

1979

State of Utah v. Eloy Paul Lopez : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff-Respondent, :
 :
-v- :
 :
ELOY PAUL LOPEZ, : Case No. 16532
Defendant-Appellant. :

BRIEF OF APPELLANT

An appeal by the defendant, ELOY PAUL LOPEZ, from the conviction and judgment of Murder in the Second Degree, in the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah, the Honorable Bryant H. Croft, Judge presiding.

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STATEMENT OF THE NATURE OF THE CASE

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DISPOSITION IN THE LOWER COURT

After trial and conviction by jury, the Court entered judgment of guilty for the the crime of Murder in the Second Degree against the appellant and subsequently committed the appellant to the Utah State Prsion for the term as provided by Law, of Five Years to Life.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the case dismissed, or in the alternative, to have the case remanded to the Third Judicial

District Court for a new trial.

STATEMENT OF THE FACTS

On November 10, 1977, the appellant and one Lynn Oliver had a fight in the Drift Inn Bar in Lark, Utah. The fight continued for some time inside the bar at which point Lynn Oliver appeared to be getting the best of the appellant. The bar tender, Meryl Watson, put both combatants outside of the bar to continue the fight. (R. 246).

The fight continued outside the back door of the Drift Inn Bar with several observers peering through the back window of the establishment. One of the observers, Kimberly Horrocks, went out of the front door of the establishment while the fight was going on in the back parking lot.

Miss Horrocks testified that after leaving through the front door, she went around the outside of the building in order to be able to more closely observe the fight. Miss Horrocks testified that she saw Lynn Oliver fall down. She also testified that when after Lynn Oliver was on the ground, she saw the appellant walk over to him and kick him. (R. 363). Mr. Oliver rolled over according to her testimony, and the appellant kicked him again.

Other observers testified that they witnessed the victim, Lynn Oliver, on the ground and that they observed the appellant holding the victim in his arms and giving him mouth to mouth resuscitation. (R. 297). Paramedics were dispatched to the location of the fight. Subsequently, they performed

first aid measures on Lynn Oliver, and subsequently transported him to the hospital. (R. 405).

After Lynn Oliver's arrival at the hospital he was treated by Dr. John Sanders. Dr. Sanders testified that he treated the victim, Lynn Oliver, after his arrival at the hospital. He testified that he attempted to treat Lynn Oliver's apparent brain damage through the use of chemicals, but that he felt that the victim had no chance for neurological recovery. (R. 463). The doctor further testified that after two EEG's had been performed showing no brain activity that Lynn Oliver was neurologically dead and subsequently the machines maintaining life support of the victim were turned off. Subsequently, all life functions ceased.

Deputy State Medical Examiner, Terry H. Rich, testified that he was the pathologist who performed the autopsy on Lynn Oliver on November 13, 1977. He testified that he observed multiple abrasions on the head and face of the body of Lynn Oliver and that he observed two fractures of the skull and that underneath the skull he observed a significant subdural hemorrhage between the bone on top of the brain tissue. (R. 425). Dr. Rich testified that the subdural hemorrhaging would have been the cause of the death of Lynn Oliver. (R. 426).

Dr. Rich further testified that the nature of the fractures was such that they would have to have been caused by separate forces of some sort. (R. 428). Dr. Rich testified that the nature of the injuries was consistent with the victim having

been kicked twice; once from one direction, from the left side of his head, and once on the forehead, by a boot. (R. 429).

The appellant testified in his own behalf that he was, in fact, involved in a fight with the victim but denied having kicked the victim while the victim layed on the ground. The appellant stated that on the 10th day of November, 1977, that he was drinking with the victim when they became involved in a fight. (R. 498). The appellant and the victim struggled inside the bar for some time after which Meryl Watson threw them both outside. (R. 501). After they were outside, both parties swung at one another, drunkenly, both of them fell down. The victim then started to shake and went into convulsions. The appellant took out the victim's false teeth and gave him mouth to mouth resuscitation. (R. 505). Appellant denied having at any time kicked the victim in the head. (R. 519).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF ANOTHER CRIME IN VIOLATION OF RULE 55 OF THE UTAH RULES OF EVIDENCE.

The appellant testified in his own behalf that the death of Lynn Oliver occurred during mutual combat between the appellant and Lynn Oliver. The appellant testified that the fight on the 10th day of November, 1977, arose out of an argument over a fight that had occurred approximately two weeks earlier between the appellant and a third individual named "Donny". (R. 492).

