1982

State of Utah v. William Harrison Clayton : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-v- : Case No.

WILLIAM HARRISON CLAYTON, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

Appeal from the Judgment, [illegible]

Utah County, State of Utah, the Honorable

Judge, presiding.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 17518
WILLIAM HARRISON CLAYTON,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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Appeal from the Judgment of the District Court of Utah County, State of Utah, the Honorable Allen B. Sorenson, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with one count of murder in the second degree, in violation of Utah Code Annotated, § 76-5-203(1)(b) (1977), for committing an act clearly dangerous to human life, while intending to cause serious bodily injury to another, which led to the death of John Linde of Provo.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and was found guilty of one count of second degree murder on November 25, 1980 in the Fourth Judicial District Court, the Honorable Allen B. Sorensen, presiding. Appellant was sentenced on November 25, 1980 to confinement in the Utah State Prison for an indeterminate term of not less than five years to life on the one count.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence of the court below.

STATEMENT OF THE FACTS

John Linde was the victim of a brutal beating which eventually led to his death (T. 18). He was an elderly gentleman who had been seen in good health at 4:00 p.m. on November 14, 1979. However, he was discovered semiconscious later that same evening in his home around midnight by a neighbor, Richard Findley (T. 20, 31). Mr. Linde was lying on his bedroom floor moaning and groaning; his teeth had been knocked out, his clothes torn, his face beaten, and he was coughing up blood (T. 21). Multiple rib fractures were later discovered (T. 87). Blood was also found in several of the other rooms (T. 21, 53). The home had been ransacked (T. 113). Every drawer, cannister, and book had been strewn about and all rooms were in shambles (T. 20, 26, 53, 54). Part of the inside unit of the telephone had been removed and disconnected (T. 25, 51). A butcher knife was found in a bedroom and another located in the living room (T. 51). Both had blood spatters on them (T. 113).

Mr. Linde died on December 10, 1979 without ever recovering sufficiently to communicate with others (T. 41). His personal physician who attended him while he was

hospitalized gave his opinion that he would not "have died had he not received the beating. . . . (T. 42). This opinion was corroborated by the medical examiner who performed the autopsy (T. 87, 88).

Among items that Mr. Findley noticed in Mr. Linde's home the night of the beating was a yellow baseball-style cap (T. 22, 112) (State's Exhibit No. 1). He had seen it earlier that evening at about 8:00 p.m. at Bullock's Billiards worn by a "bearded man with long hair . . . an orange vest [and] Levis" (T. 22). He remembered the hat had a bend in the bill (T. 23). Although he positively identified the hat, he was not certain whether appellant had been the bearded man he had seen wearing the hat at the billiard hall (T. 23). Defendant was clean-shaven at trial.

David Robertson, an acquaintance of appellant, worked at Bullock's Billiards and had twice seen appellant on the evening of November 14, 1979--once at the billiard hall at about 7:30 p.m. (T. 102). He said appellant was wearing an orange hunting vest or jacket, Levis, and a yellow baseball cap (T. 103). He identified the baseball cap found in the victim's home as the same one worn by appellant at the billiard hall, noting it had an identical patch with an AHI helicoptor on it, and that it had the bill folded to square it up (T. 103-105).

Human hairs found on the cap were scientifically compared with samples of head hair taken from the appellant and were found by James Gaskill, director of the crime laboratory at Weber State College, to be consistent and likely to have come from the same person (T. 95). He testified that it is difficult to place a specific degree of probability on the comparison of hair samples, but that studies of others indicate the likelihood of two hair samples from two different people matching is in excess of ninety-five percent and that the studies range up as high as one in forty-five hundred (T. 96). The defense did not object to Mr. Gaskill's testifying to the degree of probability, but did object to his referring to the studies of others for lack of foundation (T. 96, 99-100).

Appellant's sister-in-law, Tony Clayton, testified that appellant came to her home late in the evening of November 14th or early in the morning of the 15th of November, 1979, wearing Levis and what she thought was a red shirt (T. 79, 82). He wanted to speak to his brother (T. 79). She testified appellant left some credit cards at her home which bore the decedent, John Linde's, name (T. 79). She destroyed them because she knew they did not belong to the appellant and she did not want them in her house (T. 79).

