

1980

The State of Utah v. Rodney K. Starks : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Robert Hansen; Attorneys for RespondentF. John Hill; Attorney for Defendant-Appellant

Recommended Citation

Brief of Respondent, *Utah v. Starks*, No. 16609 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/1887

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

RODNEY K. STARKS,

Defendant-Appellant.

Case No. 16605

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE TRIAL
JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE ERNEST F. BALDWIN, JR.,
JUDGE, PRESIDING.

ROBERT B. HANSEN
Attorney General

ROBERT R. WALLACE
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84103

Attorneys for Respondent

F. JOHN HILL

Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111

Attorney for Appellant

FILED

SEP 29 1960

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	1
STATEMENT OF THE FACTS-----	1
ARGUMENT	
POINT I: THE INSTRUCTION ON THE LIMITATION OF SELF-DEFENSE TO NON-AGRESSORS WAS PROPERLY SUBMITTED TO THE JURY-----	5
POINT II: THE TRIAL COURT CORRECTLY REFUSED APPELLANT'S REQUESTED INSTRUCTION CONCERNING VIOLENT ACTS OF THE DECEASED-----	14
POINT III: THE TRIAL COURT WAS CORRECT IN REFUSING TO INSTRUCT ON REASONABLE ALTERNATIVE HYPOTHESIS-----	20
POINT IV: THERE IS NO CUMULATIVE EFFECT OF ERRORS JUSTIFYING A REVERSAL IN THE INSTANT CASE-----	27
CONCLUSION-----	29

CASES CITED

People v. Callaghan, 4 Utah 49, 6 Pac. 49 (1885)----	16
Ramsey v. State, 558 P.2d 1179 (Okla. 1977)-----	18
Rice v. State, 567 P.2d 525 (Okla. 1977)-----	18
State v. Bender, 581 P.2d 1019 (Utah 1978)-----	21
State v. Bush, 148 Cal.Rptr. 430 (1978)-----	17
State v. Eagle, No. 16189 (Utah Sup. Ct. filed May 6, 1980)-----	27
State v. Fort, 572 P.2d 1387 (Utah 1977)-----	21
State v. Gallegos, 16 Utah 2d 102, 396 P.2d 414 (1964)-----	7
State v. Garcia, 11 Utah 2d 67, 355 P.2d 57 (1960)--	20
State v. Hall, 228 S.E.2d 637 (N.C. 1976)-----	19
State v. Hopkins, 11 Utah 2d 363, 359 P.2d 486 (1961)-----	23
State v. Hughes, 24 Utah 2d 235, 469 P.2d 235 (1970)-----	7
State v. Minnish, 560 P.2d 340 (Utah 1977)-----	7,10,14

TABLE OF CONTENTS
(Continued)

	Page
State v. Murphy, 27 Utah 2d 98, 493 P.2d 617 (1972)-----	22
State v. Peterson, 22 Utah 2d 377, 453 P.2d 696 (1969)-----	22
State v. Romero, 554 P.2d 216 (Utah 1976)-----	21
State v. Rummage, 185 S.E.2d 221 (N.C. 1971)-----	19
State v. Schoenfeld, 545 P.2d 193 (Utah 1976)-----	7,8,11,12
State v. Sinclair, 15 Utah 2d 162, 389 P.2d 465 (1964)-----	28
State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955)-----	27,28
State v. Turner, 79 P.2d 46 (Utah 1938)-----	10

STATUTES CITED

Utah Code Ann. § 76-2-402 (1953), as amended-----	6,11,12
Utah Code Ann. § 77-42-1 (1953), as amended-----	29

IN THE SUPREME COURT OF THE
STATE OF UTAH

- - - - - : - - - - -
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No. 16609
RODNEY K. STARKS, :
Defendant-Appellant. :

- - - - - : - - - - -
BRIEF OF RESPONDENT
- - - - -

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged with Criminal Homicide,
Murder in the Second Degree, in violation of Utah Code Ann.
§ 76-5-203 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty
of Criminal Homicide, Manslaughter, a lesser included offense,
on June 27, 1979, in the Third Judicial District Court, the
Honorable Ernest F. Baldwin, Jr., presiding. The trial court
sentenced appellant to an indeterminate term of one to fifteen
years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming

the judgment of the jury at trial and the sentence of the trial court.

