

2000

Utah v. Jose Mario Jiminez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, : Case No. 20000044-CA
 v. :
 :
 JOSE MARIO JIMINEZ, : Priority No. 2
 :
 Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR MANSLAUGHTER, A
SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE
ANN. § 76-5-205 (1996), AND TWO COUNTS OF ATTEMPTED
MANSLAUGHTER, THIRD DEGREE FELONIES, IN VIOLATION
OF UTAH CODE ANN. §§ 76-5-205 AND 76-4-101 (1996), IN THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE ROBIN W.
REESE, JUDGE, PRESIDING.

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Utah Court of Appeals
June 6, 2000
Debbie Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
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Plaintiff/Appellee,	:	Case No. 20000044-CA
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v.	:	
	:	
JOSE MARIO JIMINEZ,	:	Priority No. 2
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR MANSLAUGHTER, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-205 (1996), AND TWO COUNTS OF ATTEMPTED MANSLAUGHTER, THIRD DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. §§ 76-5-205 AND 76-4-101 (1996), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ROBIN W. REESE, JUDGE, PRESIDING.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20000044-CA
JOSE MARIO JIMINEZ,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for one count of manslaughter, a second degree felony, and two counts of attempted manslaughter, each third degree felonies. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

- I. Did the trial court abuse its discretion in denying defendant's mid-trial motion for mistrial where the incidents of alleged prosecutorial misconduct were four isolated questions spread out over the course of a four-day trial?

“On appeal from the denial of a motion for mistrial based on prosecutorial misconduct, because the trial court is in the best position to determine an alleged error's impact on the proceedings, we will not reverse the trial court's ruling absent an abuse of discretion.” *State v. Hay*, 859 P.2d 1, 6 (Utah 1993); *see also State v. Wright*, 893 P.2d 1113, 1118 (Utah App. 1995). “Unless a review of the record shows that the court's

decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial, [this Court] will not find that the court's decision was an abuse of discretion.'" *State v. Harmon*, 956 P.2d 262, 274-75 (Utah 1998) (quoting *State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997))

- II. Did the trial court abuse its discretion in denying defendant's motion for mistrial at the end of closing argument where the prosecutor's comments in closing did not undermine defendant's right not to be tried in prison clothes but, rather, addressed only the evidence before the jury and the inferences concerning defendant's credibility arising therefrom?

The same standard of review applies to this issue as applies to Issue I.

- III. Should defendant receive a new trial based on the cumulative error doctrine where defendant has not demonstrated that any of the alleged errors collectively deprived him of a fair trial?

A court will reverse a conviction under the cumulative error doctrine "only if the cumulative effect of the several errors undermines . . . confidence that a fair trial was had." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

No constitutional provisions, statutes, or rules determine this appeal.

STATEMENT OF THE CASE

On July 29, 1998, defendant was charged by amended information with one count of criminal homicide, a first degree felony; with two counts of attempted criminal homicide, also first degree felonies; and with firearm enhancements, all in connection with a shooting at a local 7-Eleven store (R. 4-7, 12-14). Before trial, defendant filed

several motions in limine, including one requesting the exclusion of prior crimes evidence (R. 151-56, 193-94, 339, 343:168-75). The trial court accepted the parties' stipulation that the State would not address defendant's prior convictions except to rebut any character evidence offered by defendant (R. 339:20, 343:172-75).

At trial, defendant made two motions for mistrial based on prosecutorial misconduct. The trial court denied both motions (R. 344:455-76; R. 345:708-11).

After a four-day trial, defendant was convicted by jury of one count of manslaughter and two counts of attempted manslaughter (R. 282-87). The jury also found that defendant had used a firearm in each of those crimes (*Id.*).

Defendant was sentenced to one to fifteen years and a consecutive firearm enhancement term on the manslaughter count, and to zero to five years and a consecutive firearm enhancement term on each of the attempted manslaughter counts (R. 308-16). The trial court ordered that defendant's manslaughter term run consecutive to his concurrent attempted manslaughter terms (*Id.*).

Defendant timely appealed (R. 321).

STATEMENT OF THE FACTS

On October 20, 1996, defendant opened fire on three unarmed men in a 7-Eleven parking lot. Two of the men were able to shelter themselves from harm. The third was killed when defendant fired two bullets at point blank range into his chest as he sat in a

parked car. The shooting and killing were recorded by the store's security camera (St. Exh. 1).

On October 20, 1996, Henry David Miera went out with his girlfriend, Daphne Sanchez, and friends Manuel Rios and Anthony Montoya to a bar named Shooters (R. 343:226-27, 271-72; St. Exh. 6 at 1; Def. Exh. 3A at 3). After drinking and dancing, the foursome left the bar, stopped for more beer, and took Ms. Sanchez home (*Id.*). The three men then stopped at a 7-Eleven so that Rios could use the restroom (*Id.*). Miera was in the driver's seat; Montoya was on the passenger side (R. 343:232; St. Exh. 6 at 1-2). Rios, a former boxer who weighed about 330 pounds, went into the store (R. 343:233; St. Exh. 1). It was about 1:22 a.m. (*Id.*).

Rios was still in the store when a black car pulled in next to Miera's white one (R. 343:233; St. Exh. 1). Defendant's wife got out of the passenger's side of the black car and went into the store to use the restroom (R. 344: 434-35, 442; St. Exh. 1). Defendant got out of the driver's side and, after retrieving his gun from under his seat and sticking it in the front of his pants, approached the white car (R. 343:232-42; R. 344:562, 570; St. Exh. 1). Defendant asked Montoya and Miera whether they had a problem, i.e., whether they "want[ed] to fight or something" (R. 343:244; St. Exh. 1; St. Exh. 6 at 3).

Rios, hearing the confrontation, quickly left the store and asked defendant whether he had a problem (R. 343:234-35, 245, 247; R. 344:562; St. Exh. 1; Def. Exh. 3A at 6). Montoya, who was slightly smaller than Rios, got out of the car and joined Rios (R.

343:235, 246; St. Exh. 1). Miera, however, remained in the car, “just sitting” there, saying nothing (R. 343:235; St. Exh. 1).

Despite the fact that defendant was much smaller than Rios and Montoya, he showed no sign of backing down when they approached him (R. 343:245-46; St. Exh. 1; Def. Exh. 3A at 4). Instead, defendant reached for the gun in the front of his pants (R. 343:236-37, 277). In response, Rios punched defendant and then turned immediately and ran to the other side of the white car, “just duckin’” (R. 343:236-37; St. Exh. 1; St. Exh. 6 at 5; Def. Exh. 3A at 5-7). Montoya followed Rios as defendant fell backwards to the ground (R. 344:438; St. Exh. 1). Miera opened his car door but then quickly shut it again because defendant, though still on the ground, had opened fire (R. 344:438-39, 501, 546-47; St. Exh. 1; St. Exh. 6 at 3-5, 7; Def. Exh. 3A at 5).

As defendant got up from the ground, he shot into the driver’s side of the car and killed Miera (R. 343:237-38, 298, 301; St. Exh. 1; St. Exh. 6 at 5). One of the shots went through Miera’s rib, lung, and heart (R. 343:295-96). The second shot hit Miera’s diaphragm, spleen, aorta, liver, and lung (*Id.*). Defendant then moved in front of the car and, after apparently clearing a gun jam, continued firing on Rios and Montoya (R. 343:237-38; R. 344:548; St. Exh. 1; Def. Exh. 3A at 5).

During the shooting, defendant’s wife took cover behind a 7-Eleven door (R. 344:443; St. Exh. 1). Defendant then signaled to her to get back into their car (R.

343:238; R. 344:440; St. Exh. 1). As defendant drove away, Rios and Montoya threw beer bottles and firewood at defendant's car (R. 343:238; R. 344:440).

After realizing that Miera had been shot, Rios and Montoya pulled him out of the car and tried to revive him (St. Exh. 1; St. Exh. 6 at 10; Def. Exh.. at 9). Paramedics soon arrived and Miera was eventually transported to the hospital by helicopter (R. 343:305, 313-14; R. 344:543; St. Exh. 1).

After the shooting, defendant parked his car in the garage of a friend, Amber Fabela (R. 343:192, 316; R.444:448). He and his wife then went over to another friend's home, which turned out to be where Amber also was (R. 343:186-87). Defendant, "in hysterics," told them, "I just killed somebody" (R. 343:187). Defendant then fled; his wife did not see him again for two years (R. 344:478, 591).

Police arrived at the 7-Eleven shortly after the shooting and found five slugs and seven casings around or implanted in the white car (R. 343:308, 309, 313, 343).

Although defendant later claimed Miera had a gun, no gun was found at the scene (R. 343:219, 233, 309-10, 315; St. Exh. 6 at 8). Rios testified that if he had had a gun, he would have used it (R. 343:238).

Additional facts. Additional facts will be included in the relevant portions of the argument section of this brief.

SUMMARY OF THE ARGUMENT

Defendant's claims of prosecutorial misconduct fail. None of the instances of alleged misconduct were significant enough to call an improper matter to the jury's attention. Furthermore, none of the alleged misconduct, considered individually or collectively, was so substantial and prejudicial as to warrant a new trial.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MID-TRIAL MOTION FOR MISTRIAL WHERE NONE OF THE PROSECUTOR'S QUESTIONS ROSE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT

Defendant claims that four questions asked by the prosecutor over the course of a four-day were so prejudicial to his case that the trial court abused its discretion in denying his mid-trial motion for mistrial. *See* Aplt. Br. at 10-34. However, none of the alleged errors were sufficiently substantial or prejudicial to warrant a new trial.

A. Defendant's claim that the State committed prosecutorial misconduct by blatantly violating the trial court's pre-trial order fails on the merits where it made no reference to defendant's prior bad acts during its case-in-chief.

Defendant claims that the State committed prosecutorial misconduct by "interject[ing] . . . improper, offensive information . . . [i]n blatant disregard" for the trial court's pre-trial ruling on his motion in limine. Aplt. Br. at 20. Defendant's claim fails, however, because the State did not violate the court's order at trial.

On April 23, 1999, defendant filed a Motion in Limine to Suppress Evidence of

Prior Convictions, requesting that evidence of prior offenses be excluded under rules 402, 403, and 609, Utah Rules of Evidence (R. 151-52, 155-56). Twice before trial, the State stipulated that it would not elicit any evidence concerning defendant's prior convictions or bad acts in its case-in-chief (R. 339:20; R. 343:173-75; Addendum A). However, both times, the State reserved the right to present such evidence if defendant "is going to bring in his character for being a peaceable person in the furtherance of a self-defense claim" (R. 193-94; R. 339:20; R. 343:169, 173-75; Add. A). Defendant accepted the stipulation (R. 339:20; Add. A). The court then ruled that it would take the State's motion under advisement, noting that if, in presenting his case, "Mr. Jiminez has placed his character at issue, . . . clearly the State would be entitled to rebut" (R. 343:175; Add. A).¹

Consistent with its prior stipulation and the trial court's pre-trial order, the State presented no evidence concerning defendant's prior convictions in its case-in-chief (R. 343:182-349). The State did not, therefore, violate the trial court's pre-trial order.

B. The impact on the jury in a four-day trial from four allegedly improper questions posed by the prosecutor, three of which went unanswered after objection, was not so substantial and prejudicial as to constitute prosecutorial misconduct requiring a new trial.

Defendant claims that the prosecutor "circumvented evidentiary rules . . . on four separate occasions in order to get information in front of the jury that it was not allowed

¹In the record, defendant's last name appears both as Jiminez and Jimenez. In this brief, the State will use the spelling, "Jiminez."

to consider.” Apl’t. Br. 10, 12. Defendant asserts that the prosecutor’s misconduct “was particularly contemptuous in this case” because, “in a deliberate fashion, the prosecutor interjected the improper, offensive information in an effort to influence and inflame the jury . . . [i]n blatant disregard of the rules.” Apl’t. Br. at 20.

In support of his claim, defendant identifies four questions asked by the prosecutor in cross examination during the second and third days of a four-day trial. *See* Apl’t. Br. at 13-18. Specifically, defendant challenges *one* question directed at defendant concerning his use of aliases; *one* question directed at his wife concerning whether she knew it was illegal for defendant to carry a concealed weapon; *one* question directed at his wife concerning whether she assisted that night in concealing defendant; and *one* question directed at his medical expert concerning other violence to which defendant may have been exposed in the past. *See* Apl’t. Br. at 13-18.

However, to succeed on his claim of prosecutorial misconduct, defendant must show *both* that the prosecutor called to the jury’s attention a matter it would not be justified in considering in reaching its verdict, *and* that, under the circumstances of this particular case, the prosecutor’s comments were so substantial and prejudicial that there is a reasonable likelihood that, absent the comments, the result of the trial would have been more favorable to defendant. *See State v. Kohl*, 2000 UT 35, ¶17, 999 P.2d 7; *State v. Pearson*, 943 P.2d 1347, 1352-53 (Utah 1997); *State v. Basta*, 966 P.2d 260, 268 (Utah App. 1998). Defendant has not done so here. Notwithstanding the emotionally-charged

language in defendant's brief, none of the prosecutor's questions constituted prosecutorial misconduct warranting a new trial under this test.

1. Proceedings below.

Defendant's use of aliases. Defendant was the first person to testify for the defense (R. 343:363). He did so in order to lay foundation for subsequent expert testimony concerning the effects of prior head trauma on how defendant would likely respond to being punched by Rios at the 7-Eleven (R. 343:349, 363-69).