ARGUMENT

POINT I

THE JURY WAS PROPERLY INSTRUCTED ON CIRCUMSTANTIAL EVIDENCE.

Appellant's conviction was based solely upon circumstantial evidence. The narrow question presented by this appeal is whether the trial court properly instructed the jury on how it should consider and weigh evidence in a case which is totally circumstantial.

The jury was specifically instructed on circumstantial evidence as follows:

> Circumstantial evidence is competent, and is to be regarded by the jury in all cases. It should have its just and fair weight with you; you are not to fancy situations or circumstances which do not appear in the evidence but you are to make those just and reasonable inferences from the circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances; and if in connection with the other evidence before you, you then have no reasonable doubt as to the defendant's guilt, you should convict him but if you then entertain such doubt, you should acquit him. To warrant a conviction on circumstantial evidence, each fact necessary to establish the guilt of the accused must be proven by competent evidence beyond a reasonable doubt and the facts and circumstances proven should not only be consistent with the guilt of the accused but must be inconsistent with any other reasonable hypothesis or conclusion than that of guilt.

Jury Instruction No. 9 (R. 118).[1] The defense objected to this instruction at trial on the sole ground that it did not advise the jury to regard circumstantial evidence with "caution":

> MR. STANGER: We will take exception to Instruction No. 9. That is the only one we have, Your Honor.
> THE COURT: You don't wish to make a specification in No. 9 what you claim is error?
> MR. STANGER: The thing we have set forth, Your Honor, it's our position that the Utah cases hold that circumstantial evidence is not of the same quality as direct evidence, and the jury should so be instructed. And that is left out of Instruction No. 9. As I recall the case it said it should be regarded with caution; that I cited for the Court.
> THE COURT: It [Instruction No. 9] says "guarded judgment of a reasonable man would ordinarily make under like circumstances." Then I have the reasonable hypothesis.
> That is your only exception?
> MR. STANGER: Yes, sir. (T. 119-20)

No objection was made to the adequacy of any other aspect of Instruction No. 9.

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[1] The jury was also given standard instructions on evidence including the fact that the State had "the burden of proving beyond a reasonable doubt the essential elements of the crime," Instructions Nos. 4, 5, and 10 (R. 113, 114, and 119); the definition of reasonable doubt, Instruction No. 11 (R. 119); that they should consider the evidence as a whole, Instruction No. 12 (R. 120); and that the jury was to determine the weight and credibility of the evidence, Instruction No. 13 (R. 120).

On appeal, appellant raises an additional objection to the instructions given, beyond the single objection he preserved at trial. He now asserts that the jury was not adequately instructed that in a totally circumstantial evidence case such evidence must preclude every other reasonable hypothesis of defendant's innocence. He concedes that this subject was addressed in Instruction No. 9, but claims it should have been covered in a separate specific instruction because of its importance. Finally, appellant claims that his proposed jury instructions were clearer and more accurate on the above two points than the instruction given by the Court, and therefore it was error to reject his proffered instructions.[2]

At the outset, appellant should be barred from raising any claims for the first time on appeal which were not properly preserved at trial. It is well recognized in Utah that:

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[2]Note that the record contains two separate sets of instructions proposed by the defense and that appellant only refers in his brief to the first set found at R. 91-101 dated June 30, 1980. He also submitted a second set of proposed instructions on November 24, 1980 found at R. 102-110. Despite the fact that these two sets were duplicative in substance though worded somewhat differently, the trial court reviewed both sets and either rejected them or noted that the instructions had been given in substance.

> When a party fails to make a proper objection to an erroneous instruction; or to present to the court a proper request to supply any claimed deficiency in the instructions, he is thereafter precluded from contending error.

