1999

State of Utah v. Jason Randy Biggs : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

990297-CA

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 990297-CA
JASON RANDY BIGGS,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION FOR CRIMINAL HOMICIDE, MURDER, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-203 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK, PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for criminal homicide, a first degree felony. This Court has jurisdiction over the appeal pursuant to the pourover provision of Utah Code Ann. § 78-2a-3(2)(j)(1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Did the trial court clearly err in determining that the State had carried its burden of demonstrating that it struck the only minority member of the jury venire for reasons unrelated to his race?

The trial court's finding that the State did not engage in purposeful racial discrimination presents a factual question. Accordingly, that determination will not be set aside unless it is clearly erroneous. State v. Higgenbotham, 917 P.2d 545, 548

(Utah 1996)(citations omitted); State v. Bowman, 945 P.2d 153, 155 (Utah App. 1997)(citation omitted). In order to show clear error, defendant must marshal all the evidence in support of the court's determination and then demonstrate that the evidence and all inferences that may fairly be drawn from that evidence are insufficient to support the trial court's finding. State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990).

2. Does the record contain sufficient evidence to support the jury's verdict that defendant murdered Kenny Leiter?

A criminal conviction will be reversed for insufficient evidence only when the evidence is "so inconclusive or so inherently improbable that 'reasonable minds must have entertained a reasonable doubt' that the defendant committed the crime." State v. Goddard, 871 P.2d 540, 543 (Utah 1994)(quoting State v. Petree, 659 P.2d 443, 444 (Utah 1983), superseded on other grounds, State v. Walker, 743 P.2d 191 (Utah 1987)).

3. Should this Court consider for the first time on appeal defendant's unpreserved claim of prosecutorial misconduct?

No standard of review applies where an issue is unpreserved.

4. Did the trial court err when, three days after the issuance of State v. Lopes, 980 P.2d 191 (1999), it imposed a gang enhancement pursuant to Utah Code Ann. § 76-3-302.1?

The trial court's "interpretation of the effect of a prior judicial decision, whether one of its own or one of another

court" presents a question of law, reviewed for correctness, with no deference accorded the trial court. State v. Montoya, 887 P.2d 857, 858 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No specific provisions are necessary to the resolution of this case.

STATEMENT OF THE CASE

Defendant was charged with one count of criminal homicide, murder, for shooting Kenny Leiter on January 2, 1996 (R. 2-4). After a two-day trial, a jury convicted defendant as charged (R. 277). Following a presentence evaluation, the trial court sentenced defendant to a minimum mandatory term in the Utah State Prison of nine years to life, including a gang enhancement. As an additional enhancement for the use of a firearm in the commission of the offense, the court imposed a consecutive term not to exceed five years (R. 311-12). The court also ordered restitution in the amount of $9288.01. This timely appeal followed (R. 313). The Utah Supreme Court subsequently poured the case over to this Court (R. 324).

STATEMENT OF THE FACTS

At a 1995 New Year's Eve party in a condominium clubhouse in Murray, a young man associated with the West Side Piru Bloods stole a baggie of marijuana from an associate of the Inner City Crips (R. 328: 229, 236). Because the Bloods outnumbered the

Crips, the Crips let the incident pass (Id. at 192). The Crips were angry, however, and within the next day or so, "pretty much everybody" learned about what had happened at the party (Id. at 193).

On the evening of January 2, 1996, three young men associated with the Crips - defendant, Jody Carroll, and Trevor Symes - were driving near the condominium complex when they saw Kenny Leiter, the victim, and Lori Nelson, his girlfriend, walking towards a nearby convenience store (Id. at 64-66, 170, 173). Trevor Symes believed that Leiter and Nelson, who both associated with the Bloods, had been at the New Year's Eve party and, accordingly, that "they" had stolen the marijuana (Id. at 66, 135, 149, 173-75).[1] The three Crips decided to follow the couple and beat up Leiter (Id. at 67, 176).

Kenny Leiter and Lori Nelson entered the convenience store (Id. at 66, 133). Meanwhile, Jody Carroll parked the car at a nearby fast food restaurant and removed a tire iron from the trunk of his vehicle (Id. at 70, 178). With Carroll in the lead, the three Crips prepared to confront the couple who, having completed their shopping, were now returning home to the condominiums (Id. at 68-70, 134, 177).