On cross examination of the appellant, counsel for the respondent sought to develop the details of that earlier fight. Counsel asked whether, on that earlier occasion, he had kicked Donny in the head while Donny lay on the ground. Counsel for appellant objected to this question and moved for a mistrial, which motions were denied and the appellant's answer of "no" was allowed to stand. (R. 518).

In rebuttal, the respondent called to the witness stand Janice Ortega, who testified, over appellant's objection, that on the earlier occasion of the fight between appellant and "Donny" that she had observed the appellant kick "Donny" while he lay on the ground. (R. 556). Counsel made repeated objections to the testimony including a motion for a mistrial, (R. 557), but the motions were denied and the testimony of the details of the earlier altercation were admitted into evidence. Appellant subsequently moved for a new trial which motion was denied. (R. 211, 217).

The effect of the testimony is clear. The respondent had earlier introduced the testimony of Kimberly Horrocks that she witnessed the appellant kicking Lynn Oliver in the head while he lay on the ground. The appellant denied that he kicked Lynn Oliver. (R. 518).

Respondent introduced evidence of another criminal act in order to discredit the appellant generally as well as to impeach appellant's testimony that he did not kick Lynn Oliver on the occasion of which the instant charges arose. The earlier alleged incident of kicking was used to prove similar conduct

on another occasion. In addition, the prejudicial effect of such testimony is apparent.

Rule 55 of the Utah Rules of Evidence makes evidence of other crimes generally inadmissible. The substance of Rule 55 is as follows:

Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48 such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity. (Rule 55, Utah Rules of Evidence.)

The provisions of Rule 55 are taken directly from the Uniform Rules of Evidence (Rule 55) and are substantially similar to Rule 404(b) of the Federal Rules of Evidence. While the Utah Rules of Evidence became effective in 1971, the substance of Rule 55 had been in effect some time before that, since the Utah Supreme Court expressly adopted a similar rule promulgated by the American Law Institute in its Model Code of Evidence in the case of State v. Scott, 175 P.2d 1016 (1947).

The reasons for the general inadmissibility of prior bad acts have been widely recognized by legal scholars. As Professor Norman Garland said in an article entitled Impeachment Through Proof of Prior Bad Acts and Prior Convictions, prepared for the National College of Criminal Defense Lawyers and Public Defenders, June, 1978:

Evidence of character in any form, whether reputation, opinion from observation, or specific acts will not

generally be received to prove that the person whose character is sought to be shown engaged in certain conduct, or did so with a given intent on a particular occasion. The reason for this rule is that when character is used for this purpose it is not essential, as it is when character is in issue, and generally it comes with too much dangerous baggage of prejudice, distraction from the issues, time consumption, and hazards of surprise. This long established rule thus forbids the prosecution, unless and until the accused gives evidence of good character, to introduce initially evidence of bad character of the accused. It is not irrelevant, but in the setting of jury trial the danger of prejudice outweighs the probative value. Bad character and prior bad acts may not be shown for proof of action in conformity therewith.

McCormick is in accord:

The long-established rule, accordingly, forbids the prosecution, unless and until the accused gives evidence of his good character, to introduce initially evidence of the bad character of the accused. It is not irrelevant, but in the setting of jury trial the danger of prejudice outweighs the probative value.

This danger is at its highest when character is shown by other criminal acts, and the rule about the proof of other crimes is but an application of the wider prohibition against the initial introduction by the prosecution of evidence of bad character. The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character.

However, courts have long accepted, and Rule 55 of the Utah Rules of Evidence provide for, exceptions to the inadmissibility of prior criminal or civil wrongs generally. Rule 55 lists the exceptions recognized in this jurisdiction: "absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity".

The question before this Court is quite simply: Which of the exceptions set forth above could possibly accommodate the admission of testimony about the earlier altercation between the appellant and the victim? The evidence belies any contention that absence of mistake or accident could be made. Prior fights or arguments frequently relate to motive in homicide cases. (See People v. Thiede, 11 Utah 281, 39 P. 837 (1895)).