State v. Kazda, Utah, 545 P.2d 190, 193 (1976); State v. Kitchen, Utah, 564 P.2d 760 (1977); State v. Gandee, Utah, 587 P.2d 1064 (1978). This rule has been modified by the plain error rule which is recognized in many states and in the federal courts. The modification allows this Court to review an issue for the first time on appeal if there appears to be a substantial likelihood that an injustice has resulted. State v. Schoenfeld, Utah, 545 P.2d 193 (1976). However, as will be shown, no such injustice is present in the instant case. Thus, appellant's argument that the jury should have been separately instructed on the alternate reasonable hypothesis should be summarily rejected. Should this Court choose to reach this issue, it is clear the jury was adequately instructed on this point. Again, Instruction No. 9 (R. 118) provided in pertinent part that:

> . . . To warrant a conviction on circumstantial evidence, each fact necessary to establish the guilt of the accused must be proven by competent evidence beyond a reasonable doubt and the facts and circumstances proven should not only be consistent with the guilt of the accused but must be inconsistent with

> any other reasonable hypothesis or conclusion than that of guilt.

(CT 118). To give a separate instruction on the reasonable alternative hypothesis would have been superfluous and confusing.

In any criminal case,

> [t]he prosecutor's burden, . . . whether the evidence be direct or circumstantial or a combination thereof, is to prove all elements of the crime charged beyond a reasonable doubt, whether the defense is a denial or an affirmative defense.

State v. Starks, Utah, 627 P.2d 88, 92 (1981).

The test whether rejection of a reasonable alternative hypothesis instruction is error is set forth in State v. King, Utah, 604 P.2d 923 (1979), a case in which the appellant argued that the trial court had committed error in refusing to give such an instruction. This Court said:

> Of course, the requested instructions may make more understandable and explicit the usual instruction on burden of proof. We cannot say, however, that the instructions given in this case inadequately informed the jury as to how convincing the proof had to be to convict.

Id. at 926. This Court also cited State v. Schad, 24 Utah 2d 255, 470 P.2d 247 (1970), to the effect that it is a matter

for "the jury to determine from all the facts and circumstances" the guilt or innocence of the accused. Id. at 247. If the jury is:

> convinced beyond a reasonable doubt of the defendant's guilt, it necessarily follows that they regarded the evidence as excluding every other reasonable hypothesis.

Id. Therefore, if the instruction "adequately inform(s) . . . the jury as to how convincing the proof . . . [(has)] . . . to be to convict" (Starks, supra, at 92), the jury in such a case has been adequately instructed and no reasonable alternative hypothesis instruction is necessary. Accord: State v. Eagle, Utah, 611 P.2d 1211 (1981). "Generally, other forms of instructions can effectively accomplish the same purpose of conveying to the jury the meaning of 'proof beyond a reasonable doubt'" (Starks, supra, at 92).

On the first day of trial the prosecutor advised the jury in his opening statement that the evidence in this case would be wholly circumstantial and introduced to the jury the notion of "every other reasonable hypothesis except guilt."

> Now evidence generally speaking, just by way of explanation, falls into two classes. There is direct evidence, which can be explained as similar to an eyewitness, someone having seen something

> occur, something that points directly toward the facts being attempted to be proved. Then there is indirect or more commonly known as circumstantial evidence. These are circumstances. This case will be presented to you entirely by way of circumstantial evidence.
>
> Now as I believe the Court's instructions will tell eventually in evaluating circumstantial evidence, it must exclude every other reasonable hypothesis, except guilt. If the circumstantial evidence is also consistent with innocence, then you must find innocence or not guilty.

(R. 12) (Emphasis added).

As noted above, the reasonable alternative hypothesis theory was included in the jury instruction in this case. Had appellant's requested jury instructions been given, the result would have been superfluous, repetitive, and ambiguous with the risk of confusing the jury.

Finally, Respondent could not locate, nor did appellant cite, any authority for the proposition that the reasonable hypothesis theory must be presented in a separate jury instruction as opposed to being part of a general instruction on circumstantial evidence.

Appellant's second major contention is that the trial court erred in refusing to instruct that circumstantial evidence should be viewed with caution. At trial, appellant seemed to contend that the word "caution" is a legal term of art when used in a jury instruction intended to indicate to

the jury how it is to view circumstantial evidence, and that the court's use of the term "guarded judgment" in this case was inadequate.