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[1] The testimony of Symes implies that as an associate of the Bloods, Leiter would be accountable for the acts of his fellow associates, regardless of whether he personally took the marijuana. See R. 328: 173-75.

Carroll approached Leiter and Nelson and asked for a cigarette (Id. at 71-72, 137, 210). They refused the request and kept walking (Id. at 137). He asked again. When they refused a second time, they turned and quickly realized something was amiss (Id. at 72-73, 138). Carroll began striking Leiter across the chest with the tire iron (Id. at 73-74, 139, 179).[2] In response, Leiter pulled out a knife (Id. at 74, 138, 180, 203). Carroll then backed off and threw the tire iron at Leiter, hitting him in the chest (Id. at 76-77, 106, 180-81).

With his cohort now unarmed, defendant, armed with a .38 caliber handgun, moved forward to join the fight. (Id. at 81-82, 181). Leiter was standing still, poised, waiting (Id. at 84, 112, 141). Either defendant or Carroll then stated, "You're fucked now. We have a gat" (Id. at 140, 152, 181, 206).

Jody Carroll testified that when he saw defendant's gun, he turned to walk away, leaving Leiter standing there, saying nothing. Carroll then heard the gun click several times. Looking back over his shoulder as the weapon finally fired, Carroll saw Leiter hit (Id. at 83, 86-87, 111-12). Trevor Symes testified that after he heard the gun click, he turned and ran

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[2] The tire iron was variously described as a crowbar and as a device used "to jack the jack up" when preparing to change a tire (R. 328: 107).

towards the car, and then heard the gun go off (Id. at 182).[3]

Defendant, Jody Carroll, and Trevor Symes, having all run from the scene of the shooting, met up again at the car and drove away (Id. at 89, 184-85).[4] Trevor Symes testified that as they left, defendant exclaimed, "I blasted him. I don't know if I got him" (Id. at 185). Symes also testified that right after the shooting, they drove to a McDonald's where defendant's girlfriend was working. They discussed the shooting to the extent "that [defendant] was supposed to be with her for an alibi" (Id. at 188). Jody Carroll testified that sometime later "defendant came to my house and said that the cops were looking for us. To keep my mouth shut, basically" (Id. at 124).

Meanwhile, Kenny Leiter's companion, Lori Nelson, had heard the same clicks and the same shot that the Crips had heard. In addition, she heard "this loud howl [from Leiter] like he had been shot" (Id. at 142). She, too, fled (Id. at 141-42). As she was fumbling with the entry code to the condominium complex, Leiter caught up with her. The door finally opened, and they

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[3] Jody Carroll struck a bargain with the police, exchanging his testimony in this case for a reduced felony charge (R. 328: 96, 119-20). Trevor Symes, who also testified for the State, was interviewed by the police but not arrested for any crime in connection with this case (Id. at 209).

[4] Within the next several days, Carroll disposed of the gun, which defendant had stowed under the seat of Carroll's car (Id. at 91, 94-95, 114-15, 122, 184).

began running down the hallway. Leiter collapsed (Id. at 143, 256). Lori Nelson testified, "He was just laying there with a lot of blood coming out of his mouth. . . . he just had a - - like a scared or something look on his face with just tons of blood coming out of his mouth" (Id. at 143).

Kenny Leiter died in the hallway where he fell. According to the medical examiner, he bled to death, the result of a bullet piercing his carotid artery (Id. 330, 335).

SUMMARY OF ARGUMENT

Defendant first argues that the State used one of its peremptory challenges to strike the only minority juror on the panel for racially-motivated reasons. The State, however, provided race-neutral reasons for its strike, and the trial court determined that the State did not strike the juror with any racially discriminatory intent. Consequently, to overturn the court's finding, defendant must marshal the evidence supporting the finding and then demonstrate that it is clearly erroneous. He has not done so.

Second, defendant argues that the evidence of both his identity and his intent was insufficient to support the jury's verdict. As to identity, defendant argues, in essence, that the jury believed the wrong witnesses. Credibility, however, is a matter left to the finder of fact and will not be revisited on appeal. As to intent, defendant pointed a loaded .38 caliber

handgun at his victim in the midst of a physical fight and then pulled the trigger multiple times. The very nature of these acts supports the jury's determination that defendant committed the murder with the necessary intent.