However, there is no contention in this case that there was "bad blood" between the victim and the appellant. To the contrary, the record is replete with evidence that the two combatants were friends. It is uncontroverted that on the evening in question contact between the victim and the appellant began as a few drinks together as friends. The appellant testified that he regarded the victim as a friend. (R. 507). Immediately after the victim lapsed into convulsion the appellant gave mouth-to-mouth resuscitation in a futile attempt to save the victim's life. (R. 509). There was no contention by the prosecution that the earlier events constituted a motive for intentional killing, and the facts do not support such a contention.

The exceptions of motive, opportunity, intent, preparation, plan, knowledge and identity are all not applicable in this case. The evidence before this Court and jury as the appellant was asked about the details of the previous fight obviated the necessity for further inquiry into the events.

The true purpose underlying the respondents's delving into this aspect of the earlier fight is clear. The impact upon

the jury of showing that the appellant had kicked another person on another occasion would be to buttress directly the respondent's contention that the appellant kicked the victim on this occasion. It is precisely this type of inference which is unacceptable under Rule 55.

The admission on rebuttal of the testimony of Janice Ortega was nothing more than a thinly disguised attempt to show that appellant had a propensity for violent criminal acts, and was prejudicial to him. As the Court stated in State v. Green, 578 P.2d 512 (Utah 1978):

. . . in the interest of justice the defendant is entitled to be tried on the charge against him, and without having any prejudice aroused by attempting to disgrace him, or show a disposition to commit crime. (578 P. 2d at 513-514).

The effect of such evidence as was here introduced was to inflame and prejudice the jury and to deny appellant a fair trial.

The Utah Supreme Court has repeatedly held that pursuit of such collateral issues had no legitimate purpose and was prejudicial as well. In State v. Dickson, 12 Utah (2d) 8, 361 P.2d 412 (1961), the Court reversed defendant's conviction of robbery. The Court indicated that allowing cross-examination of defendant as to details of a prior felony conviction was reversible error, but apparently based its reversal on a "matter of graver importance". During cross-examination of defendant, the prosecutor was allowed to elicit testimony of a "disturbance" in Texas, where defendant had been shot, and later charged, but not tried, on the offense of being an accessory to a robbery. The Court found the Texas incident to be

irrelevant to modus operandi.

. . . the Texas incident would have no legitimate probative value as to defendant's complicity in the robbery charged here. It's only effect would be to cast aspersions upon the defendant and to imply that because he was involved in the Texas trouble he is a person of evil character who would be likely to commit such a crime as here charged. The very purpose of excluding such evidence is to prevent the prosecution from smearing an accused by showing a bad reputation and relying on that for a conviction, rather than being required to produce adequate proof of the crime in question. (361 P.2d at 412).

The impact of the evidence of the earlier fight was precisely the same as the evidence of unrelated crime in State v. Kazda, 14 Utah (2d) 266, 382 P.2d 407 (1963):

It implied that the defendant was implicated in other crimes, none of them proven, and could have no other effect than to degrade the defendant and give to the jury the impression that he had a propensity for crime. It is true that the defendant admitted prior felony convictions, but 'we cannot say with any degree of assurance that there would not have been a different result' in the absence of such testimony. (382 P.2d at 409 and quoting Dickson, supra.)

Nor can it be claimed that the appellant somehow opened up this additional, unrelated area by taking the witness stand. While it was necessary to set the fight that resulted in the death of Lynn Oliver in context, inquiry into irrelevant details had no legitimate purpose and had no direct bearing either on the State's theory of the case or on the defense presented by the defendant.

State v. Putzell, 40 Wash. 2d 174, 242 P.2d 180 (1952) is of interest, there defendant was convicted of first degree murder. Defendant, in addition to pleading not guilty, entered

a plea of insanity or mental irresponsibility. The evidence showed that defendant entered a tavern, approached deceased and fired several shots, one of which hit deceased. Deceased then ran outside, got in a cab, and stated he wanted to go to the hospital. Defendant followed deceased to the cab, and pulled him from it. Defendant then fired three or four more shots into deceased, as he lie on his back. A police officer arrived and disarmed defendant. Defendant stated to the officer:

"Leave me alone. I have been after this guy for a long time and I'm going to get him."
(242 P.2d at 182).

At the trial, defendant testified in his own behalf. He stated that some two years before the homicide, deceased had assaulted him without provocation, and that deceased had struck him on the head with a fire hose nozzle. Defendant stated that as a result of this assault, he was unconscious for a period of some thirteen hours; that surgery was required, in which pieces of skull were removed; that he had become extremely nervous and unable to sleep; that he suffered blackouts, fear of busses and planes; and that his head felt as though ants were crawling in it and an iron band was exerting pressure on it.