Appellant bases his notion that the word "caution" is required on the following language found in Schad, supra:

> As to point (1): whether the evidence justifies the verdict, we survey the evidence and any reasonable inferences that fairly may be drawn therefrom in the light favorable to the jury's verdict. However, there are some further observations as to the manner in which that basic rule is applicable in this case. It is true, as the defendant contends, that where a conviction is based on circumstantial evidence, the evidence should be looked upon with caution, and that it must exclude every reasonable hypothesis except the guilt of defendant. This is entirely logical, because if the jury believes that there is a reasonable hypothesis in the evidence consistent with the defendant's innocence, there would naturally be a reasonable doubt as to his guilt. Nevertheless, that proposition does not apply to each circumstance separately, but is a matter within the prerogative of the jury to determine from all of the facts and circumstances shown; and if therefrom they are convinced beyond a reasonable doubt of the defendant's guilt, it necessarily follows that they regarded the evidence as excluding every other reasonable hypothesis. Unless upon our review of the evidence, and the reasonable inferences fairly to be deduced therefrom, it appears that there is no reasonable basis therein for such a conclusion, we should not overturn the verdict.

Id. at 247.

Schad, when read in context, does not stand for the proposition that the word "caution" is legally necessary in an instruction on circumstantial evidence. The issue this Court was addressing involved a general discussion of the test this Court would apply in determining the sufficiency of the evidence to justify a jury verdict. While it is true that caution in viewing the evidence in a wholly circumstantial case is mentioned, it is nowhere asserted to be a required element of a jury instruction. Schad does not even discuss jury instructions. Rather, the emphasis is on the rule that for evidence to be sufficient to convict in a wholly circumstantial case "it must exclude every reasonable hypothesis except the guilt of defendant" (Id.).

That caution is not an essential element either of this test or an instruction purporting to convey the standard on burden of proof to a jury is further suggested by the fact that neither of the cases on which Schad relies for this point (People v. Scott, 10 Utah, 217 37 P. 335 (1894), and State v. Erwin, Utah, 101 365, 120 P.2d 286 (1932)) mentions "caution." Scott and Erwin address only the reasonable hypothesis portion of the statement in Schad.

The Schad progeny on this point reveal only one case which even mentions "caution" and that occurs in a direct quotation from Schad itself. King, supra, at 926. No

elucidation is given in King, supra, or in any of the cases citing Schad as to the inclusion of caution in jury instructions on circumstantial evidence. In fact, none of these cases, except King, even discusses jury instructions. The cases generally cite Schad for the proposition that where the evidence is wholly circumstantial every reasonable hypothesis of the defendant's innocence must be excluded (State v. Dodge, Utah, 564 P.2d 312, 313 (1977)), and that this "is in reality nothing more than another manner of stating the burden of proof applicable in all criminal cases, viz., beyond a reasonable doubt." State v. Lamm, Utah, 606 P.2d 229, 232 (1980). Accord: State v. John, Utah, 586 P.2d 410, 411 (1978). Respondent found no cases that would suggest that the word "caution" is essential in a jury instruction on circumstantial evidence. The only cases which shed any light on whether a particular jury instruction is required in wholly circumstantial evidence cases are King, supra, and State v. Garcia, 11 Utah 2d 67, 355 P.2d 57 (1960).

The appellant in King contended the trial court had erred in failing to give his requested "instruction to the jury in explaining the effect of reasonable alternatives or hypotheses upon the burden of proof in a criminal case." Id. at 926.

After quoting the appellant's requested jury instruction and the language from Schad containing the "caution" dicta, this Court indicated that if it cannot be said the instructions given in a case "inadequately informed the jury as to how convincing the proof had to be to commit," the fact that "the requested instructions may make more understandable and explicit the usual instruction on burden of proof" does not mean the rejected instructions are to be proffered or that it is reversible error not to give them. Id.

State v. Garcia, supra, cited in a somewhat unclear fashion in appellant's brief, provides further guidance on this same point. There this Court said:

> It is universally recognized that there is no jury question without substantial evidence indicating defendant's guilt beyond a reasonable doubt. This requires evidence from which the jury could reasonably find defendant guilty of all material issues of fact usually with reference to the jury instructions, 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 reasonable 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.

Garcia, supra, at 59, 69 (Emphasis added).

Respondent respectfully submits that nowhere has this Court indicated that caution is an essential term of art to a jury instruction on circumstantial evidence.

