

1989

Utah v. Strieby : Brief of Respondent

Utah Court of Appeals

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R. Paul Van Dam; Utah Attorney General; Sandra L. Sjogren; Assistant Utah Attorney General; Attorneys for Respondent.

Neil A. Kaplan; Anneli R. Smtih; Clyde, Pratt & Snow; Attorneys for Appellant.

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DOCKET NO. 89-0124 IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 890124-CA
v. :
ERLENE KAY STRIEBY, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT
- - - - -

AN APPEAL FROM A CONVICTION OF MANSLAUGHTER,
A SECOND DEGREE FELONY, IN VIOLATION OF UTAH
CODE ANN. § 76-5-205 (SUPP. 1989), IN THE
THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, THE HONORABLE KENNETH
RIGTRUP, JUDGE, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
CHARLENE BARLOW (0212)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

NEIL A. KAPLAN
ANNELI R. SMITH
200 American Savings Plaza
77 West 200 South
Salt Lake City, Utah 84101

Attorneys for Appellant

DEPOSITED BY THE
STATE OF UTAH

AUG 17 1990

Mary T. McLeod
Clerk of the Court
Utah Court of Appeals

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236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

NEIL A. KAPLAN
ANNELI R. SMITH
200 American Savings Plaza
77 West 200 South
Salt Lake City, Utah 84101

Attorneys for Appellant

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 890124-CA
v. :
ERLENE KAY STRIEBY, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction for manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (Supp. 1989). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether sufficient evidence was presented during the State's case in chief to overcome defendant's motion for judgment of acquittal.

2. Whether sufficient evidence was presented at trial to support the court's verdict and its subsequent denial of a motion for new trial.

3. Whether the trial court properly ordered the payment of restitution, the amount to be determined by the Board of Pardons at the time of defendant's release.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies are included in the body of this brief.

STATEMENT OF THE CASE

Defendant, Erlene Kay Strieby, was charged with second degree murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 1989) (Record [hereinafter R.] at 2-3).

Defendant was convicted of the lesser included offense of manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (Supp. 1989), on November 30, 1988, following a bench trial, in the Third Judicial District Court for Tooele County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding (R. at 86). Defendant was sentenced by Judge Rigtrup on January 9, 1989, to a term of one to fifteen years at the Utah State Prison, and ordered to pay restitution in an amount to be determined by the Board of Pardons at the time of release (R. at 86). On January 18, 1989, defendant filed a motion for new trial (R. at 87-88). On February 8, 1989, the motion was denied (R. at 114-116).

STATEMENT OF THE FACTS

On July 8, 1988, at approximately 6:30 p.m., Sandy McGanna heard a noise outside of her home, went to her window and observed the defendant, Erlene Kay Strieby, "coming down the sidewalk out of her condominium" (Record [hereinafter R.] 136 at 126-127). Defendant then approached Ms. McGanna's door and asked her to call the paramedics because she had just shot her husband, Chris Strieby (R. 136 at 128-130). Defendant explained to Ms.

McGanna that her husband had been hitting her "[a]nd the only way to get him to stop was to shoot him" (R. 136 at 130).

At 6:38 p.m., Deputy Lynn Bush of the Tooele County Sheriff's Office responded to a report of a shooting at the Strieby residence, #9 Mill Pond in Stansbury Park (R. 136 at 17). Upon his arrival, Deputy Bush saw defendant standing outside of the residence near the street curb (R. 136 at 18). Defendant was upset and appeared to have a swollen lip, swollen eyes and a mark on her forehead (R. 136 at 38-39, 41).¹ Deputy Bush entered the residence and immediately observed Chris Strieby, to the deputy's "left up the stairs on the stair landing", lying supine with his head "in an awkward position" against a broken landing window (R. 136 at 19, 22). Deputy Bush checked Mr. Strieby for vital signs, but found "no signs of life" (R. 136 at 22). Also on the landing, next to the body, was an empty blue plastic cup and a hat (R. 136 at 26, 41).

A second officer, who had accompanied Deputy Bush into the residence, testified that defendant said "the gun was in the bedroom" (R. 136 at 23). Deputy Bush went to the bedroom and saw a .357 magnum pistol lying on a nightstand (R. 136 at 23). Deputy Bush testified that there were no signs of disruption or a struggle within the residence itself, "[n]othing out of the ordinary, except Mr. Strieby" (R. 136 at 24).

Detective Sergeant Alan James of the Tooele County Sheriff's Office was called in to investigate the shooting (R.

¹ Deputy Bush testified that he could not tell whether the swollen eyes were the result of an injury or of defendant's crying (R. 136 at 39).

136 at 136). Upon his arrival, Detective James met with defendant, who, after being informed of her Miranda rights, voluntarily agreed to give a recorded statement concerning the events leading to the shooting (R. 136 at 137-139). Defendant explained that an argument had occurred the night before the shooting, which escalated at defendant's father-in-law's trailer the following afternoon:

K.S. [Kay Strieby]: Okay, I cussed him really bad last night and I just went to bed I have to get up at 4:00 in the morning to go to work and he I took the truck and went to work and I come up to his dad's, I went up to the Eagles and I had a couple of drinks cause I said I needed em' because I did.

A.J. [Alan James]: Um hm.