Third, defendant asserts a prosecutorial misconduct claim, unpreserved on the record. Moreover, the trial court refused to accede to defendant's attempt to supplement the record. Absent the contents of the supplementation, the issue has not been preserved for appellate review.

Finally, defendant correctly asserts that the trial court imposed a gang enhancement in violation of the rule of law articulated in State v. Lopes, 980 P.2d 191 (Utah 1999), issued three days prior to defendant's sentencing. Consequently, while defendant's murder conviction should be affirmed, the gang enhancement conviction pursuant to Utah Code Ann. § 76-3-203.1 should be reversed and remanded for a new trial.

ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY FOUND THAT THE STATE CARRIED ITS BURDEN OF DEMONSTRATING THAT IT STRUCK THE ONLY MINORITY VENIREPERSON FOR REASONS UNRELATED TO HIS RACE

Defendant asserts that his murder conviction should be reversed because the jury panel was tainted by racial bias. Br. of App. at 9. Specifically, he argues that the trial court

denied a panoply of his state and federal constitutional rights when it determined that the State's peremptory challenge to remove the only minority juror from the venire was not racially motivated. Id. at 5, 9. As to the juror's ethnicity, the trial court observed only that the juror, Lance Masina, "did appear to me [to have] certain Pacific Islander characteristics" (R. 328: 216).

At the outset, defendant has properly preserved but a single ground for his claim. That is, in the trial court, defendant grounded his substantive argument in the federal equal protection analysis set forth in Batson v. Kentucky, 476 U.S. 79 (1986). While defendant mentioned other state and federal constitutional rights in passing, he never offered any legal analysis based upon those rights. Furthermore, the ruling of the trial court is clearly framed as a response to a Batson challenge. See R. 328: 214-16 or addendum A. Because defendant only argued and the trial court only ruled upon a Batson challenge, that is the only proper subject for review now. State v. Span, 819 P.2d 329, 337 n.4 (Utah 1991)(where defendant raised only Batson challenge in trial court, reviewing court addresses only federal equal protection issue); see also State v. Robinson, 797 P.2d 431, 435 (Utah App. 1990)(grounds not argued or ruled upon in trial court will not be considered on appeal, absent showing of plain error or special circumstances)(citations omitted).

A challenge premised on Batson is resolved by applying a three-part analysis:

> 'Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.'

State v. Higgenbotham, 917 P.2d 545, 547 (Utah 1996)(quoting Purkett v. Elem, 514 U.S. 765, 767 (1995)(citations omitted)); accord State v. Cantu, 778 P.2d 517, 518 (Utah 1989)("Cantu II").

Typically, to establish the first step - a prima facie case of racial discrimination - defendant must demonstrate specific facts and circumstances in support of such a case. See Batson, 476 U.S. at 97-98; accord Cantu II, 788 P.2d at 518 (citations omitted). However, "[w]here the proponent of the peremptory challenge fails to contest the sufficiency of the prima facie case at trial and merely provides a rebuttal explanation for the challenge, the issue of whether a prima facie case was established is waived." Higgenbotham, 917 P.2d at 547 (citing State v. Macial, 854 P.2d 543, 545 (Utah App.), cert. denied, 862 P.2d 1356 (Utah 1993) and State v. Harrison, 805 P.2d 769, 777 (Utah App.), cert. denied, 817 P.2d 317 (Utah 1991)).

In this case, the prosecutor immediately rebutted the

challenge by explaining his rationale for striking the juror, without first contesting the establishment of a prima facie case. See R. 328: 215 or addendum A. Accordingly, whether defendant, in fact, established a prima facie case is not relevant to the Batson analysis here because the matter has been waived. See Higgenbotham, 917 P.2d at 547; accord State v. Merrill, 928 P.2d 401, 403 (Utah App. 1996); Macial, 854 P.2d at 545.

The Batson analysis, therefore, proceeds to step two, with the burden shifting to the State to provide a race-neutral explanation for its peremptory strike. Higgenbotham, 917 P.2d at 548. Notably, the explanation need not be "persuasive, or even plausible." Purkett, 514 U.S. at 768. "'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" Id., 514 U.S. at 768 (quoting Hernandez v. New York, 500 U.S. 352, 360 (plurality opinion); id. at 374 (O'Connor, J., concurring in judgment)).