Moreover, respondent submits there is no essential distinction between the word "caution" and the term "guarded judgment" as used by the court in Jury Instruction Number 9. Webster's New International Dictionary of the English Language, 2nd Edition, Unabridged, G. & C. Merriam Co., 1934, defined "caution" as:

> [a] precept or warning against evil of any kind; an exhortation to wariness; something, as a word, act, or command, that conveys a warning. Synonyms, care, forethought, heed, prudence, circumspection, counsel, advise, warning, admonition.

Id. at 428. Similarly, "guarded" is defined as being:

> cautious, wary, circumspect; as, he was guarded in his expressions; framed or uttered with caution; as, his expressions were guarded. Synonyms, discreet, watchful, Cf. careful.

Id. at 1111. "Judgment" is defined as:

> [t]he mental act of judging; the operation of the mind, involving comparison and discrimination, by which knowledge of values and relations is mentally formulated; the power of arriving at a wise decision or conclusion on the basis of indications and probabilities, when the facts are not clearly ascertained; as, to use your best judgment; discretion; discernment; as, a man of sound judgment.

Id. at 1343 (Emphasis added).

Respondent submits that even taking into account "caution" or "guarded judgment" stated in the Schad opinion when viewing all the circumstantial evidence and inferences therefrom, the test to be applied by this Court on review is the same:

> Unless upon our review of the evidence, and the reasonable inferences fairly to be deduced therefrom, it appears that there is no reasonable basis therein for such a conclusion, we should not overturn the verdict.

Schad, supra, at 247.

Respondent submits that in the sense in which it was used in Jury Instruction 9 in this case, the term "guarded judgment" is the semantic equivalent of "caution" and submits that the jury was properly instructed on the law related to circumstantial evidence in the instructions given. When those instructions are read as a whole, it is evident that they contain the correct elements of appellant's proposed jury instructions which he alleges were improperly refused by the court in the instant case (Appellant's Brief at 4). The instructions given represented an accurate understanding of the correct principles of law applicable to this case.

A brief examination of defendant's requested Jury Instruction Number 1 which he now claims for the first time was improperly rejected by the trial court indicates why it was properly refused.

Again, appellant should be precluded from raising this issue for the first time on appeal, but should this Court decide to reach it, it is clear that appellant was not prejudiced by rejection of his Jury Instruction Number 1, which stated:

> You are instructed that circumstantial evidence is necessarily less convincing and of less value than direct evidence. Circumstantial evidence must be treated with caution.

(RT 92).

This is an erroneous statement of the law. While it is true there is dicta to indicate circumstantial evidence may be of less quality than direct evidence (Schad, supra; State v. John, Utah, 586 P.2d 410, 411 (1978)), other decisions of this Court indicate this is not the case.[3]

Since direct and circumstantial evidence are treated the same under the law as regards their probative value, they should not be treated differently in jury

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[3]State v. Housekeeper, Utah, 588 P.2d 139, 140 (1978) ("Circumstantial evidence may be even more convincing than direct testimony."); State v. Laub, 102 Utah 402, 131 P.2d 805, 807 (1942) (" . . . such evidence may be just as conclusive or even more so than direct evidence."); State v. Kallas, 97 Utah 492, 94 P.2d 414, 425 (1939) ("Circumstantial evidence alone is enough to support a verdict of guilty of the most heinous crime . . ."). (See discussion in State v. Wilkins, 523 P.2d 728, 733-737 (Kans. 1974)).

instructions. The important and essential element when dealing with either form of proof is whether it convinces the jury beyond a reasonable doubt of the guilt of the defendant. If that is the case, any superfluous language commanding one type of proof is of less value and should be treated with caution could only confuse the jury.

POINT II

NO ERROR WAS COMMITTED IN ADMITTING THE TESTIMONY OR THE EXPERT WITNESS, JAMES GASKILL.

Appellant next contends that the "probability testimony regarding hair samples was improperly admitted" (Appellant's Brief at 4) and cites error in two areas. "First, there was a lack of foundation for the probability evidence and second, such probability evidence had a disproportionate impact upon the jury's conclusion" (Appellant's Brief at 5).