K.S.: And he had slept with another women the other night and I asked him about it and he said he didn't, but he just said it didn't matter anyway. And I just told him he was a dirty rotten son-of-a-bitch.

A.J.: Um hm.

K.S.: In his dad's trailer, I said you dirty rotten dirty son-of-a-bitch and I did yell and scream and carried on. He knocked me down and beat the hell out of me up there.

(State's Exhibit [hereinafter St. Exh.] #14 at 2). Defendant explained that, following the heated physical argument at her father-in-law's trailer, she returned home and sent Mr. Strieby's nephew to pick up Mr. Strieby (St. Exh. #14 at 2, 8). When Mr. Strieby returned, defendant was lying on an upstairs bedroom bed, "drinking a beer because of all that happened at the trailer today" (St. Exh. #14 at 7). She said:

And he come in yelling at me and called me a cunt and

. . .

Anyway he said I'll kill ya. He said I'll beat you to death no wonder your first husband beat you. Your a mouthy bitch. And I said just leave me alone, I don't need anymore and he started up the stairs and I said Chris damn you don't and he said go in the closet, go get the gun, point it at me, I don't care. He says you are a tough cunt, you can do it. And I said Chris it's not loaded, please don't be stupid. He said no it isn't loaded, and it was. It was loaded. It was loaded. He said it wasn't loaded and it was loaded. Oh my God.

(St. Exh. #14 at 2-3). Defendant explained that Mr. Strieby hit her

[i]n the shoulder and the arm and pushed me up the stairs.

. . .

And he'd already done this and that at the trailer. But I just told him please Chris just leave me alone, I just, give me a couple a days and he was grabbing me and shaking me downstairs so I ran upstairs . . .

(St. Exh. #14 at 4).² After running up the stairs to her bedroom, the defendant retrieved the gun from a closet, then confronted defendant somewhere near the landing separating an upper and lower flight of stairs.³ She told James:

[H]e said it isn't loaded. It wouldn't hurt anybody and there wasn't enough dust to kill a Strieby. And I was really upset and I said bullshit and went and got the gun and I said either you just get out of here Chris right

² Sometime later, defendant told Detective James she had been dragged down the steps by her leg (R. 136 at 163).

³ The stairway has a lower flight of stairs commencing at the entryway up to the landing, a 180° turn at the landing, and an upper flight of stairs leading to the second floor (R. 136 at 22).

now and he said no, he said I'm not, it's my house.

. . .

I said okay it's your house, but give me a couple of days and he said I ain't giving you no time at all, and then I really don't remember, I just 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 and I, I just shot . . .

(St. Exh. #14 at 4). Defendant later explained:

I wanted to scare him because he scares me. All I said was please don't ever hit me again and he said pull the trigger you fucking bitch, cause it ain't loaded and I can make it up the stairs before you pull it anyway. And I, I just got scared, I don't remember pulling it. I know it hurt my arm. . . .

(St. Exh. #14 at 8). After Mr. Strieby fell against the landing window, defendant ran to the neighbors "to tell them to call an ambulance because he fell down and he wouldn't move" (St. Exh. #14 at 3).

After the interview, Detective James continued with his investigation. Upon entering the residence, he observed Mr. Strieby lying face up on the landing, "obviously dead" (R. 136 at 142). Lying next to the body was a plastic cup and a multicolored cap. Detective James testified that, near the cup, "the carpet was damp" approximately "three or four inches" in diameter (R. 136 at 144). Detective James then proceeded to the upstairs' bedroom where he recovered a .357 magnum, noting that the weapon contained "five live rounds" with the "one under the hammer . . . empty" (R. 136 at 145).

At trial, the events leading to the shooting were substantially clarified by the testimony of several witnesses. Adolph Chip Lis and Don McCord were employed by Strieby Welding and were acquaintances of both Mr. Strieby and defendant. The witnesses established that on the day of the shooting, July 8, 1988, defendant arrived at the welding shop sometime around noon (R. 136 at 47, 66). Defendant confronted Mr. Strieby and an argument ensued. Lis testified, "Kay [defendant] seemed to be upset with Chris [Mr. Strieby] over something, and then Chris retaliated with being angry" (R. 136 at 48). The argument lasted approximately five to ten minutes, after which the defendant left in Mr. Strieby's truck (R. 136 at 49, 67).

That afternoon, while the witnesses and several others were eating inside the trailer, defendant returned (R. 136 at 50, 68). Mr. Strieby had consumed approximately half of a fifth of vodka (R. 136 at 72). It was also apparent that defendant had been drinking (R. 136 at 73, 74). Immediately, an argument began between defendant and Mr. Strieby, which waxed and waned over the next hour, ultimately ending in a physical confrontation (R. 136 at 51-55, 74-79).⁴ Don McCord testified:

. . . Kay lunged at Chris and tried to hit him, and there was a drink spilt. And Chris fell down by the sink and got up. And she come at him again, and he stiff-armed her [in the neck], like that (Indicating).

. . .

⁴ It appears consistent with defendant's statement to the police (St. Exh. #14 at 2) that the argument arose after defendant learned that Mr. Strieby had spent a night with another woman several days earlier (R. 136 at 68-70).

[T]hen a little wrestling match.

. . .

[I]n the scuffle, they slipped in this drink that was spilt, and fell with their heads more or less between the refrigerator and a chair that was sitting there into a garbage can, and then the garbage can was upset in the shuffle.