In laying the necessary foundation, defendant explained that he had been robbed and attacked with clubs by three or four different people in 1994 (R. 343:371; Addendum B). The medical records produced from the attack, however, were in the name of Antonio Sanchez (R. 343:366; Add. B). Defendant explained that he had used an alias to procure medical treatment "[b]ecause I didn't have money to pay the bills" (R. 343:366; Add. B).

On cross-examination, the prosecutor asked: "These aren't the only other false names that you've used, are they?" (R. 343:369; Add. B). Before defendant could answer, his counsel objected and requested an unrecorded side-bar conference (*Id.*). Upon completion of the side-bar, the prosecutor did not renew his question concerning aliases (R. 343:369; Add. B). The prosecutor moved on to a different subject and did not revisit the issue at any time during the remaining two days of trial (R. 343:369; Add. B).

Defendant's violent history. Robert Keith Rothfeder, defendant's medical expert, testified that, because of the 1994 trauma, defendant would likely react more vigorously

to the 7-Eleven incident than would one who had suffered no prior head trauma (R. 344:382, 398-99).

On cross-examination, the prosecutor asked if defendant had given Rothfeder “any other history of violence that he has had” (R. 344:403; Addendum C). Defendant objected to the question and an off-the-record side-bar was held (*Id.*). After the trial court overruled defendant’s objection, the prosecutor reworded his question to address “other history of violence that [defendant’s] been involved in” (*Id.*). Rothfeder indicated that he had asked defendant about any other history of serious trauma and that defendant had indicated there was none (R. 344:404; Add. C). After Rothfeder’s response, the prosecutor did not revisit the issue of defendant’s violent history again throughout the remainder of the trial.

Defendant’s illegal possession of a concealed weapon. Defendant’s wife was the next witness called (R. 344:430). She testified that, on the night of the shooting, she and her husband had gone to Mi Mexico (R. 344:433). She explained that they didn’t get a chance to go out much with a nine-month-old child, and that, on that night, they stayed at the club for about four hours (R. 344:433). She testified that she did not see her husband with a gun until after he had been punched by Rios (R. 344:444).

On cross-examination, the prosecutor asked: “Did you know that the concealed weapon under that circumstance would be a crime in and of itself?” (R. 344:444; Addendum D). Before Ms. Jiminez could answer, defense counsel objected and

requested an unrecorded side-bar (*Id.*). The trial court then sustained defendant's objection on the record but declined defendant's request for a curative instruction (R. 344:445; Add. D). Defendant never placed on the record either the basis for his objection or the substance of the instruction he apparently requested.

The prosecutor revisited the subject matter of its question only in response to defendant's closing argument (R. 345:694; Add. D). In rebuttal, the prosecutor argued that the important question was not whether, as defendant had argued, defendant had a constitutional right to possess a firearm or not, but, rather, whether possession of the firearm at that particular time was probative of defendant's state of mind when he approached the white car (R. 345:694-95; Add. D).²

Defendant's flight. Also during cross-examination of Ms. Jiminez, the prosecutor asked whether she had participated in concealing defendant from the police after the shooting (R. 344:450; Addendum E). Defendant objected and outside the presence of the jury, the court explained that an answer to that question could be self-incriminating (R. 344:451; Add. E). Defendant stated: "If the question is what did she observe, I think that's a proper question" (R. 344:453; Add. E).

²In denying defendant's motion for a mistrial at the close of argument, the court ruled that, although arguing propensity to violate the law is a touchy area, the State could properly argue that defendant's possession of the concealed gun went to defendant's state of mind at the time of the confrontation and supported the inference that defendant was the aggressor (R. 345:708-10; Add. D). Defendant has not challenged this portion of the State's closing argument on appeal.

When the jury returned, the court stated: “I’ll sustain the objection that was made earlier by defense counsel and ask [the State] to move to a new line of questioning” (R. 344:477; Add. E). The prosecutor then questioned Ms. Jiminez regarding whether she observed defendant concealing himself to avoid arrest after the shooting (R. 344:477; Add. E).

Defendant moves for mistrial. During a break in Ms. Jiminez’s testimony, defendant moved for a mistrial (R. 344:455; Addendum F). Defendant argued that the State committed prosecutorial misconduct when it asked defendant whether he had used aliases other than Antonio Sanchez, when it asked defendant’s medical expert whether he was aware of any other prior violence with which defendant had been involved other than the alleged 1994 incident; and when it alluded to uncharged 404(b) evidence during its questioning of defendant’s wife (R. 344:456-57, 463; Add. F).

Defendant argued that the State’s question about defendant’s use of other aliases was improper innuendo because it was not supported by admissible evidence (R. 344:457; Add. F). Defendant challenged the State’s question to his medical expert on the same basis (R. 344:463; Add. F). In response, the State presented to court with State’s Exh. 9, an FBI rap sheet identifying various aliases used by defendant, as well as prior violent criminal acts committed by him (R. 344:459-60; State’s Exh. 9; Add. F). The State also argued that it “had the right to inquire about the basis for [the doctor’s] opinion” (R. 344:460; Add. F).

Defendant challenged the State's reference to defendant's illegally carrying a concealed weapon as improper because the State had not charged defendant with that crime (R. 344:458; Add. F). The State responded that the questions asked Ms. Jiminez were "not improper questioning in terms of uncharged criminal conduct" because the conduct was "part of this criminal episode. The fact that it is criminal doesn't mean we don't get to inquire about it" (R. 344:460-61; Add. F). Furthermore, the evidence is relevant to rebut defendant's claim that the victims were the aggressors in this case (R. 344:461; Add. F).

Motion denied. Ruling on the motion, the court agreed that, although there was a basis for it, the State's question regarding aliases was improper because it was not supported by admissible evidence (R. 344:469; Add. F). However, any prejudicial effect of the question "[was] mitigated somewhat by the fact that Mr. Jiminez had admitted on direct examination he used an alias and admitted on cross-examination he [had previously] lied and [given] his health care provider false information" (R. 344:470; Add. F). Thus, "the unfair harm to the defendant's case does not, based on that problem alone, require a mistrial" (R. 344:471; Add. F).

The court then ruled that whether defendant had brought the weapon to the store and concealed it "may go to his state of mind" and is thus relevant "in determining whether he or the assailants were the aggressors" (R. 344:471; Add. F). Regarding the question concerning the *illegality* of a concealed weapon, "I sustained the objection" and

no answer was given (R. 344:471-72; Add. F). Thus, “there wasn’t sufficient unfair harm to the defendant’s case such that a mistrial would be warranted” (R. 344:472; Add. F).

Finally, regarding the questioning of defendant’s medical expert, the court held that “[w]hether [defendant] had head injuries from any source that may have had this concussive impact was relevant” (R. 344:472; Add. F). Furthermore, defendant’s objection to the State’s reference to defendant’s violent behavior had been sustained (R. 344:472; Add. F). Thus, again, “there’s not enough unfair damage to Mr. Jiminez’ case based on that question to warrant a mistrial” (R. 344:472; Add. F). The court thus denied defendant’s motion (R. 344:470; Add. F).

Jury instructions. At the close of evidence, the jury was instructed to ignore all evidence to which an objection was sustained and any evidence offered but not admitted (R. 238; Instr. 6). “[Y]ou must not conjecture as to what the answer might have been or as to the reason for the objection” (*Id.*).

2. Standard of Review.

“Because the trial court is in the best position to determine an alleged error’s impact on the proceedings, [this Court] will not reverse a trial court’s denial of a mistrial motion based on prosecutorial misconduct absent an abuse of discretion.” *State v. Harmon*, 956 P.2d 262, 276 (Utah 1998); *see also State v. Hay*, 859 P.2d 1, 6 (Utah 1993). ““Unless a review of the record shows that the court’s decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have

had a fair trial, [this Court] will not find that the court's decision was an abuse of discretion.'" *Harmon*, 956 P.2d at 274-75 (quoting *State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997)).

3. Under facts of this case, the four challenged questions did not significantly call to the jury's attention any matter it would not be justified in considering in reaching its verdict.

Defendant asserts that the prosecutor's questions improperly placed before the jury evidence of defendant's bad acts and criminal conduct that the jury should not have considered in reaching its verdict. *See* Aplt. Br. at 19. However, defendant does not show how any of the questions challenged on appeal necessarily raises an improper inference that defendant himself had not already raised. *Cf. State v. Brown*, 998 S.W.2d 531, 547 (Mo.) (en banc) ("Unless the testimony objected to consists of clear evidence of another crime, there is no trial court abuse of discretion in denying a mistrial."), *cert. denied*, 120 S. Ct. 431 (1999).

First, it is pure conjecture whether the jury understood the question regarding the illegality of defendant's carrying a concealed weapon as indicating that defendant had a criminal past. *Cf. State v. Reed*, 2000 UT 68, ¶19, 8 P.3d 1025 (finding no prosecutorial misconduct where "it is extremely unlikely that the jury drew the inference [defendant] describes"). Furthermore, in the State's final rebuttal during closing argument, the State made clear to the jury that the illegality of defendant's conduct in having the gun was

irrelevant (R. 345:694). Thus, the State essentially argued that this was *not* a matter which the jury would be justified in considering in reaching its verdict. *See Kohl*, 2000 UT 35 at ¶17; *Pearson*, 943 P.2d at 1352-53; *Basta*, 966 P.2d at 268.³

Second, “[t]he use of an alias does not constitute clear evidence associating defendant with other crimes.” *Brown*, 998 S.W.2d at 547. Thus, the State’s reference alone would not have necessarily placed such evidence before the jury. *See Brown*, 998 S.W.2d at 547. Moreover, defendant’s use of aliases had already been put before the jury by his own testimony on direct that he had used an alias in 1994 to obtain free medical services (R. 343:366). Thus, the State’s question placed no issue before the jury that defendant had not already raised. *Cf. People v. Huynh*, 626 N.Y.S.2d 159, 160 (App. Div. 1995) (memorandum decision) (concluding that prosecutor could inquire further into aliases after defendant had opened the door and placed his credibility in issue by testifying that he used aliases because of confusion about his real name); *Chase v. State*, 541 P.2d 867, 870 (Okla. Crim. App. 1975) (holding that defendant opened door to

³As the trial court noted in denying defendant’s motion for mistrial after closing argument, the State revisited the issue of whether defendant could legally possess a weapon only in rebuttal to defendant’s claim, in his closing argument, that he had such a right under the second amendment to the United States Constitution (R. 345:708-10). *See State v. Valdez*, 513 P.2d 422, 426 (Utah 1973) (concluding no prosecutorial misconduct where prosecutor’s remarks were “in direct reply to the theory advanced by defense counsel in his final argument”); *State v. Humphrey*, 793 P.2d 918, 925 (Utah App. 1990) (holding that prosecutor does not commit misconduct in responding to argument defendant addressed in his closing).

prosecution questions concerning aliases by implying on direct examination that alias disclosed was only alias ever used).

Third, the question to the expert concerning “any other history of violence that [defendant] has had” could just as easily have been understood to ask to whether defendant had been a victim of any additional violence as whether he had been a perpetrator. In fact, the expert’s response to the State’s reworded question made clear that the relevant issue was whether defendant had experienced additional head trauma in the past under *any* circumstances (R. 344:404).

Finally, there is no evidence that Ms. Jiminez had asserted her right against self-incrimination. However, even assuming *arguendo* that it was error to ask Ms. Jiminez whether she helped defendant conceal himself because the answer may have incriminated her, the issue of defendant’s concealment itself was properly before the jury as evidence of defendant’s consciousness of guilt. *See State v. Holgate*, 2000 UT 74, ¶23 & n.6, 10 P.3d 346 (noting that evidence of flight is admissible as probative of consciousness of guilt); *State v. Franklin*, 735 P.2d 34, 39 (Utah 1987) (same); *Elliott v. State*, 27 S.W.3d 432 (Ark. 2000) (“When evidence of a prior crime reflects a consciousness of guilt, it is independently relevant and admissible under Rule 4040(b).”); *Davis v. State*, 722 So. 2d

143, 145 ¶ 6 (Miss. 1998) (same); *State v. Berosik*, 988 P.2d 775, 780 ¶27 (Mont. 1999) (same); *United States v. Robinson*, 161 F.3d 463, 467 (7th Cir. 1998) (same).⁴

Thus, none of the four questions challenged on appeal sufficiently called to the jury's attention matters which it would not be justified in considering in reaching its verdict as to constitute prosecutorial misconduct.

4. None of the allegedly improper questions were so substantial and prejudicial that there is a reasonable likelihood that, absent the questions, defendant would have been acquitted

Defendant asserts that the State's questions "presented the jury with an opportunity to assume that Jimenez was a bad person and was probably guilty of the crimes at issue because he was violent or had committed other crimes, or that Jimenez had something to hide about his past." Aplt. Br. at 21-22. He then claims that he was prejudiced by the questions because they "may have added critical weight to the prosecutor's case" in a case that "came down to the word of the defense against the word of the state's witnesses" where the evidence presented by defendant "would have absolved Jimenez of the crimes." Aplt. Br. at 22, 25-26. However, defendant's claim fails where the prosecutor's questions

⁴Despite defendant's suggestion on appeal that the trial court sustained defendant's objection to questions concerning defendant's concealment as "criminal conduct . . . that had not been charged in this matter," Aplt. Br. at 17-18, in fact, the court only sustained the objection to the question concerning his wife's participation in the concealment (R. 344:454, 477). As defendant's trial counsel acknowledged, defendant's wife could properly testify as to what she observed concerning defendant's concealment (R. 344:453 ("If the question is what did she observe, I think that's a proper question.")).

were not obviously improper, where they were isolated questions occurring over the course of a four-day trial, and where the evidence against defendant was substantial.

