (Ex. 14 at 8.) As the decedent came charging up the second flight of stairs from the landing, he again told her that he was going to kill her and she fired one shot which killed him. Mrs. Strieby recalled that "I don't really remember pulling the trigger, God Almighty. It hurt my arm, it threw my arm clear back and I am so, oh God Almighty ... it was horrible. It was terrible. I, oh my neck is sore, my back is sore. He really whopped me a good one in the neck and my neck is really sore but I didn't mean to hurt him...." (Ex. 14 at 5, 8; Tr. 25.) After her arrest, Mrs. Strieby was taken to the emergency room at the local hospital for treatment for the neck and back injuries sustained during the beating.

Dr. Edward Sweeney, the state medical examiner who examined the body, testified that the decedent was a "heavyset man" weighing about 200 pounds with a "muscular development." The cause of death was a gunshot wound. Consistent with Mrs. Strieby's statement, the path of the bullet was a downward angle, with the bullet entering the decedent's mouth and coming to rest at the back of his neck. The

decedent's alcohol level was .25 milligrams percent, or approximately three times the legal limit for the State of Utah. Dr. Sweeney testified that alcohol affects the highest levels first - those "that separate man from animal." Dr. Sweeney also testified that the decedent's self-control and judgment would clearly have been affected at his .25 blood alcohol level and his coordination and reflexes would also have been affected. (Tr. 117-121.)

At the conclusion of the government's case, appellant's counsel argued that the State had not met its burden of proof on the critical element of self-defense. Counsel pointed out that overwhelming evidence of self-defense had been introduced in the State's case and there had been no evidence to overcome the State's heavy burden to prove that appellant did not act in self-defense. (Tr. 298-304.) The government responded that appellant's voluntary statement to the sheriff was the only evidence it had of what occurred at the Strieby house on the night in question. (Tr. 313-314.) The District Court denied appellant's motion for judgment of acquittal on both second degree murder and manslaughter without explanation.

2. The Defense Case:

Appellant testified in her own defense and elaborated on and expanded her voluntary statement to Detective James and Sheriff Proctor. In April of 1988, after having known each other for several years and having previously lived together, Mrs. Strieby and the decedent were married. At the time of the marriage, the decedent was

estranged from, and had no contact with, his father and brothers. A few months later, he began spending time with his family again. Since that time, in the two months immediately prior to July 8, the decedent became emotionally upset due to his family problems. He began drinking excessively and became very short-tempered. (Tr. 218-226.)

On July 7, 1988, the decedent was angry because they had not had sex for some time, and he blamed Mrs. Strieby. He told her that if he did not get sex from her soon he would "go someplace else for it." Mrs. Strieby told him that his excessive drinking was the cause of the problem, as he was unable to maintain an erection when drunk. She told the decedent that if he drank less they probably could have sex. Mrs. Strieby then went upstairs to bed. Approximately twenty minutes later, the decedent followed her upstairs, slapped her in the face with his penis and demanded sex. Mrs. Strieby asked him to leave her alone. The decedent then "jumped on" Mrs. Strieby and attempted to have intercourse with her "from behind". The decedent eventually went back downstairs and slept on the couch. (Tr. 229-230.)

The following morning, July 8, 1988, Mrs. Strieby got up early and went to her job as a seamstress in Grantsville. On Fridays, she only worked until 10:00 a.m., so she returned home at that time and did some light housework and began preparing dinner. After some time, she drove to the Strieby welding shop where she and the decedent argued again. She then spent some time at the Eagle's, returning to the Strieby welding trailer in the late afternoon. Mrs. Strieby intended to pick up the decedent and take him home, but they argued,

so she left him the keys and had Charlotte Gourley drive her home.
(Tr. 231-238.)

When the decedent, who was drunk, came home, he immediately attacked Mrs. Strieby. The decedent was substantially bigger and stronger than Mrs. Strieby. Although they had argued before, he had never before attacked her as he did that night. He had also never before threatened to kill her. Mrs. Strieby testified that "the door flew open" and the attack began. He began beating her and calling her names. When Mrs. Strieby asked for some time to get out, he told her she "didn't have any time." Although she tried to open and escape through the front door, the decedent slammed it shut. He told her that "two other women had left him, and the only way [shel] could leave was on a stretcher." (Tr. 240-241.)