. . .

I think that the side of her head hit that garbage can, but -- either that or the chair, I don't know. But I know she -- when Chris finally -- they got up, why, Kay had a red mark on the side of her face and on her neck.

. . .

She wound up on the bottom. He was trying to hold her hand, or hold her wrists.

. . .

[T]hen they got up, and they was arguing back and forth obscenities and threats and this and that and the other thing.

. . .

She made a comment, something like, "I hope" -- "I hope you feel real big about beating up on a woman in front of your buddies here," or "your friends here."

. . .

She said as soon as she got her hands on a gun, he was a dead SOB.

(R. 136 at 74-79). Adolph Chip Lis also observed the confrontation:

Kay jumped up and started screaming at Chris again. And pretty soon Chris, you know, just kind of slid his chair back and stood up (Indicating). And she shoved him, and he fell over on the hot stove. And I was watching the whole thing because the action started happening. So I turned and looked.

And when he shoved her -- or she shoved him, he fell into the hot stove on his arm. And then he come back up off that stove pretty quick. And she was swinging at him with her left hand, and Chris reached out to grab -- he went forward, being as he came off of that stove pretty fast, and straight line (Indicating), hit her throat. And he still -- they went tumbling into the fridge. . . . Not against the door, but by the side next to the door.

. . .

Chris fell on top of her.

. . .

Chris says, "Don't you ever hit me!"

. . .

[He was j]ust kind of holding her down by the throat. Wasn't squeezing her, but real kind of just held in place pretty good.

. . .

Then he figured she had calmed down enough, I guess he let her get back up. And she went out the door shortly after that.

(R. 136 at 52-54). While defendant and Mr. Strieby often argued, the argument that afternoon appeared more intense than usual (R. 136 at 81, 86). Following the argument, defendant contacted Charlotte Gourley who took her home (R. 136 at 82).

Joseph Gruenwald, Mr. Strieby's nephew, testified that after defendant arrived home, she asked him to "go pick up [Mr. Strieby] from the shop because she didn't want him driving home drunk" (R. 136 at 106). Gruenwald noticed defendant had a "little cut up on her eye" and possibly a swollen lip (R. 136 at 105). Gruenwald proceeded to pick up Mr. Strieby and arrived back home at 6:25 p.m. (R. 136 at 106-108). After their arrival,

defendant came out and got Mr. Strieby's truck keys, then returned to the house (R. 136 at 109). Moments later "she had come out and yelled something at Chris . . . a frustrated yell, like 'Come on'" (R. 136 at 109-110). Gruenwald left at approximately 6:30 p.m. (R. 136 at 111). When Gruenwald returned at approximately 1:30 a.m., he noticed nothing unusual except for the broken landing window (R. 136 at 112).

Dr. Edwin Steven Sweeney, M.D., of the State Medical Examiner's Office examined the body of Chris Strieby on July 19, 1988 (R. 136 at 114). Dr. Sweeney confirmed that the cause of death was from a "gunshot wound to the head" (R. 136 at 115). The bullet had entered through Mr. Strieby's mouth and lodged in the second cervical vertebrae (R. 136 at 116, State's Exhibit #13). Dr. Sweeney testified that Mr. Strieby's blood alcohol content "was .25 milligrams percent" (R. 136 at 117).

Following the State's case in chief, the defendant moved for a judgment of acquittal (R. 136 at 165). The motion was denied without prejudice (R. 136 at 168).

Defendant took the stand in her own defense. She testified that she had known Mr. Strieby for approximately three years before they were married on April 15, 1988 (R. 137 at 218). At the time of the marriage, Mr. Strieby was unemployed and had experienced "a falling out with his family" (R. 137 at 220).

In June of 1988, he went to work at his father's welding shop (R. 137 at 223). Although defendant and Mr. Strieby "drank usually every day", when Mr. Strieby became employed at the shop he began to drink more than before (R. 137 at 224).

On July 7, 1988, defendant and Mr. Strieby "got into a heated argument over sex" (R. 137 at 230). Mr. Strieby had indicated that "if he didn't get sex pretty soon, he was going to go someplace else for it" (R. 137 at 229). Approximately 15 to 20 minutes later, after defendant had gone to bed, Mr. Strieby entered the bedroom and attempted to have sex (R. 137 at 230). Defendant "pushed him off the bed, and . . . [he] crawled back downstairs" (R. 137 at 230). Defendant was also mad about a separate incident when Mr. Strieby "had stayed out at that woman's house before when he got drunk . . . [and] had lied about it" (R. 137 at 251).

The next morning, defendant got up and went to work at her job in Grantsville (R. 137 at 231). After work, defendant returned home, did some housework, and began preparing dinner (R. 137 at 232). At approximately 12:30-1:00 p.m., defendant left and went to the welding shop, where she and Mr. Strieby argued (R. 137 at 233). Defendant left the shop and drove to a local club (the Eagles), where she consumed eight drinks, or "about four mini bottles," and was admittedly under the influence of alcohol (R. 137 234, 260). Defendant went to the welding shop at approximately 3:00-3:30 p.m., in order to pick up Mr. Strieby (R. 137 at 234). Observing no one outside, defendant entered the trailer:

I opened the door, and threw the keys at Chris. I was mad at him because of what he had done before. I just threw the keys at Chris, and told him, "Here is the keys to your truck. You don't have to hotwire it. Why don't we go home."