In determining whether a statement constitutes prosecutorial misconduct, “the statement must be viewed in light of the totality of the evidence presented at trial.” *State v. Wright*, 893 P.2d 1113, 1118 (Utah App. 1995) (quoting *State v. Cummins*, 839 P.2d 848, 852 (Utah App. 1992)). A jury’s verdict must be upheld if “a review of the entire record does not indicate, absent the improper question, there was a reasonable likelihood defendant would have been found not guilty.” *State v. Peterson*, 560 P.2d 1387, 1390 (Utah 1977); *see also State v. Harrison*, 805 P.2d 769, 787 (Utah App. 1991) (holding that question is, “[s]pecifically, would the jury have been more likely to acquit [defendant] . . . on his self-defense claim, if the improper comment had not been made?”).

Factors relevant to that determination include the frequency with which the statements are made, the strength of the State’s case, the plausibility of defendant’s exculpatory explanation, and whether the jury was instructed concerning the statements. *See, e.g., Harmon*, 956 P.2d at 274; *State v. Wiswell*, 639 P.2d 146, 147 (Utah 1981); *State v. Morrison*, 937 P.2d 1293, 1297 (Utah App. 1997); *State v. Palmer*, 860 P.2d 339, 345 (Utah App. 1993).

The questions, even if improper, were isolated. Here, defendant challenges four different questions asked on the second and third day of a four-day trial in which fourteen witnesses were called.

One of the questions challenged, and the only one to which the State actually received an answer, was relevant to determine the extent of the expert's knowledge of defendant and the basis of the expert's opinion. *See, e.g., Storey v. State*, 552 N.E.2d 477, 482 (Ind. 1990) (holding State may "attempt[] to refute the opinion of the defendant's [medical expert] by attacking the information upon which it was based"); *State v. Thompson*, 985 S.W.2d 779, 786-87 (Mo. 1999) (en banc).

The other three questions were never even answered; rather, in those instances, the jury heard defendant object, observed counsel and the court in an off-the-record side-bar, and then saw the State drop its prior question and move on to a new subject (R. 343:369 (question concerning use of alias; no indication on the record that objection sustained); 344:444-45 (question concerning defendant's illegal possession of concealed weapon; objection sustained on the record); R. 344:477 (question concerning wife's assisting to conceal defendant; objection sustained on the record)).

Moreover, the State made no further reference to the subject matter of *any* of the four questions during the remainder of the trial, except briefly in response to defendant's closing argument. *See Harmon*, 956 P.2d at 274 (holding no prejudice where single statement, made in the course of a long trial, was not relied upon or referred to again by the prosecutor); *State v. Byrd*, 937 P.2d 532, 536 (Utah App. 1997) (holding frequency of comment is relevant in determining prejudice); *Morrison*, 937 P.2d at 1297 (same).

This is not a case, then, in which the State made repeated attempts to inflame or

place improper evidence before the jury. Thus, the cases relied upon by defendant are distinguishable. *See State v. Emmett*, 839 P.2d 781, 786-87 (Utah 1992) (finding misconduct where prosecutor made repeated attempts to have defendant admit he had rehearsed testimony with counsel); *State v. Troy*, 688 P.2d 483, 486 (Utah 1984) (finding misconduct where prosecutor made repeated references to defendant's use of aliases and prior bad acts); *Morrison*, 937 P.2d at 1297 (finding misconduct where prosecutor's comments not isolated); *Palmer*, 860 P.2d at 345 (finding misconduct where prosecutor's improper statements were pervasive); *State v. Bain*, 575 P.2d 919, 922 (Mont. 1978) (finding misconduct where prosecutor has made repeated attempts to offer evidence previously ruled inadmissible);

“It is conceivable that under some circumstances the asking of improper questions might by suggestion or innuendo have the effect the defendant contends. Yet if our rules were based on such an assumption, there would be little need or incentive for the trial court to rule correctly on objections.” *State v. Hodges*, 30 Utah 2d 367, 517 P.2d 1322, 1324 (Utah 1974). Thus, prejudice is rarely established where, “as the record stands, there is nothing but an improper question which remains wholly unanswered.” *Requa v. Daly-Judge Mining Co.*, 46 Utah 92, 148 P. 448, 451 (Utah 1915). *Cf. Harmon*, 956 P.2d at 274; *Byrd*, 937 P.2d at 536; *Morrison*, 937 P.2d at 1297.

Evidence against defendant was substantial and corroborated. Furthermore, despite defendant's claim otherwise, *see* Aplt. Br. at 25-26, this case *did not* come down

to the word of the defense against the word of the state's witnesses.

The State's evidence was substantial. It established that Rios and his friends were unarmed when they stopped at the 7-Eleven on October 20 to let Rios use the restroom. Defendant pulled in shortly thereafter, retrieved his gun from under his seat, and confronted Miera and Montoya, who were still in the car. Although much smaller than either Rios or Montoya, defendant did not retreat from them but, rather, reached for his gun. In response, Rios punched defendant in the face and immediately turned and ran. Montoya followed. Defendant began shooting at them while he was still on the ground. Once back standing, he fired two shots into Miera's chest and then resumed shooting at Rios and Montoya. He fired seven shots in all before calling his wife and leaving the scene. He then hid his car in a friend's garage, admitted to friends that he had killed someone, and fled the State.

Although the majority of this evidence came from two eye-witnesses, Rios and Montoya, their testimony was corroborated not only by the video taken by the 7-Eleven surveillance camera and the State's other witnesses, but also by two defense witnesses, John Moyes and Ron Edwards, *as well as defendant himself*. See *Harmon*, 956 P.2d at 274; *Wiswell*, 639 P.2d at 147; *Morrison*, 937 P.2d at 1297; *Palmer*, 860 P.2d at 345 (all noting that prejudice more likely where case depends primarily on resolution of conflicting evidence consisting of uncorroborated testimony).

Defendant's exculpatory explanations were weak. Defendant's defense at trial was a mix of self-defense and a sort of momentary lack of control due to prior head trauma suffered in 1994. Neither of these defenses was strong.

First, defendant immediately raised questions concerning his credibility when he began his defense by admitting that he had previously used an alias and lied to medical providers to get out of paying for --- i.e., to steal---medical services.

Second, defendant testified that he carried a gun because he was afraid and wanted to protect himself and his wife (R. 344:568, 570). This testimony was incredible for several reasons. Defendant did not carry a gun after he was allegedly viciously attacked in 1994 (R. 344:568). Furthermore, he could not explain the source of his fear in 1996 (R. 344:568). Finally, defendant fled the State after the shooting, leaving his wife essentially unprotected (R. 344:478, 590-91).

Third, defendant claimed that he did not initiate the confrontation with Rios and his friends (R. 344:560-62). However, he also testified that he specifically put the gun into his pants when he arrived at the 7-Eleven; and that he went over to the white car because he heard murmurs and, although he could not understand what was being said, he knew that he was being insulted (R. 344:560-61, 570-71).

Fourth, defendant claimed that he only pulled his gun and started shooting after having seen Miera with a gun (R. 344:563). However, Rios testified that he and his

friends were unarmed that night and Detective Mark R. Chidester testified that no gun was found at the scene (R. 343:219, 233, 309-10, 315; R. 344:563).⁵

Fifth, defendant claimed that he shot at Miera and the others only because he wanted them to leave him alone (R. 344:440, 565). However, defendant fired seven shots that night at people who were unarmed (R. 343:308-09, 313, 343). Furthermore, Rios and Montoya were running away from defendant when he shot at them, *and* defendant returned to the driver's side of the white car in order to shoot Miera point blank when Miera had never even threatened him (R. 343:235-38; R. 344:438, 548). *Cf. Harrison*, 805 P.2d at 787 (holding that rejection of defendant's claim of self-defense did not indicate prejudice where jury "had ample reason to reject the assertion that [the victim] had been armed, quite apart from any impact the prosecutor's comment may have had").

Finally, in support of his "temporary loss of control" defense, defendant's own medical expert testified that, despite any head trauma suffered in the past, defendant would nonetheless have understood that night that he was shooting at people and that he could possibly kill them (R. 344:411, 413). According to the expert, Defendant just wouldn't know whether he was shooting out of revenge, defense, or anger (R. 344:424).

⁵Defendant claims the reason for this was because the police officers' investigation was deficient. *See* Aplt. Br. at 25. However, defendant called two witnesses on this issue. One testified that the scene would have been substantially contaminated by the presence of a medical helicopter and personnel attempting to save Miera's life, that saving his life took precedence over preservation of the crime scene, and that the officer's recovery of five out of seven projectiles and seven out of seven casings was "pretty good" under the circumstances and would constitute "a good search" (R:344:541-45, 552).

Jury instructions mitigated any potential prejudice. Finally, the jury was instructed to ignore all evidence to which an objection was sustained *and* all evidence offered but not admitted (R. 238: Instr. 6). *See State v. Kohl*, 2000 UT 35, ¶24, 999 P.2d 7 (holding that defendant must show comment was so prejudicial “as to defeat the mitigating effect of the court’s . . . curative instructions”). Defendant concedes that he did not always ensure that the trial court’s rulings on objections were on the record. *See* Appt. Br. at 27. However, as to the three questions to which objections were sustained (whether immediately or subsequently), the jury heard defendant object, observed counsel and the court in an off-the-record side-bar, and then saw the State drop its prior question and move on to a new subject (R. 343:369 (question concerning use of alias; no indication on the record that objection sustained); 344:444-45 (question concerning defendant’s illegal possession of concealed weapon; objection sustained on the record); R. 344:477 (question concerning wife’s assisting to conceal defendant; objection sustained on the record)). It is reasonable to assume that the jury understood, based on how defendant’s objections were handled, that the court had in fact sustained them. The jury’s verdicts, acquitting defendant of the greater offenses of murder and attempted murder and finding him guilty only of manslaughter and attempted manslaughter, indicate that it heeded that instruction. *Cf. State v. Speer*, 750 P.2d 186, 189-90 (Utah 1988) (holding “fact that the jury acquitted defendant of two of the four charges indicates that the verdict was a result

of a reasoned application of the law, rather than prejudice engendered by the improper evidence.”).

Conclusion. To succeed on a claim of prosecutorial misconduct, “the ‘mere possibility’ of a different outcome occurring without the [misconduct] is not enough; instead, ‘the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict.’” *State v. Thomas*, 1999 UT 2, ¶26, 974 P.2d 269. Here, “a review of the entire record does not indicate, absent the [allegedly] improper question[s], there is a reasonable likelihood defendant would have been found not guilty.” *Peterson*, 560 P.2d at 1390; *see also Harrison*, 805 P.2d at 787.

II. BECAUSE THE STATE COULD PROPERLY COMPARE DEFENDANT’S APPEARANCE AND DEMEANOR AT TRIAL TO HIS APPEARANCE AND DEMEANOR AT THE TIME OF THE SHOOTING, THE STATE’S COMPARISON IN CLOSING ARGUMENT WAS NOT PROSECUTORIAL MISCONDUCT

Defendant claims that, during closing argument, the State violated defendant’s right to be tried in the “garb of innocence” by comparing his appearance at trial in a suit and tie with Rios’s appearance in prison clothes and shackles. *See* Aplt. Br. at 29. However, because the State made no such comparison, but, rather, properly addressed defendant’s credibility in light of the evidence presented, the State’s comments did not constitute prosecutorial misconduct.

A. Proceedings below.

Prior to the parties’ closing arguments, the court verbally instructed the jury that

“nothing the attorneys say in argument is evidence” (R. 345:637, 639). The court also issued a written instruction providing that the jury “should not consider as evidence any statement of counsel made during the trial, unless such statement was made as a stipulation conceding the existence of a fact or facts” (R. 250; Instr. 18).

The State’s closing argument consists of 26 pages of trial transcript (R. 345:642-667). In approximately the middle of the argument, the State commented that “[t]here are reasons to believe and not to believe witnesses” (R. 345:656; Addendum G). The State then commented on “the credibility of the Jiminezes,” noting, for example, their “extremely selective memory” (R. 345:657; Add. G). The State continued:

He can’t remember shooting. He can’t remember aiming. He can’t remember clearing the jam. He can’t remember loading the gun. He can’t remember the recoil. He can’t remember those things that are important to him.

Also I ask you this, in terms of the defendant and his credibility as to the events, you have had a chance to see not only the defendant in this courtroom today and this week with how he presents himself, with how he packages himself in appearance and dress and haircut and glasses and demeanor, in temper or lack thereof, you have seen him in every one of those aspects on [the 7-Eleven surveillance tape recorded] October 20th, 1996. Is this an honest packaging?

Manny Rios was here in chains. Manny Rios should be in chains. But Manny Rios isn’t anything except what Manny Rios is. **But you have—and I recall—I want you to recall Mr. Shapiro’s opening statement, and he was talking about the news—the couple, not newly married couple, but the couple, they had gotten their child a baby-sitter and they were able to go out for this date. Just your average couple. And on the other hand we had the drunken rowdy trouble making boxers cruising for**

trouble. Is either one of those portrayals [of the actors on the night of the crime] honest now that you know the situation? Or is it part of the packaging?