In this case, the prosecutor offered the following explanation for the peremptory challenge:

> [T]he reason Mr. Masina was stricken by the State was his direct response to a question posed by the defense counsel of whether they knew anyone in jail. And Mr. Masina stated in the affirmative, that he did know people in jail. And based upon that response, that is the reason we moved to - we peremptory [sic] struck Mr. Masina.

> The other reason is we thought he was young and single. It had nothing to do with his race.

R. 328: 215 or addendum A.[5]

The prosecution thus offered three reasons for its peremptory challenge: because the juror knew persons who were incarcerated; because he was young; and because he was single. All of these reasons could apply to individuals of any race. See Purkett, 514 U.S. at 769 (determining that wearing beards and mustaches and having long, unkempt hair are race-neutral reasons for exercising peremptory strikes). Accordingly, because a discriminatory intent is not inherent in any of the preferred reasons, they are race-neutral. See Higgenbotham, 928 P.2d at 548 (stating prosecutor's explanation for challenge is facially valid if it "does not demonstrate a discriminatory intent"). The analysis, then, progresses to step three.[6]

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[5] Specifically, defense counsel requested of the court, "Could you also ask whether any of the prospective jurors have any friends or close relatives who might be incarcerated at this time?" The trial court then queried the jury panel: "At least the last word that you had, do any of you have any friends or close friends [sic] who are in custody somewhere?" R. 328: 33. The prosecutor peremptorily struck two of the four jurors who responded affirmatively. R. 103.

[6] Defendant cites to these three factors, concluding from them that the prosecution failed to provide a race-neutral explanation for its peremptory strike. Br. of App. at 8. Nowhere, however, does defendant articulate how these factors demonstrate a racially discriminatory intent. Because defendant has failed to develop any legal analysis relevant to Batson's second step, this Court need not even consider his claim. State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984).

In the final step of the Batson inquiry, "the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." Purkett, 514 U.S. at 768; accord Higgenbotham, 917 P.2d at 548.[7] In this case, the trial court, after listening to the prosecution's explanation for striking the juror, stated:

> I am persuaded, counsel, that the prosecution has sufficiently rebutted the notion that there - that they were out simply to strike minority panel members of the panel and that they have provided to me sufficient reason for having exercised the peremptory challenge that was wholly unrelated to Mr. Masina's at least claimed minority status. Therefore, your motion is denied.

R. 328: 216 or addendum A. This ruling, in essence, constitutes a finding that the prosecutor did not strike the juror with any racially discriminatory intent.

Once the trial court has made such a factual determination, it is accorded great deference. This is because

> '[in the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.'

State v. Bowman, 945 P.2d 153, 156 (Utah App. 1997)(quoting

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[7] Throughout the entire Batson analysis, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768.

Hernandez v. New York, 500 U.S. 352, 365 (1991)(citations omitted)).

In order to overturn the trial court's factual finding, a defendant must demonstrate clear error by marshaling all the evidence in support of the finding and then showing that the evidence, including all fair inferences that may be drawn from it, provides insufficient support. Higgenbotham, 917 P.2d at 548 (citations omitted). In this case, however, defendant has failed to marshal the evidence. Consequently, for this reason alone, his claim may be rejected. Crackdown v. Fire Ins. Exch., 817 P.2d 789, 800 (Utah 1991).

Defendant asserts instead that the trial court committed reversible error by failing to enter necessary findings subsidiary to its ultimate determination. Indeed, he argues, the court was unable to make any such findings because the prosecutor's rationale for striking the juror was "a mere excuse." Br. of App. at 8-9. Defendant, however, wholly fails to articulate the basis for his conclusion that the prosecutor's articulated reasons were "a mere excuse" for striking the juror on racial grounds.

What defendant seeks are additional findings, articulating that the prosecution's reasons were "(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate." Br. of App. at 8 (citing Higgenbotham, 917 P.2d at

548 (quoting Cantu II, 778 P.2d at 518 (citations omitted))). While the record contains no such findings, their absence is not fatal to the conviction because the record contains competent evidence addressing the factors and supporting the trial court's central finding of no racial intent. State v. Ramirez, 817 P.2d 789, 788 n.6 (Utah 1991)(citing Farrell v. Turner, 482 P.2d 117, 119 (1971)).