(R. 137 at 235). A heated argument ensued and defendant "tried to slap his face":

He grabbed me by the arm and reached up and grabbed my shirt and twisted it and pushed me to the floor by the fridge.

. . .

Chris held me to the floor, and told me never to try to slap him again. And called me a few more names. He had my shirt all this time bunched like this (Indicating). And then he just let go and let me up. And he sat back down in his chair.

(R. 137 at 235-36). Defendant later indicated that the couple did not fall, "he just put me to the floor . . . put me to the floor" (R. 137 at 254).⁵ Defendant then left with Charlotte

⁵ On cross examination, the following colloquy took place:

Q. And that he pushed you, and you both fell down?

A. We didn't fall. He just put me to the floor (Indicating); put me to the floor.

Q. Do you recall any alcoholic beverages being spilled on the floor and slipping on that?

A. No, I don't

Q. So when you were down on the floor, I don't recall what you said happened. What happened on the floor?

A. He just held me there.

Q. How did he hold you?

A. He still had my shirt (Indicating), and he just held me to the floor. We were verbally talking back and forth.

Q. So he grabbed you by the arm and grabbed your shirt and pushed you to the floor and told you never to hit him again.

A. Yes.

. . .

[Q.] At that time, he let you up, is that correct?

A. Yes.

(R. 137 at 253-55).

Gourley (R. 137 at 238).

When defendant arrived home, she sent Mr. Strieby's nephew to pick up Mr. Strieby (R. 137 at 239). Defendant then opened a beer, and "went upstairs to lay down" (R. 137 at 239). When Mr. Strieby arrived home, another heated physical confrontation ensued (R. 137 at 240). Defendant testified that during a barrage of insults, Mr. Strieby "was pushing and shoving me . . . [a]nd I pushed and shoved him" (R. 137 at 240). As defendant attempted to exit the front door, Mr. Strieby slammed it shut (R. 137 at 241). Defendant then "pushed" Mr. Strieby and ran up the stairs, but he pulled her back down (R. 137 at 241). Defendant then pushed herself back up on the stairs "and kicked at Chris" (R. 137 at 242). She "[p]ushed him up against the wall" (R. 137 at 242), causing Mr. Strieby to lose his balance:

And he just -- he wouldn't stop; pushing and pulling. He had me by my shoulders, and shaking me. I pushed him away, and he'd lose his balance. He slid down the wall once. And when he got up, he grabbed at me. And I kicked him in the groin. I pushed him, and he went into the kitchen.

(R. 137 at 243). Defendant testified that when Mr. Strieby attempted to strike her, she "moved, and he went clear to the stairs with his fist" (R. 137 at 242). She testified that she got away from him a "couple of times", being "faster than he was at the time to get away" (R. 137 at 263). Defendant then pushed Mr. Strieby once again, and "he went into the kitchen . . . all this time telling me he was going to kill me" (R. 137 at 243). Defendant indicated she "got away because he lost his balance a couple of times" (R. 137 at 262-263, 266, 268).

Mr. Strieby broke off the confrontation and went into the kitchen and defendant ran upstairs (R. 137 at 242, 245). According to defendant, Mr. Strieby continued to yell threats and insults (R. 137 at 245). Defendant could not recall where she obtained the weapon, stating only "I know that I had the gun in my hands and was at the top of the stairs when he was rounding the stairs to come up the second flight." (R. 137 at 246). Defendant admitted that she knew the gun was loaded (R. 137 at 271, 273). As Mr. Strieby rounded the corner of the stairs, she fired a single shot, striking him in the face and killing him instantly (R. 137 at 247). Defendant then placed the gun on the bedroom nightstand and went to the neighbors for help (R. 137 at 279).

Dr. Mark Anderson, a physician with the Tooele Valley Hospital, examined the defendant following the incident on July 8, 1988. Dr. Anderson testified that defendant appeared to have several injuries, including what initially appeared to be a cervical fracture (R. 137 at 196). Defendant also had "a swollen left eye, a fresh rug burn of the left elbow, fresh bruising of the upper arm" and an abrasion or bruise on the forehead and neck (R. 137 at 200, 201). Dr. Anderson indicated that the type of injuries sustained by defendant were consistent with either being dragged down steps or with a person falling down and struggling with someone on a kitchen floor (R. 137 at 203, 210).⁶ However,

⁶ Dr. James acknowledged that defendant did not have any bruising of the buttocks, or complain of any new back pain, which would be consistent with someone being dragged down a flight of stairs (R. 137 at 208, 211).

the bruises, with the exception of the hand grasp, were not consistent with a person having been "seriously attacked by a strong individual" (R. 137 at 214).⁷

SUMMARY OF ARGUMENT

The trial court properly denied defendant's motion for judgment of acquittal at the conclusion of the State's case in chief. The requirement to survive such a motion is only that the State have presented sufficient evidence to establish the prima facie elements of a cause of action. Since the absence of self-defense is not a prima facie element of a cause of action, the State was not required, at that juncture, to prove the absence of self-defense beyond a reasonable doubt. The trial court had the option of determining that the State had established the prima facie elements of second degree murder or any of the lesser included offenses of that charge in order to deny the motion.