During cross-examination of defendant, he denied that he had carried a gun on the night of the assault two years before the homicide. The state rebutted over defendant's objection with two witnesses who testified that while defendant had been unconscious, they had removed a pistol and knife from his pocket.

The trial court held that the evidence was proper rebuttal to defendant's testimony that he was a peaceful, lawabiding citizen, and that it was not impeaching on a collateral matter.

The Supreme Court of Washington reversed. The Court noted that defendant did not deny the shooting, and that his main defense was lack of mental responsibility, caused by deceased's previous aggressive attack. The Court recognized that it was proper for the State to show that defendant, not deceased, had been the aggressor, but that the evidence which the State had presented on that issue was not probative of it.

". . . such testimony was not relevant or material as to the issue of whether or not appellant was the aggressor, and tended to invite the jury to guess, speculate and conjecture." (242 P.2d at 185).

As to whether the evidence was proper rebuttal to defendant's testimony of his lawabiding nature, the Court noted that it was defendant who had raised the issue initially, but held nevertheless that the State could not rebut defendant's testimony by showing specific acts of misconduct, stating:

"No rule permits the general character of the defendant, even when directly put in issue, to be impeached by showing the commission by him of a specific crime, other than the one for which he is on trial." (242 P.2d at 185).

A fortiori, when the character of a defendant is not in issue, it is improper to attempt to show his bad character by specific acts.

The Court in Putzell, supra, also held the matter to be collateral and therefore inadmissible to impeach defendant's testimony.

Finally, (and perhaps most significantly), the Court

stated:

"Conceding, for the sake of argument, that the rebuttal testimony in question might have been material; still it should not have been admitted because its inflammatory nature so far outweighed any materiality it might have had as to be prejudicial. Here was a man being tried on a charge of first degree murder. His defense was that he was mentally irresponsible as the result of a prior unprovoked assault on him by the deceased, and in which occurrence he was not the aggressor. The state, to rebut that contention, introduced evidence of finding a gun and a knife in his pocket. The purpose of that testimony was to portray him as a vicious, quarrelsome man. The very inflammatory nature of this testimony leaves no margin for speculation as to whether or not the jury was swayed by it." (242 P.2d at 186).

The appellant submits that the purpose of Janice Ortega's testimony was identical to the reason set forth in Putzell, supra.

There is one other disturbing aspect of this case.

Even if one assumes, arguendo, that the incident was in some way relevant (which appellant does not concede), whatever minimal probative value it might have had was greatly outweighed by its overwhelming potential of creating undue prejudice. The purpose of introducing the incident was to mislead the jury to the conclusion that appellant was an evil or bad person, one who is quarrelsome and likely to resort to deadly weapons without justification.

By eliciting the testimony the prosecution misled and confused the jury beyond the issue of appellant's character. The introduction of the testimony was desirable to the prosecution not because it shed light directly on the death of the victim in this case, but because it put before the jury damaging and prejudicial

information about the defendant's character.

It is precisely this type of information that the Rules of Evidence seek to avoid. Rule 45 states:

" . . . the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will . . . (b) create substantial danger of undue prejudice or of confusing the jury, . . . " (Rule 45, Utah Rules of Evidence).

The questions and rebuttal testimony should have been excluded because they did "create substantial danger of undue prejudice", and should have been excluded by the trial court judge.

Under Rule 45 the trial court's failure to exclude such evidence was an abuse of discretion and reversible error.

The admission of the evidence also violated Rule 47, which allows proof of character traits, when relevant, pursuant to Rule 46, except

" . . . that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the conduct bad shall be inadmissible, and (b) in a criminal action evidence of an accused's character . . . (ii) if offered by the prosecution to prove his guilt, may be admitted only after the accused has introduced evidence of his good character."

The admission of the evidence violated Rule 47(a), since a specific instance of conduct was admitted, and it was not a conviction of a crime. Rule 47(b)(ii) was also violated, since the appellant did not introduce "evidence of his good character".

In short, there is simply no justification for the admission of the evidence of the details of an earlier fight

with another individual. In addition the evidence regarding the kicking of a third party on another occasion was prejudicial and warrants reversal of the conviction of the appellant in this case.

POINT II

THE COURT FAILED TO PROPERLY INSTRUCT THE JURY
ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER.