First, the reasons were neutral on their face, as has been explained. Second, defendant in this case was a young, single, gang-associated incarcerated male. The prosecution's articulated motivation to exclude a juror who was also young and single and had friends in custody is thus closely related to the particular case being tried. Notably, the prosecution also struck another young, single member of the venire, a woman whose daughter had been fathered by a gang member. See R. 103, R. 328: 29, 33. Two of the State's peremptory challenges were thus used to strike individuals whose lifestyles bore some resemblance to defendant's. Third, the reasons given were, on their face, clear and specific: age, marital status, and close association with persons in custody. And, fourth, the reasons were legitimate because they could apply to anyone, regardless of race. See Purkett, 514 U.S. at 769 (defining a "legitimate reason" as one "that does not deny equal protection"); accord Merrill, 928 P.2d at 404.

Consequently, because defendant has not carried his burden of persuasion, the trial court cannot be said to have committed clear error when it accepted as credible the prosecutor's explanation and denied defendant's challenge to the peremptory strike.

POINT TWO

THE STATE ADDUCED SUFFICIENT EVIDENCE TO DEMONSTRATE BOTH THAT DEFENDANT WAS THE PERSON WHO SHOT KENNY LEITER AND THAT DEFENDANT HAD THE REQUISITE INTENT TO COMMIT MURDER

Defendant argues that his conviction should be reversed because the evidence of both his identity and his intent to commit murder was insufficient to support the jury's verdict. Br. of App. at 10-13. At the outset, an appellate court's role in reviewing the sufficiency of the evidence following a criminal conviction is a limited one. State v. Goddard, 871 P.2d 540, 543 (Utah 1994). That is, a reviewing court will reverse a criminal conviction on insufficiency grounds only when the evidence is so lacking that "reasonable minds must have entertained a reasonable doubt" that defendant committed the crime. State v. Petree, 659 P.2d 443, 444 (Utah 1983), superseded on other grounds, State v. Walker, 743 P.2d 191 (Utah 1987). However, "[w]here there is any evidence, including reasonable inferences that can be drawn from it, from which findings of all the elements of the crime can be made beyond a reasonable doubt, our inquiry is complete and we

will sustain the verdict." State v. Gardner, 789 P.2d 273, 285 (Utah 1989), cert. denied, 494 U.S. 1090 (1990).

Defendant asserts two grounds for his insufficiency claim. First, he claims that the evidence was insufficient to establish that he was the person who shot Kenny Leiter. He argues that Jody Carroll and Trevor Symes were inherently unreliable witnesses, that Lori Nelson's testimony was both incomplete and factually incorrect, and that defendant's mother and her ex-husband provided the jury with credible evidence that exonerated defendant. See Br. of App. at 11-12.

The crux of defendant's argument - and its fatal flaw - is his contention that the jury believed the wrong witnesses. See Br. of App. at 11-12. The law is well-settled that "[d]eterminations of witness credibility are left to the jury. The jury is free to believe or disbelieve all or part of any witness's testimony." State v. Hayes, 860 P.2d 968, 972 (Utah App. 1993)(citing State v. Jonas, 793 P.2d 901, 904-05 (Utah App.), cert. denied, 804 P.2d 1332 (Utah 1990)). And,

> [w]hen the evidence presented is conflicting or disputed, the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence. Ordinarily, a reviewing court may not reassess credibility or reweigh the evidence, but must resolve conflicts in the evidence in favor of the jury verdict.

State v. Workman, 852 P.2d 981, 984 (Utah 1993)(citations omitted).

In this case, the jury did hear conflicting evidence from witnesses for the State and witnesses for defendant. The three eyewitnesses to the shooting, however, all testified either directly or implicitly that defendant was the person who shot Kenny Leiter. Jody Carroll testified that he saw defendant with a gun, heard the gun click several times, and then saw Kenny Leiter get hit (R. 328: 81-82, 85, 87). Trevor Symes testified that he saw defendant pull out a gun, heard him say to Kenny Leiter, "You're fucked now; I've got a gat", heard the gun click, and then heard a shot as he ran to the car (Id. at 181-82). Lori Nelson testified that a tall man was brandishing a long metal object when a shorter man approached, pointing a gun at Kenny Leiter and ultimately shooting him (Id. at 139-41, 152).[8]