The verdict reached by the trial court is not clearly erroneous and is supported by the clear weight of the evidence. Since the evidence presented in this case is sufficient to uphold the verdict, it was not error for the trial court to deny the motion for new trial which was based on the same sufficiency argument.

Because defendant did not object at trial to the court's order of restitution, she is precluded from raising that argument on appeal. Even if the issue had been preserved, the

⁷ When cross-examined by the prosecutor, Dr. James testified that the three linear bruises on defendant's arm appeared to be consistent with someone grasping her. He acknowledged that the bruising was as consistent with someone grabbing her arm to restrain her as someone "throwing [her] around" (R. 137 at 214).

trial court did not abuse its discretion in ordering restitution.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL FOLLOWING THE STATE'S CASE IN CHIEF.

At the conclusion of the State's case in chief, the defendant moved for judgment of acquittal, claiming that the State had failed to meet its burden of proof. Defendant specifically argued, and now argues on appeal, that "the State failed to prove in its own case, beyond a reasonable doubt, that Mrs. Strieby [defendant] did not act in self-defense." (R. 136 at 165-168, Brief of Appellant [hereinafter Br. of App.] at 12).

Notably, defendant has erroneously placed the burden of proof for this stage of the proceeding at "beyond a reasonable doubt", when, in fact, the prosecution was only required to establish a prima facie case. A motion for judgment of acquittal in a criminal proceeding is governed by Utah Code Ann. § 77-17-3 (1982) and Utah Code Ann. § 77-35-17(o) (1982). Section 77-17-3 provides; "When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged." Section 77-35-17(o) states:

At the conclusion of the evidence by the prosecution, or at the conclusion of all of the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

(emphasis added). The interplay of those two statutes was explained in State v. Smith, 675 P.2d 521, 524 (Utah 1983). In Smith, the Utah Supreme Court said:

Motions for directed verdicts in criminal proceedings are governed by U.C.A., 1953, § 77-17-3 and Rule 17(o) of the Utah Rules of Criminal Procedure (U.C.A., 1953, § 77-35-17(o)). Section 77-17-3 requires the immediate discharge of a defendant when there is not sufficient evidence to put him to his defense[.]

. . .

This section is founded on the basic concept that a defendant need not adduce any evidence in his defense unless the prosecution first adduces believable evidence of all the elements of the crime charged. Only then should the defendant be put to his proof.

Rule 17(o) of the Utah Rules of Criminal Procedure is not inconsistent with § 77-17-3. Rule 17(o) authorizes the dismissal of an *entire information or indictment, or any count thereof*, either at the end of the State's evidence or at the close of all the evidence[.]

. . .

Rule 17(o) merely recites the traditional rule that a trial judge may dismiss an information or indictment, or any count of an information or indictment, either at the close of the State's evidence or at the conclusion of all evidence. If the State's evidence at the close of its case in chief does not establish a *prima facie* case against defendant, the Court must, as required by Rule 17(o), dismiss the charge. . . .

Smith, 675 P.2d at 524.

In State v. Romero, 554 P.2d 216 (Utah 1976), the Utah Supreme Court stated:

In order to submit a question to the jury it is necessary that the prosecution establish a prima facie case. That is, it is necessary to present some evidence of every element needed to make out a cause of action, and it has long been established that such may be proven by direct or circumstantial evidence. But the evidence required need be only that which is sufficient to conform to the statutory definition of the crime

charged, and the "element of each offense" is defined as (a) conduct, attendant circumstances, or results of conduct; and (b) the requisite mental state.

Romero, 554 P.2d at 217 (emphasis added) (footnotes omitted); see also State v. Noren, 704 P.2d 568, 570 (Utah 1985).

While the State may be required to show some evidence of every element to avoid a directed verdict, it is not required, at that point, to prove an absence of self-defense. In State v. Knoll, 712 P.2d 211, 214 (Utah 1985), the Utah Supreme Court held:

Absence of self-defense is not an element of a homicide offense. As a matter of statutory construction, § 76-5-201 [and §76-5-203] do[] not make absence of self-defense a prima facie element of a homicide crime. Rather, self-defense is a justification for a killing and a "defense to prosecution." §76-2-401; see §76-2-402. Furthermore, appellant's argument would force the prosecution to prove a negative in a homicide offense, a burden the law does not often impose. In short, we hold that the absence of self-defense is not one of the prima facie elements of homicide.

Knoll, 712 P.2d at 214 (emphasis in original). Plainly, the law does not require the State to prove the absence of self-defense in order to survive a motion for directed verdict at the close of the State's case in chief. At that point, the State must only have presented some evidence to establish every element of a cause of action, not have proven beyond a reasonable doubt that the killing was not in self-defense.

The record demonstrates, and defendant does not dispute, that the State presented "some evidence" of every statutory element of manslaughter, a lesser included offense of the charged offense. The State was not required at this stage of

the proceeding to establish the absence of self-defense. Since the State satisfied its requisite burden, the trial court properly denied defendant's motion for judgment of acquittal.

This is even more true because of the fact that this case was tried to the bench instead of to a jury. The trial court had the right, especially sitting without a jury, to consider not only the charged offense but any lesser included offenses in his decision. As the Utah Supreme Court said in State v. Dyer, 671 P.2d 142 (Utah 1983):

This Court has recognized on numerous occasions the prerogative of the trial court to . . . consider lesser included offenses whenever the interest of justice so requires.