(R. 345:659-60; Add. G) (emphasis added). No further reference was made to Rios during this part of the State's argument. However, later in the same argument, the State reminded the jury: "You got to view the deportment of both the defendant and his wife on the stand" (R. 345:664; Add. G). It then asked the jury to "[w]atch the tape" and "[r]ealize the packaging today as it is today and as it was then" (R. 345:666; Add. G).

Defendant did not object to any of the foregoing statements made during the State's initial closing argument. However, defendant did object several times during the State's rebuttal, (R. 345:688, 692, 696), and the jury was reminded "that nothing the attorneys say is evidence," (R. 345:689). Defendant does not challenge any of the rebuttal statements on appeal.

After the jury was excused to deliberate, defendant moved for a mistrial, claiming, inter alia, that the State had improperly compared Rios's appearance in court to that of defendant's (R. 345:701; Addendum H). The State argued that the State's comments did not compare defendant's appearance and deportment to that of Rios, but rather compared defendant's appearance and deportment at the time of trial to his appearance and deportment at the time of the crime; and defendant's portrayal of both himself and Rios at the time of the crime with the actual evidence of their appearance at the time of the crime.

(R. 345:702-03; Add. H). Such comment, argued the State, was proper where defendant took the stand and placed his credibility in issue (R. 345:702; Add. H).

In denying defendant's motion for mistrial, the court noted that, "in opening arguments and during Mr. Jiminez' own testimony, the defendant attempted to present to the jury an appearance or an image of what Mr. Jiminez was like and what his intention was" (R. 345:709; Add. H). "It's not inappropriate for the prosecutor to make an effort to contradict that image" (*Id.*).

B. Standard of Review

As discussed above, to establish prosecutorial misconduct, defendant must demonstrate both that the prosecutor called to the jury's attention a matter it would not be justified in considering in reaching its verdict, and that, under the circumstances of this particular case, the prosecutor's comments were so substantial and prejudicial that there is a reasonable likelihood that, absent the comments, the result of the trial would have been more favorable to defendant. *See Kohl*, 2000 UT 35 at ¶17; *Pearson*, 943 P.2d at 1352-53; *Basta*, 966 P.2d at 268. "[T]he [challenged] statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.'" *State v. Baker*, 963 P.2d 801, 804 (Utah App.) (quoting *State v. Hopkins*, 782 P.2d 475, 480 (Utah 1989)), *cert. denied*, 982 P.2d 88 (Utah 1998).

However, where, as here, the trial court has already ruled on defendant's claim, this Court will not reverse that decision "absent an abuse of discretion." *Harmon*, 956

P.2d at 276; *see also Hay*, 859 P.2d at 6. An abuse of discretion exists only if “a review of the record shows that the court’s decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial.” *Harmon*, 956 P.2d at 274-75 (quoting *Robertson*, 932 P.2d at 1231).

C. Because the State may properly comment on the credibility of a defendant who has testified on his own behalf and because the State’s comments on defendant’s appearance and deportment were based on the evidence and were offered to rebut defendant’s claim that he was an innocent victim guilty only of self-defense, the State’s comments did not constitute prosecutorial misconduct.

Defendant asserts that the State’s comments on defendant’s appearance and demeanor improperly referred to defendant’s right to appear at trial in the “garb of innocence” by comparing defendant’s appearance at trial in a suit with Rios’s appearance at trial in prison clothes. *Aplt. Br.* at 30 (quoting *State v. Mitchell*, 824 P.2d 469, 473 (Utah App. 1991)). However, the challenged statements, considered both in isolation and context, do not support defendant’s claim.

Numerous courts have held that, once a defendant testifies at his trial, “[i]t is fair comment for the State to point out the difference in defendant’s appearance at the time of the incident and at the time of trial.” *People v. Porrata*, 613 N.E.2d 1212, 1221 (Ill. App. 1993); *see also Robertson v. State*, 319 N.E.2d 833, 836 (Ind. 1974) (“It is proper to show Defendant had changed his appearance since the alleged crime.”); *cf. Commonwealth v. Frazier*, 480 A.2d 276, 280 (Pa. Super 1984) (concluding that reference to defendant as

“dressed like he’s out of Gentlemen’s Quarterly” was not improper and, even if improper, was not prejudicial).

This principle is a natural extension of the rule generally accepted in Utah that “[i]f [a defendant] takes the stand and testifies in his own defense[,] his credibility may be impeached and his testimony assailed like that of any other witness.” *State v. Winward*, 941 P.2d 627, 634 (Utah App. 1997) (brackets in original) (quoting *Brown v. United States*, 356 U.S. 148, 154-55 (1958)); see also *State v. Hansen*, 22 Utah 2d 63, 448 P.2d 720, 721 (Utah 1968). Thus, the State may introduce and comment on “any testimony or evidence ‘which would tend to contradict, explain or cast doubt upon the credibility of [a defendant’s] testimony.’” *State v. Reed*, 820 P.2d 479, 482 (Utah App. 1991) (brackets in original) (quoting *State v. Green*, 578 P.2d 512, 514 (Utah 1978)).

Finally, “Utah law affords trial attorneys considerable latitude in closing arguments.” *Cummins*, 839 P.2d at 852. “Counsel for both sides have a ‘right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom.’” *Id.* at 842-43 (quoting *State v. Parsons*, 781 P.2d 1275, 1284 (Utah 1989)). They also have the right, “during closing arguments, [to] comment on the credibility of witnesses.” *Baker*, 963 P.2d at 804 (quoting *Cummins*, 839 P.2d at 854 n.15).

In light of these legal principles, the statements that defendant challenges on appeal do not constitute improper comment on defendant’s right to appear at trial in a “garb of innocence.”

The State's first comment was:

Also I ask you this, in terms of the defendant and his credibility as to the events, you have had a chance to see not only the defendant in this courtroom today and this week with how he presents himself, with how he packages himself in appearance and dress and haircut and glasses and demeanor, in temper or lack thereof, *you have seen him in every one of those aspects on [the 7-Eleven surveillance tape recorded] October 20th, 1996*. Is this an honest packaging?

(R. 345:659; Add. G). Clearly, the purpose of this statement was *not* to ask the jury to draw certain inferences concerning defendant's credibility based on his "garb of innocence," but to contrast defendant's appearance and demeanor at the time of the shooting with his appearance and demeanor at the time of trial. As the State reiterated later in its argument, "Realize the packaging today as it is today and as it was then" (R. 345:666; Add. G).

"The prejudicial effect that flows from a defendant's appearing before a jury in identifiable prison garb is not measurable, and it is so potentially prejudicial as to create a substantial risk of fundamental unfairness in a criminal trial." *State v. Chess*, 617 P.2d 341, 344 (Utah 1980); *see also State v. Bennett*, 2000 UT 34, ¶4; 999 P.2d 1. Thus, a criminal defendant has the "right . . . to be tried in front of a jury in the 'garb of innocence,' rather than in prison clothing." *State v. Mitchell*, 824 P.2d 469, 473 (Utah App. 1991). However, this does not mean that the State must provide defendant with an "expensive wardrobe." *Chess*, 617 P.2d at 345. Rather, it means only that, unless defendant specifically chooses otherwise, defendant has a right to appear in "civilian

clothing,” *Kohl*, 2000 UT 35 at ¶21,—“clean, respectable clothes, not identifiable as peculiarly prison clothes.” *Chess*, 617 P.2d 345.

Defendant’s right to appear in the “garb of innocence,” then, is not a right to appear at trial in a suit and tie. *See Chess*, 617 P.2d at 345. Rather, defendant only has a right in civilian clothes. *Id.* He thus could have appeared at trial in clothing similar to what he was wearing on October 20, 1996. He chose not to, opting instead to “clean up” his appearance.

Because defendant testified at his trial, the State could properly comment on this change. *See Porrata*, 613 N.E.2d at 1221; *Robertson*, 319 N.E.2d at 836; *Frazier*, 480 A.2d at 280. The State’s comment in no way detracted from defendant’s right to appear at trial in the “garb of innocence.” It did not, as defendant suggests, imply that defendant was incredible because he was not wearing prison clothing. Rather, it only suggested what the jury could reasonably infer concerning defendant’s credibility based on his changed image. *See Winward*, 941 P.2d at 634; *Green*, 578 P.2d at 514; *Hansen*, 448 P.2d at 721; *Baker*, 963 P.2d at 804; *Cummins*, 839 P.2d at 854 n.15; *Reed*, 820 P.2d at 482. The State “[has] the right to discuss ‘fully from [its] standpoint[] the evidence and the inferences and deductions arising therefrom.’” *See Cummins*, 839 P.2d at 842-43 (citation omitted).

The State’s second statement was also proper.

But you have —and I recall—I want you to recall Mr. Shapiro’s opening statement, and he was talking about the

newly—the couple, not newly married couple, but the couple, they had gotten their child a baby-sitter and they were able to go out for this date. Just your average couple. And on the other hand we had the drunken rowdy trouble making boxers cruising for trouble.

(R. 445:659-660; Add. G). Here, the State asked the jury to consider whether defendant's and Rios's appearances at the time of the shooting supported defendant's portrayal at trial of himself and Rios at the time of the shooting---that he was an innocent victim and Rios, a drunken trouble-maker. "Is either one of those portrayals honest now that you know the situation? Or is it part of the packaging?" (R. 445:660; Add. G).

Again, nothing in the State's comment suggests that defendant should have worn prison clothing during the trial or that he was incredible because he did not. Indeed, the comment did not even refer to defendant's appearance at trial. Rather the comment only asked the jury to consider whether defendant's appearance on the 7-Eleven surveillance tape was consistent with his claim that he was an innocent victim acting in self-defense, and whether Rios's appearance on the tape was consistent with defendant's claim that Rios was a drunk and rowdy trouble-maker. The State was thus only discussing from its standpoint the evidence and inferences concerning the witnesses' credibility arising therefrom. *See Cummins*, 839 P.2d at 842-43; *see also Winward*, 941 P.2d at 634; *Green*, 578 P.2d at 514; *Hansen*, 448 P.2d at 721; *Baker*, 963 P.2d at 804; *Cummins*, 839 P.2d at 854 n.15; *Reed*, 820 P.2d at 482. .

Although the State did comment on Rios's appearance in chains in between the

two comments discussed above (R. 345:659-60; Add. G), the Rios comment did not raise the inference, as defendant claims, that defendant should have also appeared in chains. Rather, the State's comment merely asserted that Rios's appearance in chains was consistent with the violent criminal history he himself had testified to at trial (R. 345:656-57). To the extent that statement related at all to the other two, it did not suggest a comparison of Rios's appearance at trial with defendant's appearance at trial; rather, it suggested only that Rios's appearance was consistent with his testimony and that defendant's was not. There was nothing improper about this or the other comments. *See Winward*, 941 P.2d at 634; *Green*, 578 P.2d at 514; *Hansen*, 448 P.2d at 721; *Baker*, 963 P.2d at 804; *Cummins*, 839 P.2d at 854 n.15; *Reed*, 820 P.2d at 482.

The larger context in which the statements were made confirms this conclusion. *See Baker*, 963 P.2d at 804 (holding that appellate court must consider statement in context). The State opened this section of its argument with the statement that “[t]here are reasons to believe and not to believe witnesses” (R. 345:656; Add. G). The State first discussed the evidence relative to Rios's credibility (R. 345:656-57; Add. G). It then moved on to discuss the credibility of the Jiminezes (R. 345:657; Add. G). It began with their “extremely selective memory” (*Id.*). It next moved to issues concerning defendant's appearance, including the comments challenged here (R. R. 345:659-60; Add. G). It then discussed the testimony of defendant's medical expert and whether that testimony was consistent with Rios's testimony or the 7-Eleven video of the crime (R. 345:660-62; Add.

G). In conclusion, the State asked the jury “to view the deportment of both the defendant and his wife on the stand,” (R. 345:664; Add. G), and to “[r]ealize the packaging today as it is today and as it was then,” (R. 345:666; Add. G).

The State’s comments on defendant’s credibility span eleven (11) pages of transcript (Add. G). The only reference to Rios in chains is that upon which defendant rests his misconduct claim. Neither alone or in context did that reference call on the jury to compare Rios’s appearance in chains with defendant’s appearance in a suit. Defendant’s assertion, then, that the State called to the jurors’ attention a matter which it would not be justified in considering in reaching a verdict, fails.

Moreover, even if a juror were able to discern in the prosecutor’s statements the implication that defendant now sees there, defendant has not shown that the effect of the comment was so substantial and prejudicial as to require a new trial. First, although defendant’s trial counsel immediately objected to several comments during the State’s rebuttal argument (R. 345:688, 692, 696), it did not do so to the Rios comment (R. 345:659-60). Thus, trial counsel did not initially find the phrase objectionable or understand the comment to be anything other than fair comment on witnesses’ credibility. Second, it is extremely unlikely that the jury would have understood the comment as asking it to compare Rios’s appearance in chains with defendant’s appearance in a suit. *See, e.g., Reed*, 2000 UT 68 at ¶19 (finding no prosecutorial misconduct where “it is extremely unlikely that the jury drew the inference [defendant] describes”).