The jury apparently chose to believe these witnesses rather than defendant's central witness - his mother - and the other gang members whose testimony attempted to impeach Carroll and Symes. Nonetheless, however credible the testimony of defendant's central witness, it was not dispositive. Defendant's mother testified only that defendant was home watching the news

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[8] Jody Carroll testified that he was 6'2" or 6'3" tall and was armed with a tire iron, and that defendant was significantly shorter, about 5'10" tall, and was armed with a handgun. R. 328: 70, 75, 107, 123. Trevor Symes corroborated that Carroll was the individual with the tire iron. Id. at 178.

on television at 9:00 pm. R. 328: 278.[8] The shooting, however, occurred just prior to 8:27 pm. Id. at 227. Where, as here, defendant's insufficiency claim "presumes that the jury was obligated to believe the evidence most favorable to defendant rather than that presented in opposition by the State," the claim must necessarily fail. State v. Howell, 649 P.2d 91, 97 (Utah 1982).

Second, defendant asserts that the State failed to prove that the shooter intended to kill or even harm his victim. See Br. of App. at 12. "Evidence of intent is generally supplied by evidence of the injury by which the victim died or of the act which caused the death. The inference is made that the natural consequences of that act were intended to occur." State v. James, 819 P.2d 781, 790 (Utah 1991).

Defendant focuses on the act of shooting, inferring that the failure of the gun to fire when defendant first pulled the trigger gives rise to a reasonable inference that the shooter "assumed the gun was unloaded" and was using it merely to "assault and frighten" Leiter. Br. of App. at 12. Such an inference is unpersuasive in light of the facts. If defendant had intended only to "assault and frighten" Leiter, he would have likely brandished the weapon, encouraging Leiter to believe that

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[8] Defendant's mother's ex-husband stipulated that his testimony would be the same as that of defendant's mother. R. 328: 292.

it was loaded, rather than pulling the trigger and demonstrating that it was not.

Further, defendant joined in the fight only *after* Jody Carroll had thrown his only weapon at Leiter, leaving Leiter armed with a knife and the Crips wholly unarmed. R. 328: 76-77, 82, 180). A reasonable inference is that defendant used the loaded .38 caliber handgun to regain the advantage the Crips lost when Carroll discarded his weapon.

Of central significance, however, is the undisputed fact that defendant pointed the handgun towards Kenny Leiter in the heat of a physical fight and pulled the trigger multiple times. R. 328: 85, 111, 141, 152, 181-82. The "natural consequence" of that act was Leiter's death, caused by a bullet entering at his left shoulder and piercing his carotid artery. R. 328: 329-30, 335. The very nature of these acts supports the jury's determination that defendant committed the murder with the requisite intent.

POINT THREE

BECAUSE DEFENDANT DID NOT PRESERVE HIS PROSECUTORIAL MISCONDUCT CLAIM, IT IS WAIVED ON APPEAL

Defendant argues that the prosecutor referred to defendant as a "wedo" or "light-skinned Mexican" during closing argument, thus engaging in prosecutorial misconduct and mandating reversal of his conviction for murder. Br. of App. at 13-14. This

argument, however, has not been properly preserved for appellate review.

The law is well-settled that "in criminal cases in Utah . . . a contemporaneous objection or some form of specific preservation of claims of error must be made part of the trial court record before an appellate court will review such claim on appeal." State v. Tillman, 750 P.2d 546, 551 (Utah 1987).[9] In this case, the trial record contains no evidence of preservation. Defendant thus relies for preservation of his argument on his Stipulation to Supplement the Record, which references an off-the-record bench conference in which defendant purportedly asked for a curative instruction with respect to the prosecutor's remark. See addendum B.

This document, however, does not preserve his claim. Defendant filed his Stipulation to Supplement the Record in this Court, just a few days prior to filing his opening appellate brief, which relied wholly on averments in the pending stipulation. The pleading, however, should have been filed in the district court. See Utah R. App. P. 11(h)("If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled

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[9] Plain error and exceptional circumstances constitute two exceptions to this general rule. See, e.g. State v. Archambeau, 820 P.2d 920, 922 n. 4, 5 (Utah App. 1991). Neither have been asserted here.

by that court and the record made to conform to the truth"). To correct defendant's filing error, this Court remanded the case to the district court for the limited purpose of having the trial court consider and rule upon the stipulation.