The appellant, ELOY PAUL LOPEZ, was charged with the offense of Murder in the Second Degree in violation of Section 76-5-203(b) and (c) Utah Code Annotated (1953 as amended). (R. 28). The State alleged the following alternative theories for a Second Degree Murder charge, that either appellant under:

" . . . Subsection (b) intending to cause serious bodily injury to Lynn Oliver, he committed an act clearly dangerous to human life that caused the death of Lynn Oliver"

or

" . . . Subsection (c) acting under circumstances evidencing a depraved indifference to human life, he recklessly engaged in conduct which created a great risk of death to Lynn Oliver and thereby caused the death of Lynn Oliver."

Both of these theories were submitted to the jury by the Court in its instructions. (R. 154).

The appellant requested instructions on the lesser included offense of Manslaughter under §76-5-205 Utah Code Annotated (1953 as amended). (R. 90). The appellant submitted the theory of Manslaughter as a lesser included offense under three alternative theories. (R. 90). That appellant caused the death of Lynn Oliver

under one of the following circumstances:

A. That the appellant recklessly caused the death of Lynn Oliver.¹

B. That the appellant caused the death of Lynn Oliver under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse;² or

C. That the appellant caused the death of Lynn Oliver under circumstances where appellant reasonably believed the circumstances provided a moral or legal justification or extenuation for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.³

The trial court refused to submit appellant's requested instruction Number 3 on the alternative theories B and C of Manslaughter to the jury. (R. 158). And appellant took proper exception to the Court's failure to so instruct.⁴

-
1. Section 76-5-205(a) Utah Code Annotated (1953 as amended).
 2. Section 76-5-205(b) Utah Code Annotated (1953 as amended).
 3. Section 76-5-205(c) Utah Code Annotated (1953 as amended).
 4. Counsel for appellant requested both Instructions 3 and 1 in writing and took exception to the trial court's failure to give such request to the jury, properly preserving this issue on appeal. Utah Rules of Civil Procedure, Rule 51. State v. Erickson, Utah, 568 P.2d 750 (1977); State v. Bell, 563 P.2d 186 (1977); and State v. Gleason, 17 U.2d 150, 405 P.2d 793 (1965). Accord: Rules of Practice in the District Courts, Rule 5.4.

A. THE DEFENDANT IN A CRIMINAL CASE HAS A RIGHT TO SUBMIT HIS THEORY OF THE CASE TO THE JURY IN THE INSTRUCTIONS.

It has long been the law in the State of Utah, that an accused in a criminal action has a right to submit to the jury his theory of the case, and that such theory when properly requested should be given to the jury in the form of written instructions. State v. Stenbeck, 78 U. 350, 2 P.2d 1050 (1931). In Utah this right allows for the presentation of instructions on all defenses and theories, including lesser included offenses, when such are properly requested by the accused. State v. Gillian, 23 Utah 372, 374, 463 P.2d 811 (1970); State v. Mitcheson, Utah, 560 P.2d 1120 (1977).

An accused may make the decision as a matter of trial strategy to go "for broke" and decline to request instructions on lesser included offense if his theory of defense so dictates. State v. Mora, Utah, 558 P.2d 1335, 1337 (1977); State v. Gellatly, 22 U.2d 149, 152, 449 P.2d 993 (1969); State v. Valdez, 79 U.2d 426, 428, 432 P.2d 53 (1967); State v. Mitchell, 3 U.2d 70, 278 P.2d 618 (1955). However, when the accused as his theory of the case requests instructions on lesser included offenses and is willing to submit his guilt or innocence to the jury on that theory, the trial court as a general rule is duty bound to submit these alternatives to the trier of the fact. State v. Gillian, 23 U.2d 374, 375, 463 P.2d 811 (1970).

When the theory of defense embraces an argument, in effect in mitigation, that he is guilty of not the crime as

charged in the Information but some lesser offense the teachings of Gillian yet apply. On this point the Gillian court stated:

One of the fundamental principles to the submission of issues to juries is that where the parties so request they are entitled to have instruction given on their theory of the case; and this includes on lesser offenses if any reasonable view of the evidence would support such a verdict. (State v. Gillian, supra, 23 U.2d at 374).