STATEMENT OF THE FACTS

On the evening of September 29, 1978, appellant Rodney K. Starks arranged with Kaylene Griggs to have her permanent wave his hair (R. 159). Starks had become friends with Ms. Griggs when they worked together at Kim's Massage Parlor (R. 157). Starks agreed to pick up Ms. Griggs after she completed her shift as a dancer at the Golden Fleece Bar located in the area of 250 West and 3300 South (R. 160). When appellant arrived at the bar he called Kaylene from a telephone in the Touch of Class Massage Parlor located on the lower floor of the same building (R. 159). Ms. Griggs testified that she told appellant that Joe Boykin, her ex-boyfriend, was in the bar bothering her and asked Starks if he would come upstairs to wait by the door for her (R. 160). When Starks left the bar with Ms. Griggs, Boykin followed them outside into the parking lot (R. 161) and over to a vehicle Starks had borrowed from his employer Al Cortez (R. 163).

As Ms. Griggs was seated in the car with the passenger door open, Boykin grabbed her arm, removed her from the car, and pulled his fist back as if he were going to hit her. Starks pushed Boykin away and attempted to calm him (R. 165-166). Ms. Griggs testified that Starks told Boykin "if he wanted to talk

to [her] to talk to [her] on his own time, that right now [she] was on his time . . ." (R. 166). When Boykin asked if Starks was Ms. Griggs' "old man," he told Boykin that he was not and added, "[I]f I was I would treat her alot better than you have." (R. 166). As Ms. Griggs turned her back on Starks and Boykin to place her personal articles in the car, she heard a shot (R. 167). When she turned back, both men were running toward the end of the parking lot (R. 167). Ms. Griggs returned to the bar and called the police (R. 169).

During the interval before the shooting, Peter Isaacson, owner of the Touch of Class Massage Parlor, arrived in the parking lot (R. 240). Isaacson testified that it was growing dark when he arrived, and Boykin, Ms. Griggs and Starks were standing near the passenger side of Al Cortez' car (R. 241). Isaacson walked over to the car to say hello, whereupon Boykin became upset with him (R. 242-244). Appellant told Isaacson it would be best if he left (R. 244). Isaacson walked away, but turned and looked back toward the car before he reached the building (R. 245). He then say Boykin grab Ms. Griggs' arm and saw Starks remove Boykin's hand (R. 245-246). He testified that Boykin backed off as if he wanted to fight (R. 247). He heard shots as appellant and Boykin stood seven to eight feet apart facing each other (R. 247-249). Isaacson saw both men run toward the street with Boykin running ahead of Starks,

and he heard three more shots (R. 250). Isaacson followed Starks and Boykin up 3300 South toward the railroad tracks where he saw Boykin fall (R. 252). Starks returned to the car then began walking north of 3300 South (R. 253).

When Officer Vaughn of the Salt Lake County Sheriff Department arrived at the scene, the victim was lying in the middle of 3300 South about 400 yards from the Golden Fleece Bar (R. 141). Boykin subsequently died from multiple gunshot wounds. Dr. Serge Moore of the State Medical Examiner's Office testified that the ultimate cause of death was a gunshot which entered the left thigh and severed the femoral artery which carries blood to the legs (R. 207).

In support of appellant's claim that he shot Boykin in self-defense, appellant's counsel introduced evidence illustrating the violent propensities of the victim. On cross examination, Kaylene Griggs testified that one evening while she was having dinner with Starks and Al Cortez, Boykin entered the restaurant and asked her to step outside where he assaulted her (R. 174-175). She also testified that she told appellant about an incident when Boykin pretended to have a gun in his pocket to frighten two men (R. 178), and also told him that Boykin had raped her (R. 176).

Appellant testified that his contacts with the deceased generally involved keeping Boykin away from Kim's

Massage Parlor (R. 296). Starks further testified about the incident in the restaurant (R. 297) and acknowledged that Ms. Griggs told him about the alleged rape (R. 303-304) and the incident in which Boykin pretended to have a gun (R. 304). Starks admitted that when he pulled into the parking lot of the Golden Fleece bar, he recognized Boykin's car, removed a pistol which he was aware was under the seat of Al Cortez' automobile and placed it in his pocket (R. 311-312). Appellant said he knew the gun was loaded but was not certain how to operate it (R. 312). Starks claimed to have shot Boykin because he believed he was reaching into his pocket for a gun (R. 323-325) and that he continued to shoot to assure the deceased would not return to the parking lot (R. 328).