Third, the comment was the only one like it in 26 pages of closing argument. *See Harmon*, 956 P.2d at 274 (Utah 1998) (holding no prejudice where single statement, made in the course of a long trial, was not relied upon or referred to again by the prosecutor); *Byrd*, 937 P.2d at 536 ((holding that frequency of comment is relevant in determining prejudice); *Morrison*, 937 P.2d at 1297 (same). Finally, as discussed above, *see pp. 23-22 supra*, the evidence supporting the jury’s verdicts in this case was substantial. *Cf. State v. Speer*, 750 P.2d 186, 189-90 (Utah 1988) (holding “fact that the jury acquitted defendant of two of the four charges indicates that the verdict was a result of a reasoned application of the law, rather than prejudice engendered by the improper evidence.”).

Thus, under the circumstances of this particular case, there is no reasonable likelihood that, absent the challenged comment, the jury would have found in favor of defendant. *Cf. Wright*, 893 P.2d at 1119 (rejecting claim that prosecutor’s statement that “the performance that you saw from the defendant on the witness stand was utterly incredible” was prejudicial “in light of the totality of the evidence”).

III. THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE BECAUSE THERE WERE NOT NUMEROUS ERRORS AND ANY ERRORS COMMITTED WERE SO MINOR AS TO NOT HAVE INFLUENCED THE OUTCOME

Defendant next claims that there were so many errors in his trial that even if no single error undermined confidence in the verdict, their cumulative effect was sufficient to do so. Br. Applt. at 33. The cumulative error doctrine requires reversal “only if the

cumulative effect of the several errors undermines . . . confidence that a fair trial was had.” *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (citations omitted); *State v. Alonzo*, 932 P.2d 606, 617 (Utah App. 1997), *affirmed by* 973 P.2d 975 (Utah 1998).

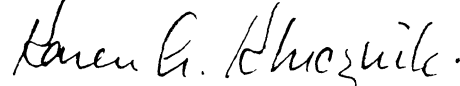
Although defendant has alleged several errors, as explained above, he has not established that any substantial errors were committed that could collectively result in any harm to him. *See State v. Rammel*, 721 P.2d 498, 501-02 (Utah 1986). Defendant asserts that any errors were likely to affect the outcome because the State’s case against him was weak. Br. Aplt. 33. However, as discussed above, the State’s case against defendant was sufficiently strong that, even if none of the alleged errors had occurred, the jury would have convicted him.

CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm defendant’s convictions.

RESPECTFULLY SUBMITTED  November 2000.

JAN GRAHAM
Utah Attorney General


KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 6 November 2000, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this **BRIEF OF APPELLEE** to Linda M. Jones and David V. Finlayson, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, Attorneys for Appellant.

Karen A. Hecox

Addenda

Addendum A

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
FILED DISTRICT COURT
Third Judicial District

THE STATE OF UTAH

JAN 12 2000

ORIGINAL

Plaintiff, *S. Olson* Deputy Clerk

VS.

CASE NO. 961022250

JOSE MARIO JIMENEZ

Pretrial Motions

Defendant.

BEFORE THE HONORABLE FRANK G. NOEL

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, APRIL 23, 1999

FILED

Utah Court of Appeals

APR 17 2000

Julia D'Alessandro
Clerk of the Court

2000044-47

REPORTED BY: Bonnie Eggers, RPR, CSR (Utah/Ore/Calif)

(801) 238-7104

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1 MR. FINLAYSON: There is gruesome
2 photographs. It's my understanding that the State is
3 not planning on --

4 MR. LEMCKE: We'll be submitting the drawings
5 of the medical examiner, Your Honor, only. The only
6 reason we would ever bring in photographs is if
7 counsel announces that he is going to bring in a
8 ballistics expert. If he is going to try to say it
9 was not Mr. Jimenez but the stranger on the grassy
10 knoll and the photographs are somehow necessary to
11 prove that, we might use them. But I think that is so
12 remote --

13 MR. FINLAYSON: And we are not planning on
14 doing that.

15 MR. LEMCKE: We are not going to do that.

16 THE COURT: All right. With that
17 understanding, I will grant the motion. If anything
18 unexpected occurs --

19 MR. LEMCKE: Yeah.

20 THE COURT: It would have to be reviewed at
21 that time.

22 MR. FINLAYSON: Right.

23 THE COURT: I will grant the motion.

24 What about to suppress the evidence of prior
25 convictions?

1 MR. LEMCKE: Your Honor, the prior
2 convictions the defendant has -- actually, I don't
3 think there are any relevant ones that are within the
4 period.

5 He has had some involvement with drug
6 dealing. There is one that was a failed to file, an
7 aggravated assault with a knife. He has had a
8 resisting arrest.

9 THE COURT: No felonies?

10 MR. LEMCKE: Forged government document which
11 I see was a driver's license or something. I don't
12 see how those would come in unless we are going to say
13 that, you know, he is going to bring in his character
14 for being a peaceable person in the furtherance of a
15 self-defense claim which we would then, of course, be
16 able to bring in a lot of things in terms of even bad
17 acts, not just convictions.

18 THE COURT: So far as your case in chief,
19 you're willing to submit or stipulate to this motion?

20 MR. LEMCKE: Oh, yeah.

21 THE COURT: Is that satisfactory?

22 MR. FINLAYSON: It is, Your Honor.

23 THE COURT: Okay.

24 MR. FINLAYSON: And the only other motion
25 that I see right now coming up is that I talked to

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

VS.

JOSE MARIO JIMINEZ,

Defendant.

MAR 16 2000

Stacy Carter

CASE NO. 961022250

Jury Trial

VOLUME II

BEFORE THE HONORABLE ROBIN W. REESE

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 14, 1999

REPORTED BY: Jody Edwards, CSR, RPR, RMR, CRR

238-7378

FILED
Utah Court of Appeals
APR 17 2000

ORIGINAL

Julia D'Alessandro
Clerk of the Court

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1 there's fertile enough ground without worrying about
2 that one, as it turns out.

3 MR. LEMCKE: We would ask though that the
4 defendant personally waive any objection he may have
5 to this particular fact. Because that, you know, is
6 a personal right to him.

7 THE COURT: Okay. Well, I guess,
8 Mr. Jiminez, the -- your attorney once represented
9 one of the State's witnesses in a criminal case.
10 I'm not sure if that poses much of a conflict to you
11 or from your interests. But do you have any
12 objection if Mr. Shapiro continues as your attorney?

13 MR. JIMINEZ: I don't.

14 THE COURT: Okay.

15 MR. JIMINEZ: Yeah, it's okay.

16 THE COURT: Apparently Mr. Jiminez has
17 agreed then and there will be no problem.

18 Then there were other motions we needed to
19 put on the record?

20 MR. LEMCKE: Yes, your Honor. Before there
21 was the change of judge from Judge Noel to you due
22 to the structural constraints of the court --

23 THE COURT: Right.

24 MR. LEMCKE: -- there were a number of
25 motions that were put before Judge Noel and ruled

1 upon by him. And it would be our, I believe joint
2 motion, that each of those has now been put before
3 you in written form and that you would essentially
4 rule as Judge Noel has, nunc pro tunc, to preserve
5 the record.

6 MR. FINLAYSON: That's correct, your Honor,
7 and I think we filed a written motion to review
8 those records.

9 THE COURT: The motion was filed yesterday.

10 MR. FINLAYSON: Those motions.

11 THE COURT: One was a motion in limine to
12 allow statements of an unavailable witness. As I
13 understand, Judge Noel sustained or granted the
14 objection to that -- to the testimony of those
15 unavailable witnesses; is that correct?

16 MR. LEMCKE: He did. And then we agreed by
17 stipulation that the entirety of a videotape could
18 be played, but not an edited version.

19 THE COURT: So I won't change or alter
20 Judge Noel's ruling in any way. I will rule that
21 those -- that tape is inadmissible. However, I
22 understand the State will agree to its admissibility
23 in any event so long as the entire tape is played.

24 MR. LEMCKE: That is correct, your Honor.

25 THE COURT: And then there was a motion in

1 limine to exclude gang references. Is that a motion
2 to exclude gang references as to all witnesses, both
3 State and defense?

4 MR. LEMCKE: We would hope so.

5 MR. FINLAYSON: Yes, your Honor, unless
6 some witness puts that at issue.

7 THE COURT: But at this point Judge Noel
8 granted a motion in limine to exclude all gang
9 reverences?

10 MR. FINLAYSON: All gang references. There
11 is -- we do have some information on Mr. Rios. We
12 asked him at the preliminary hearing whether he was
13 ever involved in gangs, he said no. We do have some
14 information that he was involved in gangs. So that
15 would actually go to credibility, that being an
16 issue there.

17 MR. LEMCKE: Well, it's still a gang
18 reference, your Honor.

19 THE COURT: Well, I didn't hear the motion,
20 but -- who brought the motion in limine?

21 MR. FINLAYSON: We brought the motion in
22 limine because the State had some photographs of
23 Mr. Jiminez and had some information that he may
24 have been involved in gangs in California. So we
25 brought the motion in limine to -- so that no gang

1 reference -- it actually was brought on behalf of
2 our client. At the preliminary everybody said, all
3 the witnesses said they had no gang involvement.
4 And in Mr. Rios' statements to corrections people he
5 indicated that he was involved in a gang. So that
6 is a --

7 THE COURT: Well, I'll rule the same as
8 Judge Noel did. And that would be to exclude all
9 gang references at this point. I suppose -- I mean,
10 that was his ruling, as I understand it?

11 MR. LEMCKE: It was, your Honor.

12 MR. FINLAYSON: That was his ruling.

13 THE COURT: Okay, I won't change that in
14 any way.

15 Then there was a third motion in limine, I
16 suppose a defense motion to exclude gruesome
17 paragraphs.

18 MR. LEMCKE: And we have none to show.

19 THE COURT: And that motion was granted by
20 Judge Noel.

21 MR. FINLAYSON: It was, Your Honor.

22 THE COURT: Are there any photos that the
23 defense is aware of that you would characterize as
24 gruesome that you think the State is going to --

25 MR. FINLAYSON: I don't think any autopsy

1 photos are coming in. Those are what we were
2 concerned with. You know, some of the photos have
3 blood on the street and that's -- we just can't get
4 around that. So we're not objecting to those.

5 THE COURT: Those are not gruesome photos
6 for purposes of that proceeding?

7 MR. FINLAYSON: I don't think they qualify
8 as gruesome photos.

9 THE COURT: And apparently one of the
10 parties brought a motion to suppress prior
11 convictions.

12 MR. FINLAYSON: We brought that motion in
13 limine that there shouldn't be any 609 evidence out
14 there on our client. And I think that was
15 stipulated to as well.

16 THE COURT: Okay. And Judge Noel granted
17 that motion?

18 MR. FINLAYSON: Granted that.

19 THE COURT: Suppress evidence of prior
20 convictions as far as Mr. Jiminez is concerned?

21 MR. FINLAYSON: Right.

22 THE COURT: Okay, I'll rule the same as
23 Judge Noel. I'll grant the motion in limine to
24 prohibit the use of a videotape of an interview of
25 Mr. Rios. Is --

1 MR. LEMCKE: Mr. Montoya.

2 THE COURT: Or Montoya then. Except so far
3 as the State intends to stipulate to its
4 admissibility. I'll grant as well Judge Noel's
5 ruling or confirm Judge Noel's ruling on a motion in
6 limine to exclude all gang references.

7 I'll rule the same as he did on the
8 defendant's motion in limine to exclude gruesome
9 photographs. And note the conclusion of the Court
10 that that does not preclude the use of crime scene
11 photographs that may show some blood.

12 And I'll rule as Judge Noel did on the
13 motion in limine to suppress evidence of
14 Mr. Jiminez' prior convictions.

15 Okay, anything else?

16 MR. LEMCKE: Yes, your Honor. The State
17 has a motion at this time based on the opening
18 statement of Mr. Shapiro, and as you'll recall
19 Mr. Shapiro proffered to the jury in the opening
20 statement that what the defendant did in this case
21 in killing Mr. Miera and shooting at Mr. Montoya and
22 Mr. Rios went beyond self-defense. It went beyond
23 defense of others. It went to, in fact, the safety
24 of wife and children. It went to the defense of the
25 family and it is what any man would do. And we feel

1 that this has called the defendant's character into
2 issue in this case.

3 THE COURT: And you --

4 MR. LEMCKE: And if, in fact, this is going
5 to come back with a closing argument that a man, you
6 know, kind of the John Wayne, Jimmy Stewart, a man
7 must do what a man must do to protect the women and
8 children, that these are character issues, and from
9 that point if these are raised we are entitled to
10 examine the defendant's character in full.

11 THE COURT: Now, qualify -- or explain a
12 little better the second part of what you just said.
13 If they are raised, you said something --

14 MR. LEMCKE: Well, actually, we believe it
15 has been raised already by -- brought into issue in
16 this. Although it wouldn't go in the case in chief,
17 nonetheless were the defendant to testify that, you
18 know, this is -- a man has to do this to protect his
19 family sort of thing, because clearly you will see
20 from the videotape and other things that the
21 defendant was not -- or the wife of the defendant
22 clearly was not in imminent danger from either the
23 person who was being shot or the two people that
24 were running away.

25 That to go to this as some kind of a

1 character thing and he -- what a man must do, puts
2 character on the plate and at that particular point
3 we're entitled to start examining those issues and
4 the defendant's character and counter that.

5 THE COURT: Let me say this at this point,
6 because I'm not sure the motion is yet ripe, I'll
7 listen to the testimony of Mr. Jiminez and the other
8 defense witnesses and if in my judgment Mr. Jiminez
9 has placed his character at issue, testifying or
10 having someone else testify that he's got a
11 reputation in the community for being a piece-loving
12 man or by nature he's a peaceable person or
13 something like that, clearly the State would be
14 entitled to rebut.