As she fought off the decedent's attack in the entryway, Mrs. Strieby ran up the stairs to the landing. The decedent grabbed her and pulled her back down the stairs by her legs. As she was pulled down the steps, she hit her head on the landing and stairs. Mrs. Strieby had broken her back before and had a long history of serious back injuries, including four prior back surgeries. To protect herself, she said she "put my hands up and tried to double my body up so I would -- I was scared because of my back, and I was scared because of my head. I didn't know if I had hurt my head bad. He just wouldn't leave me alone." (Tr. 241-244.)

Throughout the attack, the decedent told Mrs. Strieby that he was going to kill her. She testified:

I had never seen him like this. I had never seen his eyes -- I had never seen his face contorted to the point where he was completely uncontrollable, where he -- I couldn't talk to him. He just kept saying, "I am going to kill you, you bitch. I am going to kill you, you bitch. You don't deserve to live." And he just -- he wouldn't stop.... But all this time he was telling me he was going to kill me. And he told me -- just screaming things at me. Just screaming ... He was screaming obscenities, and things that -- sometimes he didn't even make sense. [She became] so scared of him I knew that he was going to kill me. And he said he was going to kill me.

(Tr. 241-243.)

As the decedent struck out at Mrs. Strieby, she ran up the stairs again. When he came after her, she pleaded with him to "leave [her] alone." He told her "I'm going to kill you, you bitch. You've just embarrassed me enough, and I am going to kill you." Mrs. Strieby testified that "he just -- he kept coming up the stairs. He just kept coming. And he kept screaming at me that he could get me before I could shoot him...." As the decedent continued up the stairs in pursuit of her, Mrs. Strieby fired one shot from his gun, killing him.

(Tr. 245-246.)

Mrs. Strieby was taken to the Tooele Valley Hospital emergency room where she was examined by Dr. Mark Anderson for her neck pain and other injuries. At trial, Dr. Anderson testified that based on Mrs. Strieby's pain and the numbness in her hands, he initially thought that Mrs. Strieby had suffered either a broken neck or a ruptured cervical disk. Dr. Anderson stated that four prior back surgeries is an "extremely unusual" number and Mrs. Strieby's range of motion in her back and neck was generally less than half of normal.

In addition, Mrs. Strieby had bruises on various parts of her body, including bruises that were in the shape of fingers, "a classic description of somebody being grabbed with the fingers very hard." She also had multiple abrasions, a swollen left eye and a tender area on her neck. (Tr. 194-201.)

Dr. Anderson testified that Mrs. Strieby's injuries were consistent with being dragged down stairs on her neck and back, and with trying to escape an attack. Dr. Anderson further testified that being dragged down stairs on one's neck and back could certainly have caused death or serious bodily injury. In fact, Dr. Anderson stated that because of Mrs. Strieby's back problems and prior surgeries, serious bodily injury was more likely for her. For someone in her condition, Dr. Anderson testified, being dragged down the stairs could have caused paralysis or death. (Tr. 203-204.)

SUMMARY OF ARGUMENTS

1. The District Court, at a bench trial, erred in not granting appellant's motion for judgment of acquittal made at the conclusion of the State's case-in-chief. At that point in the trial, the issue of self-defense had been raised and the State completely failed to prove that appellant did not act in self-defense.

2. The District Court's verdict of manslaughter was against the clear weight of the evidence on the issue of self-defense. Not only did the State fail to prove in its case that appellant did not act in self-defense, but evidence presented by the defense created further reasonable doubt.

3. The District Court erred in not granting appellant's motion for a new trial, as its sole theory to find beyond a reasonable doubt that appellant did not act in self-defense was not based on a scintilla of evidence but was simply a speculative leap across the State's gap in the evidence.

4. The District Court's order of restitution was procedurally and substantially illegal because no reasons for the order were given and because restitution cannot be ordered for collateral loss to persons arguably collaterally injured by an offender's conduct.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

At the conclusion of the State's case-in-chief, appellant made a motion for judgment of acquittal on the basis that the government had failed to meet its burden of proof. Specifically, appellant argued that the State failed to prove in its own case, beyond a reasonable doubt, that Mrs. Strieby did not act in self-defense.