Appellant's argument that there was a lack of foundation for the expert testimony on probabilities may be summarily disposed of. After Mr. James Gaskill had been called and sworn as a witness for the state, the prosecutor began asking questions to establish his qualifications so that he might give expert opinion and testimony (T. 89). Defense counsel interjected that he would stipulate to Mr. Gaskill's

qualifications (Id.). The court found that stipulation adequate to establish Mr. Gaskill as an expert (Id.), and that he was qualified to base his opinion on the studies of others (T. 96). When defense counsel objected (citing lack of foundation) to Mr. Gaskill's testimony based on his own studies and those of others, the court overruled the objection based on defense counsel's prior stipulation to the witness' qualifications.

Speaking generally about the qualifications of a witness to testify as an expert, Wigmore indicates:

> The possession of the required qualifications by a particular person offered as a witness, must be expressly shown by the party offering him. This follows from the nature of the situation . . . and is universally conceded. . . . Second and emphatically, the trial court must be left to determine, absolutely and without review, the fact of possession of the required qualification by a particular witness. In most jurisdictions it is repeatedly declared that the decision upon the experiential qualifications of witnesses should be left to the determination of the trial court.

2 Wigmore, Evidence, §§ 560, 561 (Chadbourn rev. 1979).

Rule 56 of the Utah Rules of Evidence (1953) indicates the conditions under which a witness may testify as an expert and says that "[u]nless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission."

It would seem that where the requirement to show qualifications to give expert testimony is obviated by an express stipulation by opposing counsel, there is no issue as to those qualifications or need for foundation for the opinion that may later be expressed. State v. Mason, Utah, 530 P.2d 795, 798 (1975).

Appellant should have challenged Mr. Gaskill's qualifications during the trial; his assertion of lack of foundation for a portion of the expert opinion comes late and should be rejected by this Court.

As to Mr. Gaskill's referring to the studies of other knowledgable persons in the field of hair comparison and analysis, it must be remembered at the outset that Mr. Gaskill did not cite those studies for the truth of the matter asserted, i.e., to show that the samples of hair taken from the appellant were in fact the same as those found on the cap found at the victim's home. Thus the studies to which Mr. Gaskill referred would not come under the definition of hearsay.

In Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962) the U.S. Court of Appeals said:

> we agree with the leading commentators that the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession.

Id. at 641. (Citing McCormick, Evidence, § 15 (1955) and 3 Wigmore, Evidence, § 688 (3d Ed. 1940).) Accord: United

States v. Morrison, 531 F.2d 1089, 1094 (1st Cir. 1976); Federal Rules of Evidence, 703.

In State v. Garrison, 585 P.2d 563 (Ariz. 1978), the Arizona Supreme Court said:

> Arizona Rules of Evidence, 17A A.R.S., effective September 1, 1977, provides by Rule 803(18) that statements contained in published treatises, periodicals, or pamphlets on the subject of medicine are not excluded by the hearsay rule.

Id. at 566. In Garrison the error asserted on appeal concerned the prejudicial quality of testimony of mathematical probabilities given by an expert as to comparisons he had made betwen bite marks found on the victim's corpse and impressions made from castings taken of the defendant's teeth.

Indeed, appellant similarly contends that the probability testimony of Mr. Gaskill was erroneously admitted because of its alleged prejudicial impact on the jury.

In examining this claim, it must be observed that the testimony offered by Mr. Gaskill was for the purpose of corroborating the eyewitness testimony of David Robertson, who personally knew appellant and observed him at approximately 7:30 p.m. on November 14, 1979 (T. 102), the day on which the victim was beaten (T. 19). He identified a cap found at the victim's home (T. 52) as the one he had seen worn by the defendant on the early evening of November 14 at Bullock's Billiards (T. 105).

Additionally, the jury had the testimony of Richard Findley to the effect that he observed a "bearded man with long hair" wearing the cap at about 8:00 in the evening also at Bullock's Billiards (T. 22, 102). Two items of clothing worn by the individual he observed wearing the cap (orange vest and Levi trousers) matched items of clothing recalled by witness Robertson (T. 103).

The jury also had before it the testimony of the appellant's sister-in-law to the effect that during the late evening hours of the 14th of November or early morning hours of November 15, 1979, the appellant, dressed in Levis and what she thought was a red shirt, came to her home to speak with his brother, the witness' husband (T. 79). Appellant apparently left some credit cards that had the name of the victim, John Linde, embossed on them (T. 79).