At the trial, the jury was instructed in the elements of Second Degree Murder (R. 87), Manslaughter (R. 89-90), and self-defense (R. 94-96). Appellant requested an instruction directing the jury to consider evidence of the deceased's character (R. 72) and requested an instruction on reasonable alternative hypothesis (R. 52-53). Both requests were denied.

POINT I

THE INSTRUCTION ON THE LIMITATION OF
SELF-DEFENSE TO NON-AGRESSORS WAS
PROPERLY SUBMITTED TO THE JURY.

The trial court instructed the jury in the present case as to the elements of criminal homicide, instruction

number 14 (R. 86), second degree murder, instruction number 15 (R. 87), and the lesser included offense of Manslaughter, instruction numbers 17, 18 and 19 (R. 89, 90, 91). The jury was further instructed as to the requisite intent necessary to be guilty of the above-noted offenses in instruction number 16 (R. 88), and the appellant's theory of self-defense was explained in instruction numbers 22, 23 and 24 (R. 94, 95, 96). As a part of its instructions on self-defense, the Court quoted portions of Utah Code Ann. § 76-2-402 (1953), as amended. Instruction number 22 reads:

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 or a third person 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 a third person, or to prevent the commission of a forcible felony.

2. A person is not justified in using force under the circumstances specified in paragraph one of this section if he:

- (a) Was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force.

Appellant contends that it was prejudicial error.

include the language in section 2(a) of the above instruction, claiming that there was no evidence to support submission of this instruction on the limitation of self-defense to non-aggressors. Respondent submits that there was substantial evidence to support submission of this instruction and, in the alternative, even if the language relating to aggression had been inapplicable, there was no error in framing this instruction in the statutory language.

This Court has previously approved the practice of giving jury instructions substantially equivalent to the statutory language. See: State v. Schoenfeld, 545 P.2d 193 (Utah 1976) (self-defense instruction substantially in the language of Utah Code Ann. § 76-2-402 (1953), is proper), and State v. Hughes, 24 Utah 2d 235, 469 P.2d 235 (1970) (voluntary manslaughter instructions substantially in the language of the statute are proper). Cf: State v. Murphy, 27 Utah 2d 98, 493 P.2d 617 (1972) (instruction in form of statute is permissible), and State v. Gallegos, 16 Utah 2d 102, 396 P.2d 414 (1964) (giving instructions in the words of the statute is not erroneous).

The standard given by this Court for determining whether statutory language is appropriate for jury instructions is whether the instruction " is supported by a reasonable interpretation of the evidence." State v. Minnish, 560 P.2d

340, 341 (Utah 1977). In the present case there was ample evidence to give rise to a jury question whether appellant was an aggressor, and the instruction was thus proper.

Appellant cites the definition of "aggressor" approved by this Court in State v. Schoenfeld, 545 P.2d 193 (Utah 1976), contending that the facts of the present case do not satisfy that definition. The trial court in that case instructed the jury that,

An aggressor is one who willingly and knowingly initially provokes a combat or does acts of such a nature as would ordinarily lead to combat. A person can also be classified as an aggressor if he leaves the scene of a quarrel, arms himself and then returns to the scene and renews the quarrel.

545 P.2d at 196. (Emphasis added.)

Applying this definition to the facts of the present case, there is sufficient evidence to support submission of the instruction on aggression to the jury. Several incident testified to at trial indicate that appellant did "acts of such a nature as would ordinarily lead to combat." The evidence established that appellant had notice of the violent character of Boykin. Appellant's knowledge was testified to by Ms. Griggs (R. 174-176, 178) and appellant himself (R. 293, 300, 303, 304). When appellant arrived at the Golden Fleece Bar, he noticed Boykin's car in the parking lot and armed himself for a possible confrontation (R. 311-312). He admitted

that rather than taking action to avoid the confrontation, he "marched" into the Golden Fleece Bar "like a man." (R. 335-336). Appellant clearly expected and was prepared for a confrontation and took no steps to avoid it. Finally, the discussion which took place shortly before the shooting clearly shows that appellant was the aggressor. Rather than acting as the peace-maker depicted in appellant's statement of facts (Appellant's Brief p.5), Starks made statements to Boykin which clearly added to the conflict. Ms. Griggs testified to the following conversation between the appellant and Boykin which took place shortly before the shooting:

Sammy told him that I didn't want to talk to him and if he wanted to talk to me to talk to me on his own time that right now, I was on his time and Joe said well, is this your old man, now, and Sammy said, no, I am not her old man but, if I was I would treat her a lot better than you have. (R. 166).