In reviewing the District Court's verdict, it is important to emphasize that appellant was tried at a bench trial. The Utah Supreme Court has clearly established that a more probing and less deferential standard of review is to be applied in a bench trial, as compared to a jury trial. As the Court noted in State v. Goodman, 763 P.2d 786 (Utah 1988):

When reviewing a bench trial for sufficiency of the evidence, we must sustain the trial court's judgment unless it is "against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." . . . [T]his standard accords "appropriate recognition of the relative deference owed multi-member panels as opposed to single-judge findings." Under this less deferential standard, the likelihood that a defendant's conviction will be reversed following a bench trial, as opposed to a jury trial, is increased. . . . [T]his standard requires that the clear weight of the evidence presented at trial not be contrary to the verdict. . . . Even if the clear weight of the evidence supports the verdict, however, this Court will reverse if it otherwise reaches a definite and firm conviction that a mistake has been made, thus providing the defendant an additional opportunity to obtain a reversal.

. . . In reviewing a bench trial for sufficiency of the evidence, we require that the weight of the evidence, discounting questions of credibility and demeanor, not oppose the verdict. Hence, a defendant's conviction must still be based on evidence establishing guilt beyond a reasonable doubt, but, on appeal, the standard of review aids the defendant in his efforts to obtain a reversal. . . .

Id. at 786-87 (footnotes and citations omitted).

By contrast, as this Court has noted, in a jury trial:

[T]he standard for reversal is high. "We reverse . . . only when the evidence . . . is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime...." . . . Furthermore, all evidence and reasonable inferences drawn therefrom must be reviewed in a light most favorable to the jury's verdict. . . .

State v. Harman, 767 P.2d 567, 568 (Utah App. 1989). Even in reviewing a jury trial, this Court has noted that:

Although this is a high standard, it is not insurmountable. We will not make "speculative leap[s] across ... remaining gap[s]" in the evidence. . . . Every element of the crime charged must be proven beyond a reasonable doubt. If the evidence does not support those elements, the verdict must fail.

Id. at 568.

Applying those principles to the instant case, the State had the burden of proving beyond a reasonable doubt, by competent evidence, that Mrs. Strieby did not act in self-defense. In that regard, State v. Knoll, 712 P.2d 211 (Utah 1985) is controlling. Therein, the Utah Supreme Court held that, although the absence of self-defense is not one of the prima facie elements of homicide, once the issue is raised, it is the prosecution's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense:

[A] defendant is not required to establish a defense of self-defense beyond a reasonable doubt, or even by a preponderance of the evidence. . . . In sum, when there is a basis in the evidence, whether the evidence is produced by the prosecution or by the defendant, which would provide some reasonable basis for the jury to conclude that a killing was done to protect the defendant from an imminent threat of death by another, an instruction on self-defense should be given the jury. And if the issue is raised, whether by the defendant's or by the prosecution's evidence, the prosecution has the burden of proof beyond a reasonable doubt that the killing was not in self-defense.

Id. at 214 (emphasis added) (citations omitted).

The only evidence presented by the government on what happened during the decedent's assault on Mrs. Strieby came from the taped statement of Mrs. Strieby. In the absence of any other evidence, much less any conflicting evidence, the statement itself clearly created a reasonable doubt on the issue of self-defense on which the State had

the entire burden of proof. Most importantly, a finding at the end of the government's case that a reasonable doubt did not exist on that issue is overwhelmingly against the clear weight of the evidence. Indeed, no evidence existed on that issue other than Mrs. Strieby's statement.

In the absence of any evidence to support its case, the government completely failed to carry its burden of proof on the issue of self-defense. It did not offer any evidence whatsoever in its case to establish that Mrs. Strieby did not act in self-defense. To the contrary, Mrs. Strieby's statement and the testimony of Dr. Sweeney offered strong evidentiary support for self-defense. For example, Dr. Sweeney testified that, due to the decedent's blood alcohol level of .25, his judgment and self-control would have been seriously impaired. This testimony fully corroborated Mrs. Strieby's statement regarding the decedent's uncharacteristic rage, refusal to quit beating her and repeated threats to kill her when he got ahold of her. In short, the only evidence presented was that of a 200 pound muscular, burly man in a wild, drunken state, more of an animal than a man, driven to seriously injure or kill his wife. The District Court's denial of appellant's motion for judgment of acquittal was erroneous and against the clear weight of the evidence.³

³ The District Court's error was compounded by its failure to grant even a partial acquittal on second degree murder. As a result of this error, appellant was placed in the position of being strategically forced to present evidence in her behalf. Had the District Court granted her motion, even in part, appellant's range of decisions and choices would have been substantially broader including, e.g., to have remained silent at trial.