Thus, the only purpose for James Gaskill's expert testimony was to provide corroboration that the cap found at the Linde home and seen on appellant's head earlier that evening had been worn by appellant (T. 95).

The test on appeal in Utah for the admission of expert opinion testimony is as follows: The reviewing court: (a) examines the record to determine if there was some basis for the testimony given at the trial, and (b) determines if the jury had opportunity to weigh the testimony against any opposing, mitigating or impeaching testimony or opinion.

Where it appears to the trial court that a reasonable foundation for the opinion of the expert has been given, it is then within the discretion of that court to admit the challenged evidence and "allow any frailties therein to be exposed by cross-examination." State v. Ward, Utah, 347 P.2d 865, 868 (1959).

> In considering whether such testimony was prejudicial error, it is necessary to weigh not only the opinion itself but the extent to which any existing weaknesses therein were so exposed to the jury. The faults in it, assailed by the defendant, go to its weight rather than to its competency.

Id.

This test was met in the instant case. A reasonable foundation for the testimony existed because of defense counsel's stipulation to the witness' qualifications. This was sufficient to establish him as an expert qualified to base his opinions on his own studies and those of others (T. 96).

Next, the jury had before it admissions on direct examination by Mr. Gaskill to the effect that "it [is] very difficult to put a specific number on" (T. 96) the "likelihood [that the hair from the defendant and hair found on the cap] came from the same person" (Id.).

On cross-examination, Mr. Gaskill frankly admitted the difficulty in assigning a numerical value to the probability that two hairs came from the same individual. Additionally, counsel for the appellant brought out several areas in his cross-examination of Mr. Gaskill that limit and impeach the reliability of giving probablity percentages in hair similarity cases (T. 96-99).

As stated by this Court in Ward, supra, any faults in the testimony of an expert witness "go to its weight rather than to its competency" (Id. at 868).

Here, the testimony of Mr. Gaskill was by way of corroboration, not primary identification. The testimony was subject to cross-examination during which negative aspects of that testimony were brought to light before the jury, and the witness freely admitted the difficulty of assigning a percentage of numerical probability to hair comparison cases.

In State v. Carlson, 267 N.W.2d 170 (Minn. 1978), cited by appellant for the proposition that statistical probabilities are prejudicial, the testimony of the expert was directed specifically at the defendant in that case, and the probabilities were projections from the specific hairs found on the victim as compared with samples taken from the defendant Carlson. In the instant case, the expert merely testified that:

> [t]he studies indicate that the likelihood of two hair samples from two people, two different people matching, is way in excess of ninety-five percent. The studies range up as high as one in forty-five hundred.

(T. 96). There was no elaboration or attempt by the prosecutor to apply any specific percentages or numerical quantities to the facts and circumstances of this case, and the witness freely admitted the difficulties in making statistical comparisons. In answering the question "[M]ay expert witnesses express their findings in terms of mathematical probabilities?", the court in Carlson found that the testimony conveying "the suggestion of mathematical precision" (Id. at 176) was improperly received but was nonprejudicial because it was cumulative in nature. The Carlson court indicated that probability testimony becomes prejudicial only when "the odds are based on estimates, the validity of which have not been demonstrated." Id., citing State v. Sneed, 414 P.2d 858 (New Mexico, 1966). In Carlson, supra, the court found that adequate foundation had been laid for the expert's testimony and that the statistics quoted in the record were based "upon empirical scientific data of unquestioned validity." Id.

The error found by the court in U.S. v. Massey, 594 F.2d 676, 680 (8th Cir. 1979), also cited by appellant, was also lack of foundation for the testimony that was admitted, not the inherent invalidity of the studies or results referred to.

Respondent asserts that appellant in the instant case was not prejudiced by the comment made by the expert witness concerning studies he had read regarding hair comparison. If error was committed, it was not prejudicial. Respondent respectfully submits that the admission of the testimony was proper and that if error was committed in so doing, the error was harmless under the Ward, supra, analysis.

CONCLUSION

Based upon the points and authorities stated above, the conviction and sentence should be affirmed.

DATED this 20th day of January, 1982.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Shelden R. Carter, Attorney for Appellant, 350 East Center Street, Provo, Utah, 84601, this 20th day of January, 1982.

Susan Patton