Dyer, 671 at 145 (footnote omitted). In the present case, the trial court had the prerogative to consider lesser included offenses in determining whether the State had presented evidence to establish the prima facie elements making out a cause of action.

POINT II

THE EVIDENCE WAS SUFFICIENT TO CONVICT
DEFENDANT OF MANSLAUGHTER.

The issues raised by defendant in Points II and III on appeal are the same for all practical purposes. In Point II, defendant claims that the evidence presented at trial was insufficient to sustain the trial court's verdict of manslaughter. In Point III, defendant claims that the trial court erred by denying a motion for new trial on grounds of insufficient evidence. Therefore, if the evidence was sufficient to support the verdict, then necessarily, the trial court did not abuse its discretion in denying defendant's motion for new trial.

The standard of review in bench trials has recently been clarified in accordance with Utah Rules of Civil Procedure 52(a), as applied to criminal cases by virtue of Utah Code Ann. § 77-35-26(g) (1982). The Utah Supreme Court held in State v. Walker, 743 P.2d 191 (Utah 1987), that, in reviewing an insufficiency of evidence claim, the appellate court must not set aside the lower court's verdict unless it is clearly erroneous. Walker, 743 P.2d at 193. See also State v. Featherson, No. 880091 Slip Op. (Utah, Sept. 29, 1989); State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987). The clearly erroneous standard requires that "if the findings (or the trial court's verdict in a criminal case) are 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, the findings (or verdict) will be set aside." Walker, 743 P.2d at 193. However, as this Court has noted, the application of this standard to bench trials "does not eliminate the traditional deference afforded the fact finder to determine the credibility of witnesses." State v. Wright, 744 P.2d 315, 317 (Utah App. 1987) (citing Utah Rules of Civil Procedure 52(a); State v. Bagley, 681 P.2d 1242, 1244 (Utah 1984) ("it is not our function to determine the credibility of conflicting evidence or the reasonable inference to be drawn therefrom")); see also State v. Watts, 675 P.2d 566 (Utah 1983).

The trial court correctly found defendant guilty of manslaughter, as that finding was sufficiently supported by the evidence. The evidence adduced at trial established each element of the crime, including the absence of self-defense. Utah Code Ann. § 76-5-205 (Supp. 1989) provides in pertinent part:

(1) Criminal homicide constitutes manslaughter if the actor:

(a) recklessly causes the death of another; or

(b) causes the death of another under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse; or

(c) causes the death of another under circumstances where the actor reasonably believes the circumstances provide a legal justification or excuse for his conduct although the conduct is not legally justifiable or excusable under existing circumstances.

(2) Under Subsection (1)(b), emotional disturbance does not include a condition resulting from mental illness as defined in Section 76-2-305.

(3) The reasonableness of an explanation or excuse under Subsection (1)(c), shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

While it is not entirely clear which subsection was used by the trial court to support its decision, defendant does not claim that the State failed to establish any specific statutory element. Defendant's only contention is that the State failed to prove beyond a reasonable doubt the absence of self-defense as required by State v. Knoll, 712 P.2d 211 (Utah 1985).

In Knoll, the Utah Supreme Court held that the "absence of self-defense is not one of the prima facie elements of homicide." Knoll, 712 P.2d at 214. Nonetheless, in conformity with constitutional requirements, if the issue of self-defense is raised, "the prosecution has the burden to prove beyond a reasonable doubt that the killing was not in self-defense." Knoll, 712 P.2d at 214 (citations omitted).

Utah Code Ann. § 76-2-402 (1978) provides that

(1) A person is justified in threatening or using force against another when and to

the extent that he reasonably believes that such force is necessary to defend himself . . . against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself . . . , or to prevent the commission of forcible felony.

(emphasis added). Under this statute, defendant was only justified in using deadly force if Mr. Strieby's attack was imminent and if defendant reasonably believed that deadly force was necessary to prevent death or serious bodily injury to herself. While there was some evidence of self-defense adduced at trial, that defense was disproved, beyond a reasonable doubt, by the clear weight of the evidence to the contrary.

There is little dispute that defendant and Mr. Strieby had battled the night before and earlier in the day of the shooting (R. 136 at 68-70 and St. Exh. #14 at 2). Early in the day of the shooting, defendant had threatened to kill Mr. Strieby, "as soon as she got her hands on a gun" (R. 136 at 79). As to what occurred just prior to the shooting, the trial court had little but the defendant's statement to police and later trial testimony to rely on. There was evidence that what happened happened quickly. Mr. Strieby's nephew testified that he left right around 6:30 p.m. and the call to the sheriff's office was logged at 6:38 p.m. (R. 136 at 110-11 and 13). Prior to the call, Sandy McGanna, a neighbor of the Striebys, had watched defendant walk from her own condominium to McGanna's--a task which took some time (R. 136 at 126-29). The defendant also testified that she had knocked on the door of another neighbor

first but received no answer (St. Exh. #14 at 3). That left little time for the pitched battle which defendant testified occurred. The time span supports the trial court's finding that the argument was "perhaps not of the magnitude as perceived by Mrs. Strieby." (R. 137 at 323).