During cross-examination, the appellant admitted that while he could not remember the exact nature of this conversation, he had tried "to sound confident . . . because [he] didn't want to sound weak or scared . . ." (R. 336). Clearly, the conversation was not as conciliatory as the appellant would have this Court believe, and Starks' statements to the deceased clearly fall within the definition of "acts of a nature which would ordinarily lead to combat" under the circumstances of this case.

Under the test delineated by this court in State v. Minnish, supra, the issue of whether appellant was an aggressor in the confrontation with the deceased was properly submitted to the jury since the disputed instruction was clearly "supported by a reasonable interpretation of the evidence." 560 P.2d at 341. Similarly, submission of the instruction on aggression was proper under the principles noted in State v. Turner, 79 P.2d 46 (Utah 1938), cited by appellant. Although concluding that the evidence did not support a finding that the deceased attacked the appellant, this court observed that it should be left to the jury to determine whether or not the defendant was the aggressor. This court stated:

. . . it was pre-eminently a jury question whether, under the circumstances, [the deceased's] conduct was sufficiently menacing to create in the mind of the defendant as a reasonable man an honest belief that the danger to him was imminent and that his action in shooting was honestly to protect himself from loss of life or great bodily harm.

79 P.2d at 52.

Similarly, it was a jury question in the present case whether appellant was the aggressor in the confrontation.

Even if the language dealing with the limitation of self-defense to non-aggressors were shown to be inapplicable in the present case, submission of this instruction was not

prejudicial error. This court reviewed a situation where portions of statutory language in a self-defense instruction were inapplicable in the case of State v. Schoenfeld, 545 P.2d 193 (Utah 1976). In that case the defendant, who was convicted of negligent homicide, assigned as error the trial court's instruction, in the language of Utah Code Ann. § 76-2-402 (1953), as amended, that one who "is committing, or is fleeing after the commission or attempted commission of a felony" may not claim self-defense. 545 P.2d at 196. Appellant's claim of error was based upon the fact that his conduct toward the deceased would not have necessarily constituted a felony, but may have been a misdemeanor only. In response, this Court stated:

The instructions are stated in abstract generality; and they do not purport to tell the jury either what the evidence is or what the facts are
[T]his paragraph is stating an exception: that is, when "a person is not justified in using force." This telling the jury that a person in defendant's circumstances is deprived of that defense if he is attempting to commit a felony has the effect of saying that defendant would not be deprived of the defense unless his conduct was an offense of the higher order; i.e. a felony, but would leave him with the defense if his conduct were only a misdemeanor. . . . it should be obvious that requiring the jury to find his conduct to be of the higher order before depriving him of self-defense could not have been prejudicial to the defendant under the circumstances.

545 P.2d at 197.

Clearly, even if there had been no evidence that the appellant acted as an aggressor in the present case, there would be no prejudicial error in an instruction which merely stated an exception requiring the jury to find evidence of aggression to deny appellant's claimed defense. Furthermore, the jury was specifically instructed that, "If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction." (R. 100) Such an instruction is necessary whenever the evidence at trial is susceptible to several interpretations.

In the present case, the jury was instructed in the elements of Second Degree Murder, Manslaughter and Homicide justified as self-defense. Accordingly, the applicability of individual instructions depended upon the determination of facts by the jury. In this case the fact that an instruction would not apply to a particular factual determination would clearly not constitute prejudicial error.

Appellant cites numerous cases from neighboring jurisdictions involving factual situations where instructions on the limitation of self-defense to non-aggressors have been found either applicable or inapplicable by the courts. Respondent submits that these cases all stand for the general principle that there must be sufficient evidence to support the legal theory behind an instruction before it is submitted to the jury.

Jury instructions should not be construed as comments upon the evidence for the sake of claiming error in their admission. State v. Schoenfeld, 545 P.2d 193, 197 (Utah 1976). The disputed instruction in the present case was properly submitted to the jury as reflecting one possible interpretation of the evidence which the jury chose to accept in returning a verdict of Manslaughter. However, even if the instruction were found to be inapplicable, submission of this instruction would not be reversible error.