15 Okay, so I'll take the motion under
16 advisement. One other thing I wanted to point out
17 and put on the record, last evening, just prior to
18 our recess and after the jury was excused, the State
19 objected to the use of two defense expert witnesses,
20 one a doctor -- remind him of his name.

21 MR. FINLAYSON: Rothfeder.

22 THE COURT: Rothfeder. And a Mr. -- help
23 me again.

24 MR. SHAPIRO: Moyes.

25 THE COURT: Moyes. I would overrule the

Addendum B

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JOSE MARIO JIMINEZ,
called by the defendant, having been duly
sworn, was examined and testified as follows:

THE CLERK: You do solemnly swear that the
testimony you are about to give in the case now
before the Court will be the truth, the whole truth
and nothing but the truth, so help you God?

THE WITNESS: Yes, I do.

THE CLERK: Be seated up here, please.

MR. LEMCKE: Your Honor, may we approach?

THE COURT: Yes.

(Side-bar conference.)

THE COURT: Go ahead, Counsel.

(Examination conducted through an
interpreter.)

DIRECT EXAMINATION

BY MR. FINLAYSON:

Q Okay, Jose, will you tell us your name and
date of birth?

A (In English) Jose Mario Jiminez.

Q When were you born?

A (In English) My date of birth is -- excuse
me?

1 Q When were you born?

2 A (In English) May 1st, 1973.

3 Q Okay. Now, the State has your date of

4 birth wrong, don't they?

5 A (In English) Yes.

6 Q And do you remember correcting that with

7 the judge at the preliminary hearing?

8 A (In English) Yes.

9 Q And telling the judge that it was May 1st,

10 1973?

11 A (In English) Yes.

12 Q Okay. We're just going to talk briefly

13 about something that happened to you sometime ago.

14 Do you remember an incident that happened a few

15 years back in California?

16 A (In English) Yes.

17 Q Where were you living?

18 A (In English) I was living in almost

19 downtown Los Angeles.

20 Q And what was your address there?

21 A (In English) Dose Tre Avenue.

22 Q Do you remember the --

23 A (In English) 1953 Castralia.

24 Q Castralia?

25 A (In English) Castralia, yeah.

1 Q Was there an occasion that something
2 happened to you in that -- at that address in
3 California?

4 A (In English) Yes.

5 Q Or close to that address in California?

6 A (In English) Yes.

7 Q And what happened?

8 A (In English) I got robbed and --

9 (Through Interpreter) And they hit me.

10 (In English) They hit me a lot.

11 Q And based on that did you have to go to the
12 hospital?

13 A (In English) Yes.

14 Q When you went to the hospital, do you know
15 how you -- how you were taken to the hospital?

16 A (In English) By the ambulance.

17 Q By the ambulance?

18 A (In English) Yes.

19 Q And did they treat you at the hospital?

20 A (In English) Yes.

21 MR. LEMCKE: Objection, leading, your
22 Honor.

23 THE COURT: I don't believe it's leading.
24 I'll overrule the objection.

25 Q (BY MR. FINLAYSON) Did they treat your

1 wounds?

2 A (In English) Yes, they did.

3 Q Now, I noticed you have a scar on your
4 head, okay. It's obvious. What did you get that
5 scar from?

6 A (In English) That's a problem.
7 (Through the Interpreter) From that
8 problem.

9 Q And do you know what happened to your head?

10 A (In English) I just remember they took me
11 to the hospital.

12 Q Okay. When you went to the hospital by
13 ambulance, what name did you use?

14 A (In English) Antonio Sanchez.

15 Q Now, Antonio Sanchez isn't your real name,
16 is it?

17 A (In English) No.

18 Q Why did you use the name Antonio Sanchez?

19 A (In English) Because I didn't have money
20 to pay the bills.

21 Q So you lied to the hospital?

22 A (In English) Yeah.

23 Q Because you didn't have money?

24 A (In English) Yes.

25 MR. LEMCKE: Objection, leading, your

1 Honor.

2 MR. FINLAYSON: I believe that's what he
3 said.

4 THE COURT: It is. It would have been
5 leading, but I'll overrule the objection. He's
6 answered the question.

7 MR. FINLAYSON: If I could have just one
8 moment, your Honor.

9 Your Honor, if I could have these marked.

10 THE COURT: That will be Defendant's
11 Exhibit 11; is that correct?

12 MR. FINLAYSON: Defendant's Exhibit 11.

13 Q (BY MR. FINLAYSON) Mr. Jiminez, do you
14 read English?

15 A (In English) Kind of.

16 Q Kind of. Okay, I have here what purports
17 to be some medical records --

18 A (In English) Okay.

19 Q -- sent to our office. Would you indicate
20 to us the name on the medical records here.

21 A (In English) Antonio Sanchez.

22 Q Okay. Now, is that the name that you used
23 at the hospital?

24 A (In English) Yes. Yes.

25 Q Now, it has an admit date, what's the admit

1 date on those?

2 A (In English) The 8th of 7, 1994.

3 Q And an admit time of 11:56 at night. Does
4 that sound right?

5 A (In English) Yes.

6 Q And what's the date of birth?

7 A (In English) It's May 1st, '73.

8 Q Now, you haven't had a chance to look at
9 these medical records, have you?

10 A (In English) No.

11 Q There's a patient transfer acknowledgment
12 on the third page of these records. Do you see
13 where it says the patient's signature?

14 A (In English) It says Antonio Sanchez.

15 Q Okay. Is that your signature?

16 A (In English) Yeah. I think so.

17 Q And do you remember signing that patient
18 transfer acknowledgment? You may have been a little
19 dazed, huh?

20 A (In English) I don't remember.

21 Q And the physician certificate transfer,
22 there's another signature there, right?

23 A (In English) Yeah.

24 Q You had a broken arm?

25 A (In English) Yeah, two.

1 Q So you had to sign with a broken arm?

2 A (In English) Yes.

3 MR. FINLAYSON: Your Honor, that's all the
4 questions I have of Mr. Jiminez at this point.

5 THE COURT: Okay. Cross-examination on
6 that -- those points?

7 MR. LEMCKE: Very briefly, your Honor.

8

9 CROSS-EXAMINATION

10 BY MR. LEMCKE:

11 Q So Mr. Jiminez, you admit you lied to the
12 people who were providing you the medical care?

13 A (In English) Yes.

14 Q And you used the name, what, Carlos
15 Sanchez?

16 A (In English) Antonio Sanchez.

17 Q These aren't the only other false names
18 that you've used, are they?

19 MR. FINLAYSON: Judge, I'm going to object
20 at this point. Can we approach?

21 THE COURT: Yes.

22 (Side-bar conference.)

23 Q (BY MR. LEMCKE) So Mr. Sanchez -- excuse
24 me, Jiminez, on this occasion you have not reviewed
25 these records that are contained in the exhibit?

1 A (In English) No. No, sir.

2 Q And other than the two signatures you claim
3 are yours, you have no way of knowing if these are,
4 in fact, the records from California from these
5 people that you lied to about who you were.

6 A (Through the Interpreter) I remember I was
7 taken to the hospital.

8 Q Okay. But the question is, sir, do you
9 know if these are, in fact, your records?

10 A (Through the interpreter) From what it's
11 been shown, yes.

12 Q What is it that tells you that this bunch
13 is, in fact, your records?

14 A (In English) The name and --
15 (Thorough the Interpreter) The results and
16 the blows that it shows in there.

17 Q The results that it shows in there?

18 A Yes.

19 Q So you have reviewed them? I thought you
20 told us you had not.

21 A (In English) Until right now I said that
22 because I told -- I was --
23 (Thorough the Interpreter) I had a -- how
24 do you say it, a surgery.

25 Q All right. So if these show surgery, they

1 might be yours?

2 A (In English) Yes.

3 Q You say they robbed you or they beat you.

4 Who are they?

5 A (In English) Three or four people. I

6 don't know. I didn't know them.

7 Q So you -- whatever it was you were in an

8 incident, a violet incident with three or four other

9 people on that occasion?

10 A (In English) Oh, there was three or four

11 people who came to me, robbed me.

12 Q Is there a police report that accompanies

13 that?

14 A (In English) Yes.

15 Q Have you brought that police report with

16 you?

17 A (In English) No, sir. I don't know.

18 Q You don't know?

19 A (The witness nods in the negative.)

20 Q Did you tell the police your correct name?

21 A (In English) I don't remember.

22 Q Did you ever talk to the police about these

23 three or four people that you were involved with and

24 the violet incident?

25 A (In English) I did.

1 Q But you don't know if you told the police
2 your correct name?

3 A (In English) I don't remember.

4 MR. LEMCKE: Nothing further, your Honor.

5 THE COURT: Anything else?
6

7 REDIRECT EXAMINATION

8 BY MR. FINLAYSON:

9 Q Just one thing. What were you hit with in
10 this incident, Mr. Jiminez?

11 A (Through the Interpreter) With clubs. The
12 ones they use to secure automobiles.

13 MR. FINLAYSON: All right. That's all I
14 have, your Honor.

15 THE COURT: Anything else, Mr. Lemcke?

16 MR. LEMCKE: No, your Honor.

17 THE COURT: Okay, then you may step down,
18 sir.

19 And I assume then we're through with -- at
20 this point the defense doesn't have its next witness
21 available and won't until tomorrow; is that correct?

22 MR. FINLAYSON: Tomorrow morning at 9:00,
23 your Honor.

24 THE COURT: So we'll excuse the jury again
25 at this point until about, let's say, 9:00 o'clock

Addendum C

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

VS.

JOSE MARIO JIMINEZ,

Defendant.

FILED MAR 16 2000
Third District

MAR 16 2000

Suzanne Carlson

CASE NO. 961022250

Jury Trial

VOLUME III

BEFORE THE HONORABLE ROBIN W. REESE

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 15, 1999

REPORTED BY: Jody Edwards, CSR, RPR, RMR, CRR

238-737

FILED

Utah Court of Appeals

APR 17 2000

Julia D'Alesandro
Clerk of the Court

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September 15, 1999

9:17 a.m.

P R O C E E D I N G S

* * * * *

THE COURT: Good morning. For the record, the members of the jury are present and counsel and parties are all present, and I assume prepared to go forward this morning.

Is there anything, Counsel, before we ask the defendant to call its next witness?

MR. LEMCKE: Not that the State's aware of, your Honor.

MR. FINLAYSON: No, your Honor.

THE COURT: All right, I'll ask the defense then to call its next witness.

MR. FINLAYSON: Your Honor, we call Dr. Robert Rothfeder.

ROBERT KEITH ROTHFEDER,
called by the defendant, having been duly sworn, was examined and testified as follows:

THE CLERK: You do solemnly swear that the testimony you are about to give in the case now

1 during -- and the broken arm, the broken jaw, that
2 is the medical records from California, that is not
3 medical records out of this particular incident
4 where --

5 A That's correct.

6 Q -- where Mr. Jiminez is punched by
7 Mr. Rios?

8 A Correct.

9 MR. LEMCKE: Could I have State's 1, your
10 Honor, the videotape?

11 Thank you.

12 Q (BY MR. LEMCKE) And have you been
13 provided any medical records from the defendant or
14 from counsel of the '96 incident where Mr. Rios
15 punched Mr. Jiminez?

16 A No, I've not.

17 Q So he presented you no place where --
18 records from a place where he went to be treated?

19 A I've not reviewed records from that
20 incident, that's correct.

21 Q All right. And he is, in fact, your
22 patient and these are his attorneys and they would
23 have access to those records if they, in fact,
24 existed?

25 A I would assume that to be the case, yeah.

1 Q And you would also assume they would
2 provide them to you?

3 A I would.

4 Q Okay. And you went over a history with the
5 defendant, and other than what he told you about the
6 violent street incident that he was involved in, or
7 in counsel's words, purports to be involved in in
8 '94, and the incident that took place in '96, did he
9 give you any other history of violence that he has
10 had?

11 MR. FINLAYSON: Judge, can we approach?

12 THE COURT: Sure.

13 THE WITNESS: I --

14 THE COURT: Before you answer, Doctor.

15 THE WITNESS: Okay.

16 THE COURT: Excuse me just a minute.

17 (Side-bar conference.)

18 THE COURT: I'll overrule the objection.

19 MR. LEMCKE: All right.

20 Q (BY MR. LEMCKE) Did the defendant give
21 you any other history of violence that he's been
22 involved in?

23 A I didn't frame my question to him in those
24 terms, in terms of whether he was involved in
25 violence. What I did ask was whether he'd had

1 significant previous illnesses or injuries. And
2 with respect to injuries, I said I'm not really --
3 I'm not really talking about, you know, cuts and
4 bruises and that type of thing, but serious, what
5 he'd consider serious injuries, and childhood or
6 adult. And he did not give me any additional
7 history of serious trauma.

8 Q So the only history he provided you then
9 was the '94 incident and the '96 incident?

10 A That was the only positive response to that
11 question on previous trauma, correct.

12 Q Okay. And you are not a psychologist as
13 such?

14 A As such, well --

15 Q Or a psychiatrist?

16 A A lot of what I do involves that, but
17 that's not what I describe myself as, a
18 psychologist.

19 Q That's not your particular professional
20 area of expertise?

21 A Correct.

22 Q And you're not here to give an opinion on
23 extreme emotional disturbance, are you?

24 A That's correct.

25 Q And also you're not here to talk about

Addendum D

FILED DIST. CT.
Third District

MAR 16 2000

Suzy Carlson

CASE NO. 961022250

Jury Trial

VOLUME III

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NOEMI MONICA JIMINEZ,
called by the defendant, having been duly
sworn, was examined and testified as follows:

THE CLERK: You do solemnly swear that the
testimony you are about to give in the case now
before the Court will be the truth, the whole truth
and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Be seated up here, please.