The trial court's verdict of manslaughter was based primarily on defendant's testimony that Mr. Strieby had broken off any physical confrontation with defendant prior to the time that she ran up the stairs and retrieved the gun, and on the fact that he was so impaired from drinking that she had been able to elude him at least twice during the confrontation (R. 137 at 323). Even accepting defendant's testimony at face value (ignoring the fact that it differed so from her statement given to the police immediately after the shooting), the clear weight of the evidence supports the trial court's verdict. Defendant testified that Mr. Strieby pulled her down the lower flight of stairs, but that she then kicked at him and he lost his balance (R. 137 at 242). He doubled his fist and swung at her, but she moved and he "went clear to the stairs with his fist." (R. 137 at 242). She pushed him again and he went to the kitchen (R. 137 at 242).

She also testified that he was shaking her and she "pushed him away, and he'd lose his balance. He slid down the wall once." (R. 137 at 243). She kicked him in the groin and he went into the kitchen (R. 137 at 243). In the course of her testimony, she said several times that he left her and went into the kitchen (R. 137 at 242, 243, 245 and 267). While he

obviously only went into the kitchen once, it was at that point that Mr. Strieby had ceased any assault on defendant and she had the opportunity to leave the house or to call and summon help (R. 137 at 323-25). She did not take that opportunity, but instead, ran up the stairs and got the gun which she knew was in the bedroom (R. 137 at 246). She also knew that the gun was loaded (R. 137 at 271-73). As the trial court said:

There was no physical evidence that Mrs. Strieby had, other than initially, tried any vigorous efforts to escape the condo, to shout, to holler, to seek the assistance of others. There was no evidence in the record to suggest that she had used objects of furniture or anything else in the house to fend him off or to take any evasive action. But rather that she went up the stairs and got the gun at a time when he wasn't in vigorous, hot pursuit.

(R. 137 at 325).

While defendant may have been justified in pushing and shoving Mr. Strieby in response to his pushing her, the use of a gun is justified only in extreme circumstances. As explained in section 76-2-402, a person is justified in using force against another when she reasonably believes that such force is necessary to defend herself against another's imminent use of unlawful force. The theory of self-defense may have justified defendant striking back if Mr. Strieby struck her or grabbed her arms. However, to justify going upstairs and retrieving a loaded pistol, defendant would have to have reasonably believed that the gun was necessary to prevent imminent death or serious bodily injury to herself. She testified that Mr. Strieby said that he was going to kill her, but that the statement was made as he left

her and went into the kitchen (R. 137 at 243). He did not have a gun, nor did he threaten to get a weapon or gun (R. 137 at 280). Defendant had a route through which to escape after Mr. Strieby went into the kitchen; thus, the trial court was correct in finding that she could not have reasonably believed that shooting Mr. Strieby was necessary to prevent death or serious bodily injury to herself. Leaving the condominium would have prevented any perceived threat from being carried out.

Defendant makes much of the trial court's reference to the cap and the blue plastic cup found near Mr. Strieby's body and claims that the court made up a theory about the cup which, he says, "is not supported by a scintilla of evidence." (Br. of App. at 18). This is not the case. The evidence that a cap and the blue cup, with a wet spot next to it, was presented at trial (R. 136 at 143). Given the defendant's testimony that Mr. Strieby had broken off the confrontation and gone into the kitchen, and that the Striebys had several similar cups, the trial court could reasonably infer that Mr. Strieby had the cup with liquid in it as he walked up the stairs. This further supported the trial court's finding that Mr. Strieby no longer was a physical threat to defendant and the use of deadly force was not justified.

The clear weight of the evidence supported the trial court's verdict. That evidence demonstrated that Mr. Strieby's drinking had impaired him to the point that defendant had been able to avoid his physical threats. It also demonstrated that Mr. Strieby was no longer imminently threatening physical harm to

defendant, but, instead, had gone into the kitchen and poured a drink (whether alcoholic or nonalcoholic is immaterial). This made him less able to carry out his threats (R. 136 at 117). The apparent injuries, which defendant tried to claim at trial were caused by a struggle at the condominium, were observed earlier, after the fight at Mr. Strieby's father's trailer (R. 136 at 75-79, 52-54 and 105). The condominium showed no signs of the struggle which defendant claimed had occurred (R. 136 at 24 and 112). Defendant also testified of numerous previous fights between Mr. Strieby and herself and that all of these fights had been settled far short of using deadly force (R. 137 at 257-58). All of this evidence and reasonable inferences therefrom support the verdict and make it clear that no mistake has been made in this verdict.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
WHEN IT DENIED DEFENDANT'S MOTION FOR NEW
TRIAL.

Defendant claims that the trial court erred in not granting her motion for new trial based on her claim that the evidence was insufficient to support the verdict. Rule 24 of the Utah Rules of Criminal Procedure provides for a new trial "in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party." Utah Code Ann. § 77-35-24(a) (1982). The decision to grant or deny a motion for new trial in a criminal proceeding is left to the sound discretion of the trial court, which should not be disturbed in the absence of abuse of such discretion. See State

v. Lairby, 699 P.2d 1187 (Utah 1984) (overruled on other grounds in State v. Ossana, 739 P.2d 628 (Utah 1987)); State v. Bundy, 589 P.2d 760 (Utah 1978). Because the evidence was sufficient to support the verdict, as argued in point I above, this issue is without merit.

