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Extra

IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent,	:	APPELLANTS' BRIEF
v.	:	No. 17350, 17351, 17358
LARRY ELLIOTT and WILLIAM H. CLAYTON, Defendants-Appellants.	:	

APPEAL FROM JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, COUNTY OF UTAH, STATE OF UTAH

HONORABLE MAURICE HARDING, JUDGE

THOMAS H. MEANS
67 North 200 East
Provo, Utah 84601

ATTORNEY FOR APPELLANTS

DAVID L. WILKINSON
Attorney General
State of Utah
236 State Capitol Building
Salt Lake City, Utah 84114

ATTORNEY FOR RESPONDENT

FILED

MAR 31 1981

Clerk, Supreme Court, Utah

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Section 76-5-103.5, U.C.A. (1953), aggravated assault by a prisoner, a 2nd degree felony;
Section 76-5-403(2), U.C.A. (1953), forcible sodomy, a 2nd degree felony;
Section 76-4-101, U.C.A. (1953), attempted forcible sodomy, a 3rd degree felony;
Section 76-5-404(1), U.C.A. (1953), forcible sexual abuse, a 3rd degre felony;
Section 76-5-102.5, U.C.A. (1953), assault by a prisoner, a 3rd degree felony 8

LAW CITED:

Constitution of the United States, Amendment XIV, Section 1 2
Constitution of Utah, Article I, Section 2 2
Constitution of Utah, Article I, Section 7 2
Section 76-1-402(4), U.C.A. (1953) 2
Utah Rules of Civil Procedure, No. 51 5
Utah Code of Criminal Procedure, Rule 19(c) 6

CASES CITED:

State v. Gillian, 463 P2d 811 (1970) 3
State v. Newton, 144 P2d 290 (1943) 3

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State v. Ferguson, 279 P.55 (1929) 3
State v. Close, 499 P2d 287 (1972) 3
State v. Torres, 619 P2d 694 (1980) 3
State v. Dougherty, 550 P2d 175 (1976) 4
State v. Chesnut, 621 P2d 1228 (1980) 4
Bowers v. People, 617 P2d 560 (1980) 4
People v. Glen, 615 P2d 700 (1980) 4
State v. Jimerson, 618 P2d 1027 (1980) 4
August v. U.S., 257 F 388 (1918) 6
State v. Cobo, 60 P2d 952 (1936) 6
State v. Marks, 602 P2d 1344 (1979) 7
State v. Baker, 617 P2d 39 (1980) 7

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NATURE OF THE CASE

Appellants were charged by information, filed on 5 June 1980, for violating provisions of Section 76-5-405(1)(a)(ii), U.C.A. (1953), to wit: engaging in a sexual act involving the genitals of one person and the mouth of another, without the consent of the victim, DENNIS FRAZIER, compelling submission to the said sexual act by the threat of death or serious bodily injury to be inflicted imminently on the said DENNIS FRAZIER.

DISPOSITION IN THE LOWER COURT

Appellants were found not guilty of violating Section 76-5-405(1)(a)(ii), but were found guilty of violating Section 76-5-403(2), forcible sodomy, a lessor included offense. Both Appellants were subsequently committed to the Utah State Prison to serve terms of not less than one year nor more than fifteen years.

RELIEF SOUGHT ON APPEAL

Appellants respectfully seek reversal of the lower Court's judgment or, alternatively, an order remanding the case for a new trial.

STATEMENT OF FACTS

Appellants' case was submitted to the jury with the Court's instructions and three sets of acceptable verdict. Those

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instructions and verdicts allowed that the jury might find Appellants either guilty of aggravated sexual assault, guilty of forcible sodomy, or not guilty (see pages 47, 52, 53, 54, 55, 56, and 57 of the Record on Appeal).

ARGUMENTS

POINT I: Appellants were entitled to have the jury instructed relative to all lessor included offenses not necessarily precluded by the evidence.

Amendment number XIV, Section 1, of the Constitution of the United States provides, inter alia, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Likewise the Constitution of Utah in Article I, Section 2 declares that governmental powers are "for (the people's) equal protection" and in Article I, Section 7 that "no person shall be deprived of life, liberty, or property, without due process of law." Section 76-1-402(4) U.C.A. (1953), directs that "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."

Appellants assert that there existed such a rational basis to believe they were not guilty of the offense charged but guilty of certain lessor included offenses that were not offered to the jury; that the Court was obligated to instruct the jury with

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respect to those included offenses; that they were, therefore, denied equal protection and due process of the law in that their convictions were entered in violation of Section 76-1-402(4).