II. THE EVIDENCE PRESENTED AT TRIAL WAS
NOT SUFFICIENT TO SUSTAIN THE TRIAL
COURT'S VERDICT OF MANSLAUGHTER.

At the end of the bench trial, the District Court rendered a verdict of manslaughter. This verdict is against the clear weight of the evidence. At the conclusion of its case-in-chief, the State had failed entirely to present any evidence conflicting with Mrs. Strieby's account of self-defense as set forth in her statement, much less prove beyond a reasonable doubt, as required, that she did not act in self-defense. Moreover, Mrs. Strieby's defense further bolstered her claim and created even more doubt.

In her own defense, Mrs. Strieby offered additional strong evidence of self-defense. Her trial testimony gave further detail regarding the decedent's relentless assault and his repeated threats to take her life on that night. Mrs. Strieby testified that she had never before seen such a crazed look in the decedent's eyes, nor had he ever perpetrated such a savage attack upon her or threatened to kill her. Mrs. Strieby further testified that, in the course of the battle, she attempted to escape by running upstairs but that the decedent dragged her down the stairs on her neck and back. Because of a previous broken back and subsequent back surgeries, this alone could have caused serious bodily injury or death to Mrs. Strieby. In fact, it did cause serious bodily injury to her as reflected in the testimony of Dr. Mark Anderson who confirmed the extent and serious nature of injuries inflicted on Mrs. Strieby by the decedent. Dr. Anderson explained how the decedent's beating of Mrs. Strieby, and, specifically, how dragging her down stairs on her back and neck, caused her

serious bodily injury and could easily have caused her death. In sum, the clear weight of the evidence at trial established that Mrs. Strieby shot the decedent in self-defense to protect herself from serious bodily injury or death. But, even more importantly, the evidence clearly did not establish beyond a reasonable doubt that she did not act in self-defense.

In reviewing the verdict at a bench trial, this Court must "discount questions of credibility and demeanor". State v. Goodman, supra, 763 P.2d at 787.⁴ In this case, however, even that requirement is not significant since the District Court credited Mrs. Strieby's testimony. Specifically, in the course of delivering its verdict of manslaughter, the District Court acknowledged that there were no substantial conflicts in the evidence. (Tr. 319.) The District Court further stated that it had "no substantial reason to doubt Mrs. Strieby's version." (Tr. 321.) In fact, the District Court specifically found that the decedent had resumed beating Mrs. Strieby upon arriving home and further indicated that it had "no substantial doubt about the reality" of her fear for her life, given the decedent's "powerful muscular build." (Tr. 323.)

Notwithstanding the clear and un rebutted evidence indicating that Mrs. Strieby acted in self-defense, the District Court found that her

⁴ That does not mean that this Court cannot, in appropriate circumstances, evaluate a witness' testimony. For example, in State v. Walker, 743 P.2d 191 (Utah 1987), the Supreme Court reversed a conviction in a bench trial when it found a key witness' testimony unreliable. Walker at 197-198. In the instant case, the District Court credited appellant's testimony which makes the verdict even more erroneous.

shooting of the decedent was not legally justifiable. Under the applicable, less deferential standard of review, it is clear that the District Court's verdict must be reversed as against the clear weight of the evidence. The evidence presented by both the prosecution and the defense established self-defense. Most importantly, the State offered no evidence which even remotely indicated that Mrs. Strieby did not act in self-defense and, thus, it completely failed to prove the absence of self-defense beyond a reasonable doubt. This is precisely the kind of case, under Goodman, where less deference is owed to a "single-judge" finding. Therefore, the District Court's verdict of manslaughter must be reversed.