The district court held a hearing on defendant's motion and subsequently refused to accede to the stipulation, articulating its reasons in a comprehensive minute entry. See Minute Entry of 9/13/99, unnumbered at top of appellate record, vol. II, or addendum C. Specifically, the trial court determined that "[n]either this Court nor the prosecutor have specific recollection of the side bar discussion referred to" and that the averments in the stipulation did not comport with the court's customary procedures in conducting trials. Id.

Because the trial court rejected the stipulation, which was the only evidence of preservation, it cannot at this juncture serve to preserve defendant's prosecutorial misconduct claim. The claim, therefore, is waived. Further, defendant does not claim plain error or exceptional circumstances. Consequently, it is not appropriate to reach the issue under either of those exceptions to the preservation requirement. State v. Pledger, 896 P.2d 1226, 1229 n.5 (Utah 1995).

POINT FOUR

THE TRIAL COURT IMPROPERLY IMPOSED A GANG ENHANCEMENT ON DEFENDANT'S SENTENCE; CONSEQUENTLY, THE CASE SHOULD BE REMANDED FOR A NEW TRIAL BY JURY ON THE GANG ENHANCEMENT CHARGE

Three days prior to defendant's sentencing hearing, the Utah Supreme Court issued State v. Lopes, 980 P.2d 191 (Utah 1999). In that opinion, the court held that Utah Code Ann. § 76-3-203.1 (1995), the "gang" enhancement or "group criminal activity" statute, "creates a separate and new offense," and that each element of that offense "must be found beyond a reasonable doubt by a jury, not the trial judge." Id. at 195.

In this case, the jury found defendant guilty beyond a reasonable doubt of all the elements of criminal homicide, murder. R. 270. It did not make any determination of defendant's guilt under section 76-3-203.1. Rather, that determination was left to the trial court. See R. 288, 330: 15. According to Lopes, the judge thus improperly became the finder of fact, "expressly taking that power away from the jury." Lopez, 980 P.2d at 196. This was incorrect as a matter of law.

Consequently, the gang enhancement here must be reversed, and the case remanded to the district court for a new trial on that charge. Defendant's jury conviction for murder, however, should remain undisturbed. See id., at 194-95 (reversed and remanded for new trial only on section 76-3-203.1 charge).

CONCLUSION

For the reasons stated, this Court should affirm defendant's first degree felony conviction for criminal homicide, murder, and reverse and remand for a new trial on the section 76-3-203.1 gang enhancement charge.

RESPECTFULLY submitted this 6th day of December, 1999.

JAN GRAHAM
Attorney General

Joanne C. Slotnik

JOANNE C. SLOTNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Samuel D. McVey, attorney for defendant, Kirton & McConkie, 1800 Eagle Gate Tower, 60 East South Temple, P.O. Box 45120, Salt Lake City, Utah 84145-0120, this 6th day of December, 1999.

Joanne C. Slotnik

ADDENDA

Addendum A

THE COURT: Members of the jury, we are going to take a recess for you. Approximately ten minutes.

Remember the admonition.

I will discuss a matter of law with the lawyers here.

The jury is now excused.

(Jury out) 3:52

THE COURT: The jury has now exited the courtroom. The defendant and counsel is present.

I indicated to you, Mr. McVey, at one of our bench conferences that I would grant you an opportunity to make an objection on the record regarding a claim which preceded in which you perceived an inappropriate striking of the only minority juror on the panel.

You may proceed. Lance Masina.

MR. McVEY: Yes, Your Honor.

Lance Masina, who was a prospective juror on the panel, was peremptorily stricken by the prosecution.

My perception was that he was the only minority potential juror and appeared to have characteristics of a South Pacific Islander or similar characteristics and possibly some Hispanic characteristics. And based on that, we believe that

we have a prima facia case for a Batson v. Kentucky error in violation of our client's 5th, 6th and 14th rights under -- the 14th Amendment right under the Federal Constitution and, also, corresponding clauses under the State Constitution.

THE COURT: All right, Mr. McVey. Thank you. Do you wish to respond, Mr. Esqueda?

MR. ESQUEDA: If I may.

I'm not sure Batson is appropriate. The defendant is not a minority. He is a Caucasian.