The Court has many times passed on a defendant's right to have lessor included offenses offered to the jury:

> One of the fundamental principles in regard to the submission of issues to the juries is that where the parties so request, they are entitled to have instructions given upon their theory of the case; and this includes on lessor offenses if any reasonable view of the evidence would support such a verdict. This is in accord with the authorities generally and with the adjudications of this Court, as stated in a number of cases dealing with instructing on lessor offenses. State v. Gillian, 463 P2d 811 (1970). See State v. Castillo, 457 P2d 618; State v. Hyams, 230 P 349 (1924); State v. Thompson, 170 P2d 153 (1946); Stevenson v. United States, 16 S.Ct. 839; State v. Johnson, 185 P2d 738 (1947).

> We have held that each party is entitled to have his theory of the case which is supported by competent evidence submitted to the jury by appropriate instructions; and the failure to present for the jury's consideration a party's theory by appropriate instructions is reversible error. State v. Newton, 144 P2d 290 (1943).

> If in a case of different degrees of charged greater offense, there is sufficient evidence to submit the case to the jury of the charged greater offense, I do not see wherein it is the perogative of the Court to direct the jury of what degree only the jury may find the defendant guilty, or to direct them that, if they do not find him guilty of the charged greater offense they must acquit him. To permit the Court to do that is to permit it to be the judge of the facts. State v. Fergfuson, 279 P.55 (1929).

> The well established general rule, that the jury should be instructed on lessor included offenses when such a conviction would be warranted by any reasonable view of the evidence, is in accord with and supported by our statutory law. State v. Close, 499 P2d 287 (1972).

> Each party is, however, entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it. State v. Torres, 619 P2d 694 (1980).

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> . . . . if there be any evidence, however slight, on any reasonable theory of the case under which the Defendant might be convicted of a lessor included offense, the Court must, if requested, give an appropriate instruction. State v. Dougherty, 550 P2d 175 (1976).

> Instructions on the lessor offense may be given because all elements of the lessor offense have been proven. 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. If there be any evdience, however slight, on any reasonable theory of the case under which Defendant might be convicted of a lessor included offense, the trial Court must, if requested, give an appropriate instruction. (Emphasis added by the Court). State v. Chesnut, 621 P2d 1228 (1980).

Other states take identical positions regarding instructing relative to lessor included offenses. See, for example, Bowers v. People, 617 P2d 560 (1980) at 562, and People v. Glenn, 615 P2d 700 (1980) at 705, both Colorado cases; and State v. Jimerson, 618 P2d 1027 (1980) at 1029, a Washington state case.

The law seems to be, then, that if any evidence is presented that would cause reasonable jurors to convict on a lessor offense and acquit on the greater, the jury must be instructed relative to those lessor included offenses. Appellants claim such evidence was introduced so that instructions on lessor included offenses were required. This brief will argue for the existence of such evidence in Point III, below.

POINT II: This Court may review the trial Court's refusal to instruct on all lessor included offenses whether or not trial counsel objected thereto.

At the trial of this matter, Defendant ELLIOTT was represented by Mr. CASEY CHRISTENSEN, ESQ.; Defendant CLAYTON was

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represented by Mr. STEPHEN R. MADSEN, ESQ. (see pages 34, 35, 36, 37, 38, and 39 of the Record on Appeal); Defendant ELLIOTT apparently did not file a written request. Part of Defendant CLAYTON'S request was an instruction on the lessor included offense of assault by a prisoner (see page 37 of the Record on Appeal).

The Minute Entry designated as "Trial" indicates that on the second day of the trial, prior to reading the instructions to the jury, the Court met with counsel in chambers relative to jury instructions (see page 60 of the Record on Appeal). The transcript of the trial, at Page 237, line 1, indicates that Defendant ELLIOTT, through his counsel, objected to the Court's refusal to instruct on the lessor included offenses of assault and aggravated assault.

Appellants claim there is authority for this Court to exercise its discretion and assign error to the trial Court's instructions if they omitted charges relative to additional lessor included offenses for which evidence would support convictions. Utah Rules of Civil Procedure, No. 51, Instructions to Jury: Objections, prescribes, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds to his objections. Notwithstanding the foregoing requirement, the appellate Court, in its discretion and in the interest of justice, may review the giving or failure to give an

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instruction. Similarly the Utah Code of Criminal Procedure, Rule 19-Instructions, states in paragraph (c) "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid manifest injustice." Case law also supports such assignment of error by a reviewing Court, absent counsel's failure to request instructions at time of trial:

> . . . in capital cases and in cases of grave and serious charged offenses and convictions of long terms of imprisonment, cases involving the life and liberty of the citizen, we think that when palpable error is made to appear on the face of the record and to the manifest prejudice of the accused, the Court has the power to notice such error and to correct the same, though no formal exception was taken to the ruling. August v. U.S., 257 F. 388 (1918).