POINT II

THE TRIAL COURT CORRECTLY REFUSED APPELLANT'S REQUESTED INSTRUCTION CONCERNING VIOLENT ACTS OF THE DECEASED.

At trial, evidence of the violent propensities of the victim, and appellant's knowledge of past violent acts of the deceased was admitted in support of appellant's claim he acted in self-defense. This is in accord with the general rule that when a defendant claims to have acted in self-defense, evidence of the deceased's character may be admitted for purpose of assessing the reasonableness of the defendant's apprehension of imminent bodily harm. State v. Minnish, 560 P.2d 340 (Utah 1977). In the present case, appellant contends the trial court erred in refusing his proposed instruction which provided:

You are instructed that all evidence known to RODNEY K. STARKS, on September 29, 1978, concerning the reputation and specific acts of violence and aggressiveness of Joseph L. Boykin is relevant to your determination of Rodney K. Starks' state of mind and the reasonableness of his conduct at the time of this incident.

On the basis of this evidence, considered in conjunction with the rest of the evidence in this case, if you find that there is a reasonable doubt that Rodney K. Starks committed the offense, then you must find Rodney K. Starks not guilty. (R. 72)

Respondent claims that there was no error in denying this instruction since the instructions actually given the jury were an adequate depiction of the defense of self-defense and clearly allowed the jury to consider the character of the deceased in assessing appellant's claim.

The trial court gave four separate jury instructions on aspects of appellant's self-defense claim. Instruction number 22, discussed under the preceding point, included the statutory provisions of self-defense delineated by Utah Code Ann. § 76-2-402 (1953), as amended. (R. 94) Instruction number 23 stated that the defendant claiming self-defense is required to present some substantial evidence which would raise a reasonable doubt as to the defendant's guilt or whether or not defendant acted in self-defense. (R. 95) Finally, the trial court's instruction number 25 particularly bears upon appellant's second claim of error. This instruction reads, in part:

You are instructed that actual danger is not necessary to establish self-defense. If one is confronted by the appearance of peril which arouses in his mind, as a reasonable person, an honest conviction that he is about to suffer death or serious bodily injury and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in

believing himself in danger, his right to self defense is the same whether such danger is real or merely apparent.

(Emphasis added.) (R. 97)

This instruction requested the jury to judge appellant's belief that he would suffer death or serious bodily injury at the hands of Joe Boykin from appellant's perspective, "seeing and knowing the same facts." These facts included appellant's knowledge of Boykin's character and prior violent acts. Therefore, the jury was instructed to consider the reasonableness of appellant's apprehension given his knowledge of the deceased's character.

Once the trial court had correctly instructed the jury in the law applicable to self-defense, refusal to give the defendant's requested instruction was not error. People v. Callaghan, 4 Utah 49, 6 P. 49 (1885). Respondent submits that the instructions given by the trial court correctly and completely covered the area of self-defense. The jury was charged in clear and concise language that they were to evaluate appellant's actions from the standpoint of a reasonable man in appellant's position and possessing appellant's knowledge. Furthermore, the proposed instructions, if given, could have encouraged the jury to lose sight of the fact that it is the threat of

imminent death or bodily harm which determines whether self-defense is available and appellant would not be justified in using deadly force simply based upon his past experience or encounters with the deceased.

Appellant again cites several cases from other jurisdictions in support of his contention that his requested instruction should have been given to the jury. Respondent submits that the court's refusal to give the instruction was consistent with principles announced in those cases.

Appellant cites the case of State v. Bush, 148 Cal. Rptr. 430 (1978) in support of the contention that failure to give a specific instruction dealing with evidence of the deceased's violent character is reversible error. However, in the Bush case, the trial court's instructions were found to unduly emphasize the fear of "imminent" or "present" danger, leading the appellate court to conclude the jury may have been diverted from adequately considering the evidence of prior threats made by the deceased to the defendant. In contrast, the jury instructions in the present case charged the jury unequivocally to judge the reasonableness of the appellant's self-defense claims from the standpoint of "a reasonable

person in a like situation, seeing and knowing the same facts." In addition, the jury was cautioned that even if it should later "appear that there was no actual danger or there was only slight actual danger, that fact would not affect the right of self-defense if the appearances establishing that right existed."