THE COURT: Go ahead, Counsel.

MR. SHAPIRO: Thank you, Judge.

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Good morning, Ms. Jiminez. Would you for
the record tell us your full name and spell your
last name.

A Noemi Monica Jiminez, J-i-m-i-n-e-z.

Q Okay. We're going to ask you to speak up
so that everybody can hear. That microphone will
help a little bit, but please speak loud enough so
that everybody can hear.

Do you know the defendant?

1 Q You saw Mr. Rios punch your husband?

2 A Yes.

3 Q You saw your husband come up with the gun?

4 A Yes.

5 Q Did you see your husband conceal that gun
6 in his clothing earlier that night?

7 A No.

8 Q Did you know when you were at Me Mexico he
9 had a concealed gun on him?

10 A No.

11 Q Did you know that the concealed weapon
12 under that circumstance would be a crime in and of
13 itself?

14 MR. FINLAYSON: Objection, your Honor.

15 MR. SHAPIRO: Objection, your Honor. May
16 we approach?

17 MR. LEMCKE: And your Honor, might we have
18 one person do the objection?

19 THE COURT: Yes, just one at a time. I
20 think we do need to designate one attorney to speak.

21 (Side-bar conference.)

22 THE COURT: The objection is sustained.

23 MR. SHAPIRO: May we approach again, Judge?

24 THE COURT: Yes.

25 MR. LEMCKE: May I be invited in?

1 THE COURT: Yes, go ahead.

2 (Side-bar conference.)

3 THE COURT: I'll overrule the objection --
4 or sustain the objection, excuse me.

5 Go ahead, Counsel.

6 MR. SHAPIRO: We'd ask for the instruction
7 as well.

8 THE COURT: There was no answer, but I'll
9 sustain the objection.

10 Q (BY MR. LEMCKE) So do you know when he
11 concealed that handgun in his clothing?

12 A No.

13 Q Had you ever seen your husband with a
14 concealed handgun before --

15 A No.

16 Q -- on other instances? You closed the bar
17 Me Mexico? You closed the bar?

18 THE COURT: Do you understand the question?

19 Q (BY MR. LEMCKE) Were you there at the bar
20 until it closed?

21 A Yes.

22 Q Then you came to the 7-Eleven?

23 A Yes.

24 Q Okay. You told us that the man in the car
25 was getting out of the car?

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Third Judicial District

THE STATE OF UTAH,

Plaintiff,

VS.

JOSE MARIO JIMINEZ,

Defendant.

MAR 16 2000

Bury Carlsen

CASE NO. 961022250

Jury Trial

VOLUME IV

BEFORE THE HONORABLE ROBIN W. REESE

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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238-7378

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Utah Court of Appeals

APR 17 2000

ORIGINAL

Julia D'Alessandro
Clerk of the Court

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1 straightforward with you, which witnesses told you
2 the truth. That is why I believe you will find the
3 defendant guilty of murder, guilty of attempted
4 murder, guilty of a second count of attempted
5 murder, and guilty in each of those three counts of
6 using a firearm in the commission of those acts.
7 Thank you.

8 THE COURT: Counsel for the defendant.

9 MR. FINLAYSON: Your Honor, could we
10 approach briefly before?

11 THE COURT: Yes.

12 (Side-bar conference.)

13 THE COURT: All right, Counsel for the
14 defense, if you'd like to make your closing
15 statement.

16 MR. FINLAYSON: Thank you, your Honor.

17 Try as I'm sure that you will, because I
18 know that you're going to follow the law, you may
19 never be able to put yourself in the shoes of my
20 client that night. But that's the law. As judges
21 of my client, as judging the facts and bringing back
22 a verdict on my client, the law is that -- and all
23 the law mentions, the circumstances arising here,
24 the law is that you must put yourself in the shoes
25 of my client in those same circumstances.

1 reasonable people. Anybody who might have
2 preconceptions or ideas that are far left, far
3 right, those -- we pick people that are not that
4 way. We picked people who are going to be fair and
5 impartial. You are reasonable people.

6 If you have any doubt that the State has
7 proved beyond any reasonable doubt that self-defense
8 took place, then you have to acquit. And you need
9 not consider anything else because that acquits
10 Mr. Jiminez of every single count, of Count I,
11 homicide; Count II, attempted homicide; and Count
12 III, attempted homicide. And that is the law in the
13 State of Utah and probably every state. And the
14 reason is, is because you cannot be held responsible
15 for what happens when the use of dangerous force is
16 used when you're trying to defend yourself.

17 The State's case, because of that problem,
18 the State's case has been, the whole two days, the
19 State's case has been that it was improper for my
20 client to have a gun. Now, in this country there is
21 a second amendment right to have a gun. We have
22 rules about that, but there is all kinds of people
23 walking around with guns, with concealed weapon
24 permits, with concealed weapons. Unfortunately
25 whether you agree with guns or you don't agree with

1 guns, guns are all over in our society.

2 And this is not a case about whether it was
3 proper for Mr. Jiminez to have a gun or not. That
4 is irrelevant. Because whether it was proper for
5 him to have a gun or not when he walked up there, it
6 doesn't matter. What matters is what happened in
7 those five or six seconds. When he was clocked,
8 when he was -- went down, when he got up and was
9 disoriented, confused, not being able to make a
10 judgment call, he defended himself. And that is
11 self-defense as Mr. Lemcke admitted. Was it
12 possible? Yes. Not only possible, but likely.

13 If you'll indulge me a minute, there's a
14 couple of things I need to say about jury
15 instructions. I hate to talk about jury
16 instructions because to tell you truth, it's boring.
17 But let me say a couple of things. Mr. Lemcke left
18 out one major part of the self-defense instruction
19 when he told you what it was. And I think we've
20 tried to put headings on them so you can find them
21 easier because I know these jury instructions are
22 complicated. But self-defense, when you're using
23 a -- when you're using the type of defense that's
24 intended or likely to cause death or serious bodily
25 injury, you only can use that if he or she

1 Mr. Rios, he's been responsible for the
2 destruction of at least two lives and who knows how
3 many others he's influenced their lives. And I
4 would ask you to not allow him to make my client the
5 next. Thank you.

6 THE COURT: Thank you. Now let me pause
7 for just a minute. Would it be appropriate at this
8 point to take another short recess?

9 Then Mr. Lemcke, I'll permit you to proceed
10 with your rebuttal.

11 MR. LEMCKE: Thank you, your Honor.

12 Ladies and gentlemen of the jury, we get a
13 chance to do what's called rebut. Talk about what
14 the defense talks about in their closing.

15 Goodness sakes, I didn't watch the video
16 close enough to know that Manuel Rios shot Henry
17 Miera. That Manuel Rios started the whole fight.
18 That Manuel Rios did this. It's real easy to have a
19 guy like Manny and call him names and everything
20 like that. I'm not going to present to you that
21 Manny is the guy you would want to date your
22 daughter or, you know, to have your sons go out and
23 on bar-hopping expeditious with at night. But Manny
24 Rios, among other things, you tell me if he's a liar
25 or if Manny is just being Manny. I tell you Manny

1 something that would put you in fear for your life,
2 but I don't remember that now.

3 He says it's self-defense when defense --
4 self-defense is clearly not available. He says it's
5 extreme emotional distress, but it's not available
6 because it's from an act that he caused. He says
7 it's imperfect self-defense, but it's not even
8 self-defense to start with.

9 He wants to lay this off on everyone else.
10 He comes in and he says things like, again,
11 misquoting Mr. Montoya, well, Montoya told me there
12 was a fight at Shooters. No, Montoya in the tape
13 uses two phrases, scuffle and an incident, which I
14 contend are not necessarily fights. But it's being
15 characterized as a fight, again, simply to denigrate
16 people who can't defend themselves.

17 Again, Montoya never saw him pull --
18 said -- he said pull the gun out and raised his
19 shirt. The idea that counsel told you, it was
20 irrelevant whether or not the defendant was entitled
21 to have the firearm. We never got into that. We
22 talked about him going into something with a
23 concealed firearm because of his propensity to obey
24 or not to obey the law. We didn't get into whether
25 or not he could have one. Counsel talks about well,

1 there's the second amendment, there are permits. No
2 evidence of whether anybody did or did not have
3 permits here. I'm certain you would have heard
4 that.

5 What you have is in the early morning hours
6 of October 20th, 1996, Henry Dennis Miera, a person
7 nobody has said was involved in the altercation in
8 any way, dies from two gunshot wounds tracts that go
9 right through his body at the hand of the defendant
10 who comes into this thing and who brings the
11 concealed firearm into this and gets in everybody's
12 face because he knows he's got it. And he pulls it
13 out, at which point the only self-defense that takes
14 place in this case is Manny Rios punching him so he
15 can get away from the gun.

16 Manny Rios, also not a perfect person.
17 There is no extreme emotional distress except what
18 the defendant brought on himself. There is no
19 self-defense because there's no imminent threat of
20 force. This while he gets up and it's kind of
21 unsolicited, well, he's knock out, he gets up, he
22 sees them standing over him, he's confused, he
23 doesn't know what's going on, so he gets up and
24 defends himself. No, they run away.

25 The time frame on the tape doesn't show

1 Scott and juror Michael Ross. You are excused at
2 this time. You are not permitted to deliberate. We
3 thank you for your service.

4 Again, it's an unfortunate thing to have to
5 do it, but you have helped us just by serving to
6 this point in the proceedings and we appreciate it.
7 If you'd like to remain, watch the final outcome,
8 you may do so. But only those eight who are to
9 serve as jurors can deliberate on the case. So
10 thank you.

11 I'll ask those eight members to follow the
12 deputy into the jury room.

13 (The following proceedings were held in
14 open court out of the presence of the
15 jury.)

16 THE COURT: You can be seated. For the
17 record, Counsel, let me just ask, in fact, it was
18 Mr. Scott and Mr. Ross, isn't that correct, that
19 were the alternate jurors?

20 MR. LEMCKE: As we understood, your Honor.

21 MR. FINLAYSON: That's the way we
22 understood it, your Honor.

23 THE COURT: Okay, just so we're clear.
24 Counsel for the defendant, you indicated that you
25 wanted to make a motion for mistrial.

1 The record should reflect the jury has been
2 excused and this would be an appropriate time to do
3 that. Go ahead if you would like.

4 MR. FINLAYSON: Your Honor, during
5 counsel's opening part of his closing argument he
6 referenced the character of our defendant, accusing
7 us of packaging him as a Jimmy Stewart. Talking
8 about Rios being in chains as he should be at the
9 prison and our client sitting out here in the suit
10 and glasses and comparing him to the video. He's
11 not allowed to comment on the character of our
12 client. It was never a point put at issue by us.
13 We approached the bench and objected to that.

14 THE COURT: You did.

15 MR. FINLAYSON: And asked that there be a
16 mistrial.

17 We also took exception to -- we also take
18 exception to Mr. Lemcke's bringing up the concealed
19 weapon as showing our client's propensity to disobey
20 the law, which I think is exactly what all the
21 404(b) and 609 evidence is exactly trying to keep
22 out. And that is trying to try Mr. Jiminez on the
23 merits and not on his propensity to disobey the law.
24 We would ask for a mistrial for that as well.

25 And that -- and I think I've made my

1 objection clear on when Mr. Lemcke started into the
2 fact that the jury had not been dealt with in a
3 straightforward manner. I think he -- that the jury
4 could take that and it is certainly reasonable for
5 them to take that that we were hiding something from
6 them or that I have done something improper in this
7 trial. It's your Honor's province to decide whether
8 there's something improper going on and I take
9 exception to that.

10 THE COURT: Thank you.

11 Mr. Lemcke, your response to the motion for
12 a mistrial on those three ground?

13 MR. LEMCKE: Your Honor, first of all
14 there --

15 THE COURT: Pardon me.

16 MR. LEMCKE: There are three grounds and
17 the idea that -- we talked about the deportment of
18 the defendant, you know, here and there. And that
19 those are different affects is proper comment on the
20 deportment of a witness. The defendant did take the
21 stand in this particular case. His credibility is
22 clearly at issue. We, in fact, attacked his
23 credibility. In fact, the second -- or the third
24 thing that counsel complains about is that we talked
25 about --

1 THE COURT: Being unfairly dealt with.

2 MR. LEMCKE: Oh, that the jury was not
3 being dealt straightforward with.

4 THE COURT: Or straightforward.

5 MR. LEMCKE: And that is simply talking
6 about I don't think that the defendant and his wife
7 were telling them the truth. I was not commenting
8 on Mr. Finlayson. If Mr. Finlayson has some ill at
9 ease with that, I apologize to him. I do not even
10 apologize for the process, though. Because I think
11 I'm entitled to comment on the defendant, as any
12 other witness, whether or not I believe he's telling
13 the truth. And I think that so much of what he said
14 was transparently false and that is the comment on
15 that.