In Gillian this court pointed out the reasons for this rule and the instant case illustrates the soundness of such a rule. This court said it should not be the prerogative of the trial court to direct the jury as to what degree of crime they may find a defendant guilty or to direct them that they must find him not guilty if they do not find him guilty of the greater offense. To allow this permits the court to be a judge of the facts and to in effect direct a verdict on the lesser included offenses. Such a procedure violates the historical spirit as well as letter of our system of jury trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 12 of the Constitution of Utah. State v. Ferguson, 74 Utah 263, 279 P.2d (1929) (Straup, J. concurring). See also United States v. Skinner, 437 F.2d 164, 165 (5th Cir. 1971).

B. MANSLAUGHTER IS A LESSER AND INCLUDED OFFENSE OF MURDER IN THE SECOND DEGREE.

The test most recently given to determine if one offense is a lesser included offense of another is that found in the recently revised Utah Criminal Code. Utah Code Annotated §76-1-402(3) (1953 as amended) provides in pertinent part:

A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
- (c) It is specifically designated by a statute as a lesser included offense.⁵

The process by which such a determination is made was described in

State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934):

The only way this matter may be determined is by discovering all of the elements required by the respective sections, comparing them and by a process of inclusion and exclusion, determine those common and those not common, and, if the greater offense includes all legal and factual elements, it may safely be said that the greater includes the lesser, if, however, the lesser offense requires the inclusion of some necessary element or elements in order to cover the completed offense, not so included in the greater offense, then it may be safely said that the lesser is not necessarily included in the greater. (33 P.2d at 645).

C. WHEN MUST THE TRIAL COURT INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES.

Conceding that Manslaughter is a lesser included offense of Murder in the Second Degree under Utah's statutes, the issue

5. This statute was recently interpreted in State v. Lloyd, Utah 568 P.2d 357 (1977) and its companion case, State v. Cornish, Utah, 568 P.2d (1977) wherein this Court held that the Utah joyriding statute is a lesser included offense of theft of an operable motor vehicle.

then becomes when must the trial court instruct the jury on such a lesser included offense.

The need that such an instruction be given has been ruled to be a statutory requirement and is found in Utah Code Annotated §77-33-6 (1953 as amended), which states:

The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense.

This provision was expounded upon by the legislature in the 1973 Criminal Code Revision in §76-1-402(4) which provides:

The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. (Emphasis Supplied).

The foregoing provision, as this Court noted, codifies prior existing common law principles dating back to territorial times in Utah. People v. Robinson, 6 U. 101, 21 P.403 (1889); State v. Bender, Utah, 581 P.2d 1019 (1978).

In State v. Bartias, 91 Utah 574, 65 P.2d 1130 (1937), this Court noted that the failure to give an instruction on lesser included offenses when requested " . . . clashes with two fundamental rules of trial in criminal cases: It has the effect of the court weighing the evidence and, in effect, limiting the jury to a consideration of only part of the evidence (the defendant's); and it, in effect, casts upon the accused the burden of proving his innocence or justification." (65 P.2d at 1132).

When the accused requests a lesser included instruction there should exist a presumption that the requested instruction be given.⁶ Such is the tenor of this Court's discussions in the past. In State v. Hyams, 64 U. 285, 230 P.2d 349 (1924), it was stated:

It is, however, always a delicate matter for a trial court to withhold from the jury the right to find the accused guilty of a lesser or included offense, and determine the question of the state of the evidence as matter of law. That should be done only in very clear cases. (64 U.2 at 287)
Accord: State v. Bartias, 91 U. 574, 580, 65 P.2d 1130 (1937). (Emphasis Supplied).

In recent years this Court has endeavored to set specific guidelines providing for the submission of lesser included offenses when requested.

The statutory necessity of instructing a jury on a lesser included offense was described in State v. Dougherty, Utah 550 P.2d 175 (1976). This Court cited Lisby v. State, 83 Nev. 183, 414 P.2d 592 (1966), which followed a provision similar to Utah Code Annotated §77-33-6 (1953). Describing the holding of the Nevada Court this Court said:

6. This seems to be the feeling of the court in State v. Gillian, supra, 23 U. 2d at 376 wherein it is said:

The usual rule on an appeal in which the challenge is to the sufficiency of the evidence to support the verdict, is that we review the record in the light favorable to the jury's verdict. However, in this situation where the question raised relates to the refusal to submit included offenses, it is our duty to survey the whole evidence and the inferences naturally to be deduced therefrom to see whether there is any reasonable basis therein which would support a conviction of the lesser offenses.