Second, appellant relies upon the Oklahoma cases of Rice v. State, 567 P.2d 525 (Okla. 1977), and Ramsey v. State, 558 P.2d 1179 (Okla. 1977). In Rice v. State, the court stated that where the instructions given at trial "fairly and accurately state the law they will be deemed sufficient." 558 P.2d at 530. Thus, the court found no error in refusing the defendant's requested instruction when its substance was contained in instructions actually given. In the Ramsey case, the court added that the admission of evidence of prior threats "does not in and of itself necessitate a special instruction," concluding that the jury would have no difficulty in applying the general self-defense instructions given by the court to the facts of the case. 558 P.2d at 1183. Thus, the Oklahoma position is that failure to give an instruction on consideration of the deceased's character is not error where the instructions given fairly and accurately state the law.

Similarly, the North Carolina cases of State v. Hall, 228 S.E.2d 637 (1976), and State v. Rummage, 185 S.E.2d 221 (1971), cited by appellant support general principles applicable to the present case. While the court in State v. Hall found it was error to omit instructions correlating evidence that the deceased was a violent man, the court cited the earlier case of State v. Rummage in support of the proposition that this error alone would not call for reversal. In a passage from the Rummage opinion quoted in State v. Hall, the North Carolina Court of Appeals stated:

[We] are reluctant to hold that this error, standing alone, constituted reversible error, since the trial judge had otherwise fully charged on self-defense.

185 S.E. at 224. Thus even in a jurisdiction where failure to give an instruction concerning the deceased's character has been found to be error, it has not constituted reversible error standing alone.

The instructions on self-defense given in the present case embody the substance of Utah law. Therefore, there was no error in refusing to give appellant's requested instruction. Furthermore, instruction number 25 (R.97), discussed at length above, charged the jury that

they were to consider appellant's claim from the viewpoint of one "seeing and knowing the same facts." This instruction clearly allowed the jury to consider appellant's knowledge of Boykin's violent tendencies. Accordingly, there was no error in denying appellant's requested instruction since its substance was included in the self-defense instructions actually given.

POINT III

THE TRIAL COURT WAS CORRECT IN REFUSING TO INSTRUCT ON REASONABLE ALTERNATIVE HYPOTHESIS.

At trial, the appellant requested that the jury be given the following instruction on reasonable alternative hypothesis:

To warrant you in convicting the defendant, the evidence must to your minds exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after an entire consideration and comparison of all the testimony in the case you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him.
(R. 52,53)

This court explained the rationale behind such jury instructions in State v. Garcia, 11 Utah 2d 67, 355 P.2d 57 (1960), where it stated:

[We] have held that where the only proof of material fact or one which is a necessary element of defendant's guilt consists of circumstantial evidence, such circumstances must reasonably preclude every hypothesis of defendant's innocence. An instruction to this effect in an appropriate situation would be proper but this requires care to use language which the jury would understand and which would not merely lend to their confusion.

We must keep in mind that this rule is applicable only where proof of a material issue is based solely on circumstantial evidence.

355 P.2d at 59-60. (Emphasis added.)

See also State v. Bender, 581 P.2d 1019 (Utah 1978); State v. Fort, 572 P.2d 1387 (Utah 1977).

The rule requiring a reasonable alternative hypothesis instruction is clearly inapplicable to a case such as the present where both direct and circumstantial evidence establishing appellant's guilt was presented. In this case, two eyewitness accounts of the events leading up to the death of Joe Boykin were submitted to the jury. This testimony established appellant's role in causing Boykin's death and also constituted direct evidence from which other elements of the crime, such as intent, could be inferred. State v. Romero, 554 P.2d 216, 219 (Utah 1976).

Appellant contends that it was error to deny his request for an instruction on reasonable alternative hypothesis,

claiming that the evidence of intent in the present case was wholly circumstantial and subject to alternative conclusions. Appellant further contends that there is a danger that in the absence of such an instruction the jury would not understand that if there were another explanation for defendant's conduct giving rise to a reasonable doubt as to his guilt, he should be acquitted.