Speaking of this rule that no review will be had of instructions or refusals to instruct where no exception was taken, this Court has reached the same conclusion as did the above Federal Court ruling:

> Such rule, however, is not uniform as to all errors so committed. In many jurisdictions there are well recognized exceptions to the general rule, especially in criminal cases involving capital offenses or other grave and serious offenses of long term imprisonment, and sometimes has even been applied in civil cases, when palpable error on the face of the record involved violations of fundamental rights and privileges of manifest prejudice to the party aggrieved. State v. Cobo, 60 P2d 592 (1936).

The reason the rule is sometimes relaxed to allow appellate review where no objection or exceptions were taken at the trial level is because instructions on lessor included offenses are fundamental to the Defendant's case. Because those instructions

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are vital to the Defendant, the trial Court should alert the jury if even on its own motion:

> This Court in a number of decisions has affirmed the rule above stated requiring the submission of lessor included offenses when the evidence and circumstances so justify, and has gone further in indicating that even in the absence of an appropriate objection, if it is clear that the interests of justice so require, that the Court should instruct on included offenses. State v. Close, supra.

The Kansas Supreme Court spoke similarly of instructions on lessor included offenses saying:

> Such an instruction is required even though such instructions have not been requested or have been objected to. State v. Mark's, 602 P2d 1344 (1979).

The Arizona appellate Court ruled:

> Where the matter is vital to the rights of a defendant, however, the trial judge is required to instruct on its own motion, even if the Defendant fails to request him to do so. State v. Baker, 617 P2d 39 (1980).

Appellants assert their case meets all criteria for this Court to exercise its discretion to review the trial Court's omission of certain lessor included offenses in its instructions to the jury: 1) Rules 51 and 19(c) vest this Court with such authority, 2) case law indicates such instructions are fundamental and vital to Appellants' rights to due process, 3) Appellants were charged with violating a felony of the first degree--a grave and serious offense, 4) Appellants were convicted of a felony of the second degree--a conviction of long term imprisonment, 5) the Trial Court did not act on its own to adequately instruct the jury, 6) the evidence supports convictions on various lessor included offenses, as will be shown in Point III, below.

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POINT III: Appellants were entitled to have the jury instructed that a verdict could have been returned on any of the following lessor included offenses:

--Section 76-5-103.5, U.C.A. (1953), aggravated assault by a prisoner, a 2nd degree felony;

--Section 76-5-403(2), U.C.A. (1953), forcible sodomy, a 2nd degree felony;

--Section 76-4-101, U.C.A. (1953), attempted forcible sodomy, a 3rd degree felony;

--Section 76-5-404(1), U.C.A. (1953), forcible sexual abuse, a 3rd degree felony;

--Section 76-5-102.5, U.C.A. (1953), assault by a prisoner, a 3rd degree felony.

As shown in Point I, instructions on lessor included offenses must be given if <u>any</u> evidence is produced at trial which would support a conviction on such included offense; such instructions may be omitted only if <u>no</u> evidence is produced to support a conviction on the included offense.

It is conceded that the evidence produced at the trial of this matter is consistent insofar as it establishes that both Defendants were inmates of the Utah County Jail on 4 May 1980, the date of the incident for which they were tried. The evidence also consistently establishes that on that date both Defendants made unlawful physical contact with their victim, repeatedly, without his consent, and against his efforts. But much of the rest of the evidence is conflicting.

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Some of the evidence indicated that the Defendants "used a means or force likely to produce death or serious bodily injury" or threatened their victim with "death or serious bodily injury to be inflicted imminently." See witness DENNIS FRAZIER'S testimony at:

page 28, line 23 to page 29, line 12;
page 43, line 1 to page 43, line 12;
page 47, line 20 to page 48, line 6;
page 70, line 14 to page 72, line 8;
page 73, line 9 to page 73, line 27;

See also witness CARL HOWE'S testimony at:

page 144, line 19 to page 144, line 29.

But other evidence did not substantiate the contention that Defendants used or threatened death or serious bodily injury. See WILLIAM CLAYTON'S testimony at:

page 161, line 21 to page 161, line 28;
page 164, line 21 to page 164, line 29.

See LARRY ELLIOTT'S testimony at:

page 177, line 4 to page 177, line 10;
page 181, line 6 to page 181, line 18;
page 185, line 1 to page 186, line 10;
page 186, line 14 to page 187, line 12;

Some of the testimony seemed to establish that on one or more occasions one or both of the Defendants touched genitals to the mouth of DENNIS FRAZIER. See DENNIS FRAZIER'S testimony at:

page 32, line 10 to page 32, line 23;
page 34, line 9 to page 34, line 16;
page 37, line 24 to page 38, line 13;
page 45, line 24 to page 46, line 4.