POINT IV

THE TRIAL COURT'S ORDER OF RESTITUTION WAS PROPER IN THIS MATTER.

In her final argument, defendant contends that the trial court erred by ordering restitution pursuant to Utah Code Ann. § 76-3-201 (Supp. 1989). Utah Code Ann. § 76-3-201(3)(a)(i) provides in pertinent part:

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.

While the defendant may have argued against the imposition of restitution during the sentencing proceeding, no formal objection to the court's order of restitution was made.⁸

⁸ Notably, when the court ordered restitution it did not fix the amount or the potential beneficiaries, but left that determination to the Board of Pardons at the time of defendant's release:

With respect to the issue of restitution, the Court will provide in the order that she

Therefore, defendant has waived her right to challenge that order. See State v. Snyder, 747 P.2d 417, 421 (Utah 1987) ("Defendant lodged no objection to the imposition, amount, or distribution of the restitution ordered. Nor did he request a hearing on the issue. . . . He thus waived the right he had to challenge the order of restitution.").

If this Court were to overlook the fact that defendant did not preserve this issue for appeal, it is clear that the order made in this case was appropriate. Section 76-3-201 allows for the discretion of the trial court in ordering restitution. As the Supreme Court said in Snyder:

It lies within the discretion of the trial court to impose sentence or a combination of sentences which may include the payment of a fine, restitution, probation, or imprisonment. However, upon conviction of a crime which has resulted in pecuniary damages, in addition to any other sentence imposed, the trial court is statutorily mandated to order the payment of restitution unless the court finds that restitution is inappropriate.

Snyder, 747 P.2d at 420 (emphasis added) (footnote omitted).

Thus, the trial court was obligated to assess restitution unless

⁸ Cont.

pay such restitution as may be fixed and assessed by the board at time of release. And I'll leave that open, leave it up to them to hold a restitution hearing at the time of release.

(R. 137 at 343). While the trial court may have erred by not making part of the record the reason for restitution, under the circumstances, the defendant was not detrimentally affected by the court's action, and any error would be harmless. See Rule 30, Utah Rules of Criminal Procedure (Utah Code Ann. § 77-35-30 (1982)) ("any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded"); State v. Snyder, 747 P.2d 417, 421 (Utah 1987).

The trial court did err by not giving its reasons for ordering restitution but that error was not prejudicial and does not require reversal. In Snyder, the court said:

Subsection 76-3-201(3)(a) was amended in 1983 to require that trial courts make the reasons for restitution orders part of their written orders. Thus, in this case, it was error for the trial court not to set forth in writing its reasons for ordering restitution. However, the record reflects that the error was not prejudicial.

Snyder, 747 P.2d at 421 (footnotes omitted). In Snyder, the court found that defendant had not lodged an objection to the restitution ordered, or requested a restitution hearing. He had argued that being placed on probation "would enhance his ability to make restitution." Snyder, 747 P.2d at 421. The court found that there was evidence that Snyder had assets from which restitution could be made and that Snyder's contention that restitution for victims not named in the information was inappropriate was without merit. Snyder, 747 at 421. As the court reiterated, restitution is to be awarded to any victim who has suffered pecuniary damages as a result of defendant's criminal activities, Utah Code Ann. § 76-3-201(4); Snyder, 747 P.2d at 421. Pecuniary damages are those damages which a person could recover from defendant in a civil action arising out of the facts of the criminal activity, Utah Code Ann. § 76-3-201(4).

As in the Snyder case, the restitution order in this case was appropriate. The requested restitution is for funeral expenses and for counseling for Mr. Strieby's daughter who was in therapy for children of homicide victims (R. 137 at 334-35). These expenses would be recoverable in a civil action against

defendant for the wrongful death of Mr. Strieby. While defendant would be unemployed during her incarceration, evidence at trial and the presentence report showed that she had held employment consistently in the past. The trial court could have reasonably assumed that she would be employed in future after her parole. The court fashioned a restitution order which allowed for a review of her situation at the time of defendant's release from prison. The order was similar to the one approved by the Supreme Court in Snyder, about which the court said:

The flexibility in the order which permits the individual amounts of restitution to be determined either by agreement, by litigation, or by order of the court comports with good sentencing practice and protects the interests of all concerned. The order does not exceed the authority prescribed by law, nor does it constitute an abuse of the trial court's discretion. Consequently, we do not disturb it.

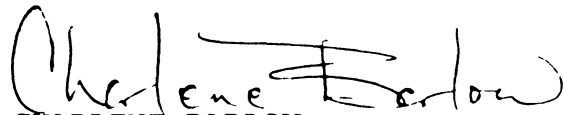
Snyder, 747 P.2d at 422. The restitution order in the present case provides flexibility to tailor the order to defendant's circumstances while protecting the rights of those victims who suffered pecuniary damages as a result of defendant's criminal activities. The order does not exceed the court's authority nor is it an abuse of the court's discretion; this Court should affirm the order.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm defendant's conviction.

RESPECTFULLY submitted this 2^d day of November, 1989.

R. PAUL VAN DAM
Attorney General


CHARLENE BARLOW
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Neil A. Kaplan and Anneli R. Smith, Attorneys for Defendant, 200 American Savings Plaza, 77 West 200 South, Salt Lake City, Utah 84101, this 2^d day of November, 1989.