Respondent contends that it was not error to deny the requested instruction. It is well established that intent can generally be presumed from other evidence produced at the trial. This court recognized the value of making reasonable inferences from proven facts in State v. Peterson, 22 Utah 2d 377, 453 P.2d 696 (1969). The defendant in that case was convicted of assault with a deadly weapon with the intent to do bodily harm. On appeal, defendant contended the intent to do bodily harm was not sufficiently established by the proven fact that defendant made a slashing motion toward his victim with a hunting knife, injuring the victim's hand. This Court affirmed the conviction, stating:

It is true that the State was unable to prove directly what was in the defendant's mind relative to doing harm to the victim; and that he in fact denied having any such intent. However, this version does not establish the fact, nor does it even necessarily raise sufficient doubt to initiate the conviction. If it were so, it would lie within the power of a defendant to

defeat practically any conviction which depended upon his state of mind. As against what he says, it is the jury's privilege to weigh and consider all of the other facts and circumstances shown in evidence in determining what they will believe. This includes not only what was said and what was done, but also the conduct shown, which in this instance they may well have regarded as speaking louder than the defendant's later defensive claims as to what his intentions were.

22 Utah 2d at 378, 453 P.2d at 697.

Appellant's contention that an instruction on reasonable alternative hypothesis was necessary because appellant's intent was established by reasonable inferences based upon facts shown by direct evidence is totally without merit. This Court treated a similar situation in State v. Hopkins, 11 Utah 2d 363, 359 P.2d 486 (1961). In Hopkins, the defendant was convicted of Second Degree Burglary involving the entry of a second story apartment. The evidence of defendant's guilt included the fact that he matched a witnesses' description of one of two men she saw climbing a ladder outside the window, and the fact that one defendant's shoes and his car were found in the vicinity. The defendant at first denied entering the apartment, then admitted that he had been present. However, the defendant claimed he had picked up a stranger, had driven him home for \$2.00 gas money, and later helped him enter the apartment. The defendant argued that since there was no direct proof that he entered

with the intent to commit larceny, he was entitled to acquittal under the rule that where circumstantial evidence is relied upon to establish guilt, the evidence must exclude every other reasonable hypothesis. This Court affirmed the conviction, stating:

The difficulty with defendant's position is that the rule he relies on is not applicable where . . . there is dispute in the evidence and one version thereof does not support his thesis. He errs in assuming that the jury was obliged to believe his story as to what happened and why he entered the apartment. The fact that after being caught in the cross-fire of his wife's identification of the shoes, he admitted that he had falsified about them and about being in the apartment, and made an explanation which seemed reasonable to him, and inconsistent with his guilt, does not mean that the jury had to so believe. It was their exclusive prerogative to judge the credit to be given the evidence and to determine the facts.

It is to be remembered that intent, being a state of mind, is rarely susceptible of direct proof, but it can be inferred from conduct and attendant circumstances in the light of human behavior and experience.

359 P.2d at 487.

In the present case the testimony of two eye-witnesses provided ample direct evidence of appellant's actions from which the requisite intent to support the jury's verdict of Manslaughter could be inferred. Appellant, on the other hand, contends that the evidence was also susceptible of the alternative hypothesis that appellant was acting in self-defense, as

discussed under the preceding two points, evidence tending to support the appellant's theory of self-defense was presented at trial and the jury was adequately instructed in the law applicable to a claim of self-defense, making an instruction on reasonable alternative hypothesis unnecessary.

It was the jury's prerogative to reach its conclusions based upon the evidence adduced at trial. Accordingly, the jury concluded that appellant was not justified in using deadly force against Boykin. This conclusion is supported by appellant's own testimony which showed he did not act in the reasonable belief that deadly force was necessary to protect himself or another from serious deadly harm. Appellant admitted that Boykin did not threaten him verbally or through gestures (R. 344-345); that although Boykin had his hand in his pocket, appellant did not see any bulge in the pocket (R. 333) and that appellant wondered before the shooting why Boykin had not removed the suspected weapon from his pocket (R. 340). Thus, direct evidence from the appellant's testimony showed that he did not act under a reasonable belief of imminent danger and, accordingly, he was not entitled to his claimed defense of self-defense.