THE COURT: Well, let's assume for the purposes of this discussion that he is entitled to claim the cloak of minority status given the circumstances.

MR. ESQUEDA: And even assuming that is true, Your Honor, the reason Mr. Masina was stricken by the State was his direct response to a question posed by the defense counsel of whether they knew anyone in jail. And Mr. Masina stated in the affirmative, that he did know people in jail. And based upon that response, that is the reason we moved to -- we peremptory struck Mr. Masina.

The other reason is we thought he was young and single. It had nothing to do with his race.

THE COURT: Very well.

I can indicate on the jury list that Mr. Masina was number ten and it did appear to me that he had certain Pacific Islander characteristics. I concur with your observations of that.

I have no idea if anyone on the panel had a minority background. None appeared to have Hispanic or minority names, surnames.

Let me inquire of you, Mr. McVey. Is your client in any fashion a minority? Part of a minority culture?

MR. McVEY: He is not, Your Honor. But I don't believe Batson requires that.

THE COURT: Maybe it doesn't. I am just establishing for the record that he is not Hispanic or in another minority.

MR. McVEY: The other jurors looked very Caucasian in appearance, as well.

THE COURT: I am persuaded, counsel, that the prosecution has sufficiently rebutted the notion that there -- that they were out simply to strike minority members of the panel and that they have provided to me sufficient reason for having exercised the peremptory challenge that was wholly unrelated to Mr. Masina's at least claimed minority status.

Therefore, your motion is denied.

Addendum B

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff, vs. JASON RANDY BIGGS, Defendant.	:	**STIPULATION TO SUPPLEMENT THE RECORD** Appeal No. 990297-~~SC~~CA Priority #2

Pursuant to Rule 11 of the Utah Rules of Appellant Procedure, the parties hereby agree and stipulate to the language in the attached Exhibit A and it is thereby added as a supplement to the record on appeal.

DATED this 12 day of August, 1999.

KIRTON & McCONKIE

By _____
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Randall C. Allen
Attorneys For Defendant
1800 Eagle Gate Tower
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DATED this 12th of August, 1999

By _____
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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff, vs. JASON RANDY BIGGS, Defendant.	:	**SUPPLEMENT TO THE RECORD ON APPEAL** Appeal No. 990297-SC Priority #2

Immediately after the prosecution's closing argument, and before the defense closing argument, lead defense counsel Samuel McVey asked for a bench conference where he stated an objection that the prosecutor had argued a fact not in evidence. The Prosecutor argued:

> Who is this Mexican Guy? Take a look at the defendant. If he is wearing a hat and dark clothes, as Lori Nelson testifies, he probably looks Hispanic. He looks a little light in my community. They call them a wedo. That means he is a light skinned Mexican.

Mr. McVey asked the judge for a curative instruction that the prosecutor's statement was not evidence and the jury should disregard it. The judge stated that he would simply wait and

instruct the jury later that the arguments of counsel are not evidence. There was no specific direction to disregard the prosecutor's statement.

Addendum C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	**MINUTE ENTRY RULING**
Plaintiff(s),	:	**CASE NO. 981911378 FS**
vs.	:	**Judge J. Dennis Frederick**
JASON RANDY BIGGS,	:	**Date: September 13, 1999**
Defendant(s),	:	

After review of the pleadings, the Court rules as follows:

1. This Court is unable to accede to the stipulation to modify the record for the following reasons:

a) Neither this Court nor the prosecutor have specific recollection of the side bar discussion referred to;

b) The trial transcript reflects an off the record discussion at the request of defense counsel (TR 380) at the conclusion of the prosecutor's rebuttal argument only. This discussion was at the moment the jury was to be released for deliberation. This Court would not have had any further opportunity to admonish the jury. It makes no sense, nor is it this Court's

procedure to "wait and instruct the jury later" at the moment they are released to consider their verdict.

c) This Court frequently admonishes juries that comments of counsel are not evidence and indeed did so throughout this trial. It is uncharacteristic for this Court to have denied such a request. Moreover, this Court's trial notes do not reflect such a request. If there was an agreed to additional instruction, there would by practice be a note thereof.

d) The proposed quote (TR 377) of the prosecutor is not complete and thus creates a misleading impression when taken out of context.

Dated this 13th day of September, 1999

J. Dennis Frederick
District Court Judge