BRAD PERRY testified similarly:

page 111, line 9 to page 111, line 11;
page 118, lines 24 to 29.

However, other witnesses testified that, while the Defendants displayed their genitals, there was not the contact

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between them and the victim's mouth necessary to constitute the offense of sodomy. See MICHAEL TAYLOR'S testimony at:

page 98, line 30 to page 99, line 12;
page 100, lines 5 through 8.

See CARL HOWE'S testimony at:

page 146,line 7 to page 146, line 13;
page 146, line 18 to page 146, line 21;
page 147, line 4 to page 147, line 9;
page 150, line 1 to page 150, line 13;
page 151, line 1 to page 151, line 15.

See WILLIAM CLAYTON'S testimony at:

page 158, lines 18 through 22;
page 159, lines 17 through 22;
page 172, line 29 to page 173, line 7.

See LARRY ELLIOTT'S testimony at:

page 176, line 25 to page 177, line 3;
page 177, lines 11 through 15;
page 184, lines 7 through 18.

Given the foregoing conflicting testimony, the jury could have rationally found either for or against the existence of threats of imminent death or serious bodily injury. In fact, the jury did return a verdict that found such a threat did not exist. Likewise, the jury could have concluded rationally either way on the issue of whether or not there was a touching of the Defendants' genitals with the victim's mouth. However, the instructions and verdict blanks given to the jury at the trial removed from them the option of returning a verdict that reflected a finding that there were no such touchings or threats. And denying the jury that option does not comply with the weight of the authority of case law which prescribes that instructions on lessor included offenses must be given if there exists _any_ evidence to support a conviction on the included

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offense.

Applying these rational and possible findings of facts, the jury could have returned verdicts convicting one or both Defendants of any of the following lessor included offenses which they were not instructed to consider at the time of trial:

1. Aggravated assault by a prisoner a) threats or attempts to do bodily injury, b) use or threats of deadly force, c) Defendants were prisoners by statutory definition, d) but no sodomistic touching;

2. Assault by a prisoner a) threats or attempts to do bodily injury, b) Defendants were prisoners by definition, c) but no use or threats of deadly force, and d) no sodomistic touching;

3. Attempted forcible sodomy a) attempts at, but no fruition of sodomistic touching, b) attempts made without the victim's consent;

4. Forcible sexual abuse a) no sodomistic touching nor attempts at sodomistic touching, b) but the taking of indecent liberties with the victim and an intent to cause substantial emotional or bodily pain to the victim, without the consent of the victim.

CONCLUSIONS

Case law from the Federal system, from this Court, and from other state Supreme Courts holds that a criminal defendant is entitled to have his jury instructed relevant to all lessor included offenses if there is <u>any</u> evidence to support a conviction on such lessor offense. The trial Court may omit such

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instructions only if there is no evidence to support a conviction on an included offense. Defendants' entitlement to such instructions is fundamental to the preservation of their rights to due process.

Because this right is so vital to the Defendants, the trial Court is obliged to see to it that the jury is instructed on the availability of convictions for lessor included offenses, if even on its own motion, notwithstanding Defendants' failure to request those instructions, and in spite of the opposition's objection to such instructions. Further, statutory and case law permit appellate review of the trial Court's omissions of such instructions even though Defendants did not adequately record objections thereto, because the right abridged is vital to Defendants, the penalties and loss of liberty are potentially severe, and the evidence supported instructions, on all lessor included offenses.

Testimonial evidence introduced at the trial of Defendants establishes that there was much evidence that would have supported convictions on several lessor included offenses that were not offered to the jury. As a result, the jury was allowed to consider only one included offense--a 2nd degree felony--and was not allowed to consider four other included offenses--one 2nd degree felony and three 3rd degree felonies.

It is likely that the jury--while convinced that "a" crime had been committed--returned guilty verdicts for forcible sodomy charges only because they had no other lessor included offenses

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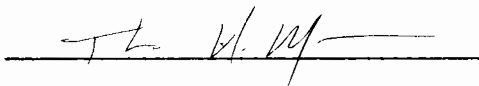
to choose from. Defendants were, therefore, denied due process of law and equal protection of the laws in violation of the Constitutions of both the United State and of Utah as well as Section 76-1-402(4), U.C.A. (1953).

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the date below he mailed a copy of the above Appellants' Brief to DAVID L. WILKINSON, Attorney General, State of Utah, 236 State Capitol Building, Salt Lake City, Utah, 84114, with all postal and other fees prepaid.

DATED this 27 day of March, 1981.



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