16 The other issue is -- deals with Manuel
17 Rios being in chains. That was mentioned at a
18 different time. To hear counsel's complaint it
19 would be, well, here is the defendant over here in a
20 suit, and here is Manuel in chains. No, I talked
21 about Manuel a lot. In fact, to comment in my
22 rebuttal, where counsel said, oh, he's an NFL
23 lineman, I said he's not an NFL lineman, he's a USP
24 inmate. We've never sold him as a church warden.
25 We've only let Manuel be Manuel.

1 And to somehow cobble together the comments
2 on Manuel as a backside comment on the defendant, I
3 don't know if that shows something of the mind set
4 of counsel, it's more so than what happened actually
5 in court. So I don't think that his comments are at
6 all well made. And his motion for mistrial
7 certainly isn't.

8 THE COURT: Did you want to comment on the
9 second ground?

10 MR. LEMCKE: Which was?

11 THE COURT: The firearm, the -- counsel
12 said --

13 MR. LEMCKE: Oh, on the firearm. The
14 problem with that was that in his close
15 Mr. Finlayson went into a speech about, well,
16 there's a second amendment. We're not talking about
17 whether people are entitled to have them or not,
18 there are permits. They had nothing to do with the
19 case, the second amendment or people having permits.
20 We never got into that. We weren't going to get
21 into that. And I have a right to rebut and come
22 back and talk about we didn't talk about permits.
23 We talked about the fact that he concealed a weapon
24 and went into this. And that he has, among other
25 things, a propensity for crime and aggression. And

1 that was, you know, clearly central to the issues of
2 this case.

3 So to somehow come out as this is
4 everything that's said when I reference the
5 defendant is somehow 403 or 404(b), is fallacious.
6 I get to comment on the defendant as a witness and I
7 get to comment on the defendant as an actor. And
8 that is what the issue is about. And to simply
9 complain about everything that comes in against
10 their client is violative and only there to smear
11 him, just isn't true.

12 THE COURT: Okay. It's your motion,
13 Counsel.

14 MR. FINLAYSON: Nothing else on that. I
15 guess I should -- I forgot to put one thing on the
16 record. I'll submit those.

17 THE COURT: Okay.

18 MR. FINLAYSON: But when we -- we did
19 approach the bench when Mr. Lemcke indicated that he
20 believed I'd mischaracterized the law.

21 THE COURT: On aggravated assault.

22 MR. FINLAYSON: On aggravated assault. And
23 I think I'd ask the Court to instruct them on the
24 statute of aggravated assault. And Mr. Lemcke, I
25 don't remember what you asked for the judge to do.

1 MR. LEMCKE: Your Honor, I asked you
2 actually to do nothing. Except, you know, I did not
3 object to you saying that the law of aggravated
4 assault was not a part of this case. And that the
5 different counsels disagree on certain issues in
6 this, which is true. Also it should be part of the
7 record that it was the defense who didn't want
8 aggravated assault instructed in this particular
9 manner. The instructions say that they contain all
10 the law that's necessary and Mr. Finlayson chose to
11 go beyond the jury instructions to get into an issue
12 of law that we weren't -- that apparently they
13 weren't set up for.

14 THE COURT: I guess we could just deal with
15 this last one, give the jury a supplemental
16 definition of aggravated assault, if you wanted to
17 do it.

18 MR. LEMCKE: I would object, Your Honor.

19 MR. FINLAYSON: That's what I'd ask for.

20 THE COURT: But you wanted me to, as I
21 understand it, Mr. Finlayson, from our discussion
22 here, you wanted me to tell the jury that your
23 characterization of aggravated assault was correct,
24 and I wasn't prepared to do that.

25 MR. FINLAYSON: No, I did ask the Court

1 then to instruct them -- I'd read off the statute is
2 what I had done to instruct them on serious bodily
3 injury and aggravated assault because that's what I
4 had read off of.

5 MR. LEMCKE: But at that point, your Honor,
6 counsel said broken teeth constitute various bodily
7 injury under the law and that is absolutely
8 incorrect.

9 THE COURT: Counsel, I appreciate what you
10 were both arguing at this time. And it's at least
11 arguable whether or not that Mr. Jiminez was a
12 victim of an aggravated assault. So I hesitate to
13 tell the jury that definitively. So I guess my
14 question now is aggravated assault has been
15 explained -- it's been relied on by the defense as
16 an explanation as to why they feel self-defense was
17 necessary. Wouldn't it be helpful to now tell the
18 jury in a brief instruction what aggravated assault
19 is and let them decide for themselves?

20 MR. LEMCKE: I wouldn't think so, your
21 Honor.

22 THE COURT: And why would you feel that
23 way?

24 MR. LEMCKE: Well, because, again, you
25 know, it is not the statute, the law which was read,

1 but it is the interpretation in the case law that
2 matters whether or not this idea of broken teeth
3 being serious bodily injury is there.

4 THE COURT: Well, what we --

5 MR. LEMCKE: Unless we want to start
6 reading the several cases that deal with this.

7 THE COURT: No, my suggestion is that we
8 just define aggravated assault, nothing more. Not
9 make any -- not instruct the jury as to whether
10 broken teeth are or are not --

11 MR. FINLAYSON: That's what I would like,
12 your Honor.

13 MR. LEMCKE: And we would object to it. We
14 think it's surplusage and we think that they've gone
15 into the jury box now, it's an invasion.

16 THE COURT: I'm not sure that it's an
17 invasion. I'll consider, It counsel, if you'd look
18 to draft the instruction having nothing more than
19 the elements of aggravated assault. I'll take a
20 look and I'll take a look whether or not it's legal
21 at this point to add a supplemental instruction to
22 the jury.

23 MR. FINLAYSON: Thank you, your Honor.

24 THE COURT: Now, in terms of the motion for
25 mistrial, I'll deny it. First of all, the comments

1 of the prosecuting attorney explaining to the jury
2 that, in fact, Mr. Jiminez is not Jimmy Stewart, if
3 I've characterized his description truthfully, is in
4 my judgment not a comment on the character of
5 Mr. Jiminez. Again in opening arguments and during
6 Mr. Jiminez' own testimony, the defendant attempted
7 to present to the jury an appearance or an image of
8 what Mr. Jiminez was like and what his intention
9 was. It's not inappropriate for the prosecutor to
10 make an effort to contradict that image. And in my
11 judgment, that's what Mr. Lemcke was trying to do.

12 On the second ground, commenting that I
13 believe something to do with the propensity to
14 violate the law as shown by carrying an illegal
15 firearm. It's a touchy area, I grant, but on the
16 other hand the defense implied through its closing
17 argument that Mr. Jiminez had a second amendment
18 right to carry a firearm.

19 It didn't quite go that far, but said words
20 to the effect of to the jury that haven't they heard
21 about the second amendment. The clear implication
22 is that the defendant has a constitutional right to
23 have this gun. Apparently there's some evidence
24 that he doesn't have a constitutional right to have
25 a gun for various reasons. Among them possibly

1 because he's an illegal alien.

2 The State didn't make that comment and, in
3 fact, couldn't have made that comment in my
4 judgment. It would have been misconduct for them to
5 do so. But to follow-up and explain as they do that
6 the issue is not so much that the defendant has a
7 constitutional right to have a gun, but as to what
8 the gun may show about his state of mind and who, in
9 fact, was the aggressor. Which I think was the
10 essence of what the prosecutor was saying, and again
11 in my judgment is not prosecutorial misconduct. And
12 I deny the motion for a mistrial on those grounds.

13 And thirdly, the prosecutor's statement
14 that he didn't feel that the jury was being dealt
15 with in a straightforward manner or an honest
16 manner, Mr. Finlayson, I think if counsel had said
17 that I think the prosecutor is lying to you -- or
18 the defense counsel, rather, is lying to you or
19 misrepresented something to you, I would agree. But
20 his statements can be construed that the defendant
21 himself was lying or the defense witnesses were
22 lying and the jury wasn't being told the truth. He
23 didn't accuse you personally of anything, and
24 therefore again it wouldn't be prosecutorial
25 misconduct in my judgement. There is no reason to

1 declare a mistrial and so I won't.

2 But I'll consider submitting an aggravated
3 assault instruction if you can draw one up quickly.
4 And I'll try to take a look at the law to see if it
5 would be appropriate even though the jury has been
6 sent to the jury room to deliberate to add that
7 instruction at this point.

8 We'll be in recess.

9 MR. FINLAYSON: Thank you.

10 MR. LEMCKE: And your Honor, before I'd
11 submit that I'd ask the Court to look at -- I
12 believe there's case law, it was Justice Zimmerman.
13 I can't remember the case, but he said that things
14 like broken fingers, broken noses and I believe
15 broken teeth do not arise to an aggravated assault
16 level.

17 THE COURT: Your argument there is that by
18 law -- as a matter of law this couldn't be an
19 aggravated assault.

20 MR. LEMCKE: Correct.

21 THE COURT: I'm not prepared to tell the
22 jury that, Counsel. Let me just explain to them
23 what aggravated assault is and draw their own
24 conclusion.

25 MR. FINLAYSON: Your Honor, it appears that

Addendum E

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

THE STATE OF UTAH,

Plaintiff,

VS.

JOSE MARIO JIMINEZ,

Defendant.

MAR 16 2000

Suzanne Carlson

CASE NO. 961022250

Jury Trial

VOLUME III

BEFORE THE HONORABLE ROBIN W. REESE

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 15, 1999

REPORTED BY: Jody Edwards, CSR, RPR, RMR, CRR

238-7378

FILED

Utah Court of Appeals

APR 17 2000

Julia D'Alessandro
Clerk of the Court

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NOEMI MONICA JIMINEZ,
called by the defendant, having been duly
sworn, was examined and testified as follows:

THE CLERK: You do solemnly swear that the
testimony you are about to give in the case now
before the Court will be the truth, the whole truth
and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Be seated up here, please.

THE COURT: Go ahead, Counsel.

MR. SHAPIRO: Thank you, Judge.

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Good morning, Ms. Jiminez. Would you for
the record tell us your full name and spell your
last name.

A Noemi Monica Jiminez, J-i-m-i-n-e-z.

Q Okay. We're going to ask you to speak up
so that everybody can hear. That microphone will
help a little bit, but please speak loud enough so
that everybody can hear.

Do you know the defendant?

1 Q So you simply don't recall that?

2 A I don't recall it.

3 Q All right. After your husband left Judy's,
4 when is the next time you had contact with him?

5 A That night.

6 Q Did you participate in concealing him from
7 the police for a period of time?

8 MR. SHAPIRO: Objection, your Honor. May
9 we approach?

10 THE COURT: Yes.

11 (Side-bar conference.)

12 THE COURT: I guess we'll have to take a
13 short recess for a period of time. I apologize to
14 the jury but we'll have to take a short recess and
15 talk about something outside the hearing of the
16 jury. So I'll ask the jury to follow the bailiff.
17 Attorneys remain, please.

18 (The following proceedings were held in
19 open court out of the presence of the
20 jury.)

21 THE COURT: You can be seated. Counsel,
22 there's an objection to the question of the
23 prosecution's attorney as to what Ms. Jiminez may
24 have done to assist in hiding her husband.

25 MR. LEMCKE: All right.

1 THE COURT: The objection is that if
2 Ms. Jiminez admits helping to conceal him from the
3 law, then she committed a crime. And by admitting
4 that crime would have -- should have the opportunity
5 to at least to be advised by counsel, separate
6 counsel, as to her right not to incriminate herself.
7 And then if she chooses, could exercise that Fifth
8 Amendment right.

9 MR. LEMCKE: Your Honor, noting that the
10 witness has already confessed to one crime of hiding
11 the car, and we're still within the statute of
12 limitations, and that is tampering with evidence,
13 we're kind of almost moot at this point on that
14 particular issue. If she, in fact, wants to consult
15 counsel, come back and say that she either cares to
16 take the Fifth Amendment or she cares to testify,
17 that would be fine. And the State, of course, would
18 have to go along with that.

19 But I think that that is the option to this
20 particular question. We may want to put that one on
21 reserve, bring her back say after lunch and have her
22 put that answer in. But as the Court noted at the
23 bench, I can ask her about things she observed of
24 her husband concealing himself from the law for that
25 particular period of time.

1 THE COURT: So if I understand what you're
2 saying, Mr. Lemcke, you'd be happy to proceed by
3 asking her what she observed Mr. Jiminez do?

4 MR. LEMCKE: Yes.

5 THE COURT: And in your judgment that
6 wouldn't be objectionable. But if you were to ask
7 her what she herself did, the actions she may have
8 taken, that could possibly incriminate her and you
9 agree that she should have the advice of independent
10 counsel to advise her on that?

11 MR. LEMCKE: Right. And I would just put
12 her on the stand, say I'll withdraw the question
13 because you have the right to talk to an attorney
14 before you answer that one, and then move on to
15 asking about what she observed her husband do.

16 THE COURT: All right. Does counsel for
17 the defense have any objection to proceeding that
18 way?

19 MR. SHAPIRO: I have an objection to him
20 saying I'll withdraw that question because you have
21 a right to counsel. That simply gives it more
22 importance than it's entitled to. I'd ask that that
23 question be stricken completely and that it be
24 rephrased.

25 The fact that Mr. Lemcke said that she's

1 already admitted to something is further evidence
2 that what he's doing is wholly improper. To ask her
3 to confess to a crime while she's on the stand
4 unrepresented is unconscionable. To say now that
5 because she's already done it once, doing it twice
6 isn't a big deal is even worse. That's
7 reprehensibly conduct I think as far