The Court discussed three situations in which the problem of lesser included offenses are frequently encountered. First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree, but would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory.

Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for any intermediate verdict; or where the elements of the offenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.

Third, is an intermediate situation. One where the elements of the greater offense include all elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser included offense. In such a situation instructions on the lesser included offense may be given, because all elements of the lesser offense have been given. However, such an instruction may properly be refused if the prosecution has met its burden of proof on the greater offense, and there is no evidence tending to reduce the greater offense. The court concluded by stating that if there be any evidence, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lesser included offense, the court must, if requested, give an appropriate instruction. (550 P.2d at 176-177).⁷

The question that arises then when lesser included instructions are requested is: was there ". . . any evidence,

7. State v. Dougherty, supra, has been followed in State v. Pierre, Utah 572 P.2d 1338, 1355 (1977), and State v. Bell, 563 P.2d 186, 188 (1977).

however slight, on any reasonable theory under which the defendant might be convicted of the lesser (and) included offense . . . " of manslaughter. State v. Dougherty, supra, at 177; State v. Bell, Utah, 563 P.2d 186, 188 (1977) (Justice Wilkins, concurring). If there was such evidence, then the instructions were properly requested and should have been submitted to the jury for consideration.

In the instant case appellant conceded the mutual combat between himself and the deceased. (R. 481 et seq.). The evidence adduced throughout the trial indicated a barroom brawl between the two participants. Part and parcel of appellant's defense was that due to the alcohol consumed by he and Oliver, that the fight just escalated. The testimony was uncontradicted that at least at one point Oliver was getting the best of appellant.

The trial court although submitting the alternative theories of Second Degree Murder offered by the State refused to provide the jury with the opportunity to apply the facts adduced to the alternative Manslaughter theories offered by appellant.

It was for the jury's decision to decide whether or not for example the appellant's actions, although not legally justified under a theory of self-defense, rose to the level of manslaughter, since appellant reasonably believed his actions were justified. This theory was offered in appellant's proposed Instruction No. 3. (R. 90). It was conceivable that the jury could have found the appellant acted intentionally or knowingly or with a depraved indifference to human life, but reasonably

believed his actions justified under the Manslaughter alternative theory. The jury also might have conceded the State's theory, but found, due to the alcohol consumed and other factors involved, that the appellant was acting under extreme mental or emotional disturbance for which his explanation or excuse was reasonable.

Under the confused circumstances of this barroom confrontation, it was for the jury to determine on all the evidence and proper instruction of alternative theory the degree of offense, if any, committed. In review of the decision of the trial court, this Court must bear in mind that the circumstances of this case provide a classic example of the escalation of a mutual combat situation where one of the participants over-reacts and a death results. Remembering that the deceased was a lifelong friend of appellant's and their argument resulted in mutual combative fist-cuffs, this circumstance when considered with the evidence that both participants were acting under the influence, at least partially of alcohol, require all alternative theories of Manslaughter to be available to the trier of fact. A clear reading of the facts in the instant case can only lead this Court to conclude that the trial court erred in submitting the case to the jury on the alternative theories of Manslaughter propounded by appellant and refused by the trial court.

POINT III

THE COURT FAILED TO ADEQUATELY INSTRUCT THE JURY
ON IMPEACHMENT EVIDENCE OFFERED BY THE APPELLANT.

In appellant's proposed Instruction Number 3 (R. 112)

the appellant requested an instruction that a witness's testimony may be impeached and the credibility of the witness thus affected by " . . . his character for honesty or veracity or their opposites." The trial court failed to so instruct the jury and proper exception was taken thereto by appellant (Tr. at 34).

The State's chief witness at trial was Kim Horrocks, who was the only witness who testified that the appellant kicked Oliver in the head. At trial appellant called John Watson and Elmer Martinez to testify concerning Horrocks' character in the community for truth and veracity vel non. This evidence was offered to show her lack of character, since the credibility of Horrocks was of primary importance during the trial. Rule 22 of the Utah Rules of Evidence provides in pertinent part that:

As affecting the credibility of a witness . . .
(c) evidence of traits of his character other than truth, honesty, or integrity or their opposites, shall be inadmissible. . .

It was upon this basis that the two defense witnesses were offered and their testimony admitted by the Court. However, in the Court's instruction Number 3 (R. at 146) there is not indication of what effect or weight such evidence should bear on the jury's deliberations. The effect of such an omission by the trial court left the jury with no standard to determine the purpose or weight of such evidence. The failure of the Court to guide the jury in weighing the credibility of the defense witnesses was error and hence requires reversal of appellant's conviction.