III. THE TRIAL COURT ERRED IN DENYING
APPELLANT'S MOTION FOR A NEW TRIAL.

Following entry of the judgment of conviction, Mrs. Strieby filed a motion for a new trial. This motion was in response to the District Court's improbable, and totally hypothetical, theory concerning the blue plastic cup found on the landing near the decedent's body -- raised for the first time by the Court in announcing its decision. In delivering its verdict, the District Court hypothesized that the decedent -- in the midst of his violent, drunken and ruthless attack on Mrs. Strieby -- stopped and "went into the kitchen and poured himself a drink," and that, with drink in hand, he then followed Mrs. Strieby upstairs. This conclusion by the District Court is not supported by a scintilla of evidence. There was absolutely no evidence that the decedent fixed himself a drink during the heat of the assault on his wife,

nor any evidence presented by the State that the decedent did not bring the cup with him from the trailer where he had been drinking vodka all day.

Mrs. Strieby's affidavit, submitted in support of her motion, establishes that there was in fact no hard liquor in the condominium. In its search of the scene, the Tooele County Sheriff's Department failed to locate any alcohol or evidence of alcohol, with the exception of an empty beer can. (Ex. B, attached to Memorandum in Support of Motion for a New Trial.) In fact, the officers observed that the condominium was clean and well-kept. (Tr. 24.) Significantly, although given the opportunity and obligation to counter Mrs. Strieby's affidavit, the State offered nothing to refute it. The District Court's theory on the blue plastic cup is thus entirely without evidentiary support.

The District Court relied on its illogical and unsupported theory to make a bootstrap finding that there was a "reasonable, substantial cessation" in the attack on Mrs. Strieby, so that the decedent was not "in vigorous, hot pursuit" at the time she ran up the stairs and got the gun. On this basis, it found her guilty of manslaughter. (Tr. 324-326.)

The District Court's conclusion, unsupported by any evidence, was clear and prejudicial error. The District Court made exactly the kind of "speculative leap[s] across ... remaining gap[s]" in the evidence condemned by this Court. State v. Harman, supra 767 P.2d at 568, quoting from State v. Petree, 659 P.2d 443, 445 (Utah 1983). Mrs. Strieby

was entitled to a new trial, and the District Court erred in denying her motion.

IV. THE TRIAL COURT'S ORDER OF RESTITUTION WAS ILLEGAL.

At the time of sentencing, the District Court ordered appellant to pay restitution in an amount to be fixed and assessed by the Board of Pardons at the time of her release. (Tr. 343.) The State argued that Mrs. Strieby should be required to pay full restitution for funeral and related expenses, as well as for therapy for the decedent's daughter. Counsel for Mrs. Strieby argued that restitution was improper because appellant was impecunious and unable to obtain gainful employment because of her back injuries, so that she had no ability to pay restitution. (Tr. 334-336.)

Utah Code Ann. § 76-3-201 (Supp. 1989) governs the imposition of restitution in criminal cases. It sets forth particular factors to be considered by the Court and specific procedures to be followed by the Court, including the requirement that "[w]hether the court determines that restitution is appropriate or inappropriate, the court shall make the reasons for the decision a part of the court record." § 76-3-201 (3)(a)(i). The District Court's failure to consider the stated criteria and to set forth in the record its reasons for ordering restitution, as mandated by the statute, is clear error. On this procedural basis alone, the District Court's order of restitution is illegal.

More importantly, the order of restitution is illegal because Mrs. Strieby has no ability to pay. This Court has held that fines and restitution are generally disfavored for defendants who lack the ability to pay.

State v. Peterson, 681 P.2d 1210 (1984). Furthermore, one cannot be imprisoned for debt -- or for contempt -- if one does not have the ability to pay. See Utah Constitution, Article I § 16; Harris v. Harris, 377 P.2d 1007 (Utah 1963).