Appellant further contends that failure to give the requested instruction could result in confusion as to the State's burden of proof. Appellant claims that without

instruction on reasonable alternative hypothesis, the jury could conclude that appellant had the burden of proof of establishing his defense beyond a reasonable doubt. Considering the jury instructions actually given, there is no possibility that the jury could have misunderstood the State's burden of proof. The jury was instructed upon the prosecution's burden where a defendant pleads not guilty (instruction number 3, R. 76), the presumption of innocence (instruction number 1, R. 85) and the need to find guilt beyond a reasonable doubt as related to the specific crimes of Second Degree Murder (instruction number 15, R. 87) and Manslaughter (instruction number 17, R. 90). In addition, jury instruction number 21 specifically applied the reasonable doubt standard to self-defense. This instruction read:

You are instructed that the laws of Utah do not require a defendant to establish self-defense by a preponderance or greater weight of the evidence. The laws of Utah require the defendant to bring forward some substantial evidence which tends to show self-defense. If the defendant has done this, and if such evidence of self-defense when considered in connection with all other evidence in this case raises a reasonable doubt as to the defendant's guilt or if it raises a reasonable doubt as to whether or not the defendant acted in self-defense you must acquit him of the charges . . .

(R. 95) The effect of this instruction would be to avoid confusion as to the burden of proof applicable in the present case.

case. Furthermore, this Court observed in its recent decision in State v. Eagle, No 16189 (Utah Sup.Ct. filed May 6, 1980), that "the reasonable alternative hypothesis instruction is merely one way of expressing [the] necessary burden of proof and there is no apparent reason to mandate that one, and only one, particular instruction be used . . . in conveying to the jury the meaning of . . . 'proof beyond a reasonable doubt.'"

In the present case, the jury was clearly and adequately informed of the legal standards to be applied to appellant's claim of self-defense and the relative burdens placed upon the State and appellant. Accordingly, the trial court committed no error in refusing appellant's requested instruction on reasonable alternative hypothesis.

POINT IV

THERE IS NO CUMULATIVE EFFECT OF
ERRORS JUSTIFYING A REVERSAL IN
THE INSTANT CASE.

The doctrine announced in State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955), that in some instances errors, which when standing alone would not justify reversal, may have such a cumulative effect so as to deprive the accused of a fair trial, is not disputed by respondent. However, respondent submits that the instant case does not meet the criteria set forth in State v. St. Clair, supra. The duty of

the appellant is set forth at 3 Utah 2d 244:

[I]f the court can say with assurance that the evidence of the defendants' guilt was so clear and convincing that no reasonable jury could be expected to return a different verdict, even in the absence of the irregularities, then the errors would be harmless and the verdict should be permitted to stand. On the other hand, if there is reasonable likelihood that in the absence of the errors a different verdict might have been rendered, a new trial should be granted. (Emphasis added.)

In the instant case there is no cumulation of errors which would justify a conclusion that a different verdict would have been reached by the jury in the absence of such errors. In State v. St. Clair, supra, the cumulation of errors supported this court's finding that it was reasonably likely the verdict of the jury would have been different but for the errors. However, the alleged errors in the instant case do not justify such a conclusion.

To conclude that a cumulation of errors has prejudiced the appellant from having a fair trial first necessitates a conclusion that errors were committed. Respondent submits that no errors were committed by the trial court in the present case, and therefore, State v. St. Clair, supra, is clearly distinguishable

Respondent submits that this court should follow State v. Sinclair, 15 Utah 2d 162, 389 P.2d 465 (1964),

wherein it is stated at 15 Utah 2d 170:

Under our statute [Utah Code Ann. § 77-42-1 (1953)], which requires that errors which do not affect the essential rights of the parties be disregarded, we cannot properly interfere with the jury's verdict, unless upon a review of the whole case it should appear that there was error of sufficient gravity that the defendant's rights were prejudiced in some substantial way. We have found nothing of any such consequence here. (Emphasis added.)

Respondent submits that a review of the whole record requires a conclusion that the appellant received a fair trial and that no error was committed that prejudiced appellant in a substantial way.

CONCLUSION

The trial court did not commit error in instructing the jury in the statutory definition of self-defense where the instruction was supported by a reasonable interpretation of the evidence. The court also correctly refused to give to the jury appellant's requested instruction concerning past violent acts of the deceased since the instructions actually given allowed the jury to consider these facts.

Finally, the appellant was not entitled to an instruction on reasonable alternative hypothesis where there was sufficient direct evidence establishing his guilt and forming the basis for reasonable inferences from his actions.

Based upon this argument and the foregoing citation

of authority, respondent respectfully urges this Court
to affirm the judgment and sentence of the court below.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

ROBERT R. WALLACE
Assistant Attorney General

Attorneys for Respondent