POINT IV

THE COURT ERRED IN REFUSING TO ALLOW DEFENSE WITNESS JOHN WATSON TO GIVE HIS OPINION AS TO THE CHARACTER OF KIM HORROCKS FOR TRUTH OR VERACITY.

As argued in Point III of this Brief, appellant offered testimony of the character of Kim Horrocks for impeachment purposes. The Court refused to allow the testimony of John Watson on this issue. The basis of the Court's ruling in a nutshell was that Watson had never discussed Horrocks' reputation for truth with others in the community of Lark. (Tr. at 15). The trial court excluded this evidence even though counsel for appellant layed the following foundation:

Q. (By Mr. Rich) Briefly, what is Kim Horrocks' reputation for truth in the community?

Mr. Marson: Object, your Honor.

The Court: You have to lay a foundation to show how he happens to know. Sustain the objection.

Q. (By Mr. Rich) How is it you happen to know about Kim Horrocks' reputation?

A. By knowing her, by talking to her, by living in the same place.

Mr. Marson: Your Honor, that is not responsive to the question and we object.

The Court: Well, he is trying to respond. The answer may remain.

Q. (By Mr. Rich) Would you finish that last answer that you were just - -

A. By living in the same place, talking to her and knowing her is the only thing I could, you know, say about her truthfulness, is what is between, like me and her, you know.

Q. For how long had she lived in the community of Lark, to your knowledge?

A. 12 years.

Q. And you lived in that community with her for that period of time or most of that?

A. Yeah.

Q. All right. And during that period of both of you living in the community of Lark for 12 years, do you have an opinion as to what her reputation is?

A. Yes, I do.

Mr. Marson: Object, your Honor, as to foundation.

The Court: Just a moment. I will sustain the objection.

Mr. Rich: I have no other questions.

Mr. Marson: We have no questions, your Honor.

McCormick, On Evidence (2d Cleary Ed. 1972) at §44 at 90 gives the black letter rule on how such character impeachment evidence becomes admissible:

In most jurisdictions the impeacher may attach the character of a witness by using the following question formula:

"Do you know the general reputation of William Witness in the community in which he lives for truth and veracity?"

"Yes."

"What is that reputation?"

"It is bad."

The questions asked of Watson by counsel for appellant were formulated on these grounds and hence appropriate. The testimony of Watson thus should have been allowed.

The offer of such testimony and its weight for impeachment purposes has long been recognized as admissible in the State of Utah. See §78-24-1 Utah Code Annotated (1953 as amended), which provides in pertinent part:

. . . in every case the credibility of the witness may be drawn in question . . . by evidence affecting his character, for truth, honesty or integrity . . . and the jury are the exclusive judges of his credibility.⁸

The failure of the Court to allow the impeachment of the primary State's witness is doubly troublesome in the instant case, given the blatant character assassination of the accused based on alleged specific instances of prior bad acts, as argued in Point I of this Brief. The failure of the Court to allow Watson's testimony was reversible error and mandates a new trial.

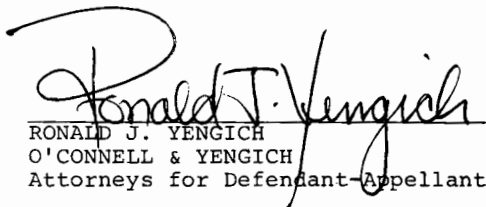
CONCLUSION

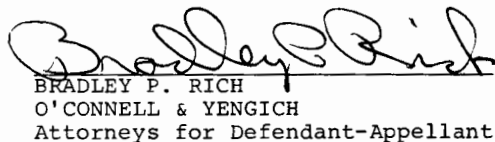
In conclusion, appellant respectfully requests that due to the individual and collective errors committed at trial in the instant case, that this Court should reverse his conviction

8. See also the early statement of the law in State v. Marks, 16 U. 204, 51 P. 1089 (1898).

and remand the same for a new trial.

RESPECTFULLY SUBMITTED this 24 day of March,
1980.


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MAILING CERTIFICATE

I hereby certify that I MAILED/DELIVERED two true and
correct copies of Defendant's Brief to the office of the Attorney
General, 236 State Capitol, this 25 day of March, 1980.