In addition, the order of restitution is illegal because it requires restitution to individuals who are not "victims." Section 76-3-201 (4)(d) defines a "victim" as a person who has suffered pecuniary damages as a result of the defendant's criminal activities. Pecuniary damages are further defined as special damages which could be recovered against the defendant in a civil action, such as "the money equivalent of property taken, destroyed, broken or otherwise harmed, and losses such as earnings and medical expenses." These are direct consequences of the criminal conduct. In this case, the restitution sought is not for pecuniary harm to the decedent. It is also not for any property damage or similar losses directly attributable to Mrs. Strieby's actions. Rather, the restitution sought is for collateral consequences to individuals arguably collaterally injured. Therapy for the decedent's daughter is simply not the type of direct pecuniary damage contemplated by the statute. See People v. Catron, 678 P.2d 1 (Ct. App. Colo. 1984) ("victim" refers to the party immediately and directly aggrieved by the criminal act, and not to others who suffer loss because of some relationship, contractual or otherwise, to the directly aggrieved party). Although "victim" is broadly defined, the term "pecuniary damages," strictly construed as required in a criminal case, is limited to payment of direct damages to the direct victims of an offender's conduct.

For these reasons, the District Court's order of restitution was illegal.

CONCLUSION

The appellant's conviction must be reversed, or, in the alternative, the case should be remanded for a new trial, and the order of restitution should be vacated.

Respectfully submitted this 3rd day of August, 1989.

CLYDE, PRATT & SNOW

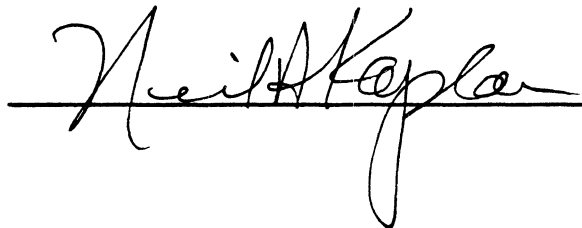


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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellant to be mailed, postage prepaid, to the following this 3rd day of August, 1989:

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— 302B —

**76-3-201. Sentences or combination of sentences allowed
— Civil penalties — Restitution — Definitions —
Resentencing — Aggravation or mitigation of
crimes with mandatory sentences.**

(1) Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentences or combination of them:

- (a) to pay a fine;
- (b) to removal from or disqualification of public or private office;
- (c) to probation unless otherwise specifically provided by law;
- (d) to imprisonment; or
- (e) to death.

(2) This chapter does not deprive a court of authority conferred by law to forfeit property, dissolve a corporation, suspend or cancel a license, or permit removal of a person from office, cite for contempt, or impose any other civil penalty. A civil penalty may be included in a sentence.

(3) (a) (i) When a person is adjudged guilty of criminal activity which has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution up to double the amount of pecuniary damages to the victim or victims of the offense of which the defendant has pleaded guilty, is convicted, or to the victim of any other criminal conduct admitted by the defendant to the sentencing court unless the court in applying the criteria in Subsection (3)(b) finds that restitution is inappropriate. Whether the court determines that restitution is appropriate or inappropriate, the court shall make the reasons for the decision a part of the court record.

(ii) When a defendant has been extradited to this state under Chapter 30, Title 77, or has been transported at governmental expense from one county to another within the state for the purpose of resolving pending criminal charges, and is adjudged guilty of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition or transportation. In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (3)(b). If the court determines that restitution is appropriate or inappropriate, the court shall make the reasons for the decision a part of the court record. The court shall send a copy of its order of restitution to the Division of Finance.

(b) In determining whether or not to order restitution, or restitution which is complete, partial, or nominal, the court shall take into account:

- (i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;
- (ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
- (iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines make restitution inappropriate.

(c) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow him a full hearing on the issue.

(4) As used in Subsection (3):

(a) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(b) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes, but is not limited to, the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses such as earnings and medical expenses.

(c) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including insured damages.

(d) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities. "Victim" does not include any coparticipant in the defendant's criminal activities.

(5) (a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.

(b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation, or presenting additional facts. If the statement is in writing, it shall be filed with the court and served on the opposing party at least four days prior to the time set for sentencing.

(c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

(d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.

(e) The court in determining a just sentence shall be guided by sentencing rules regarding aggravation and mitigation promulgated by the Judicial Council.

(6) (a) If a defendant subject to Subsection (5) has been sentenced and committed to the Utah State Prison, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Board of Pardons, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he had not previously been sentenced, so long as the new sentence is no greater than the initial sentence nor less than the mandatory time prescribed by statute. The resentencing provided for in this section shall comply with the sentencing rules of the Judicial Council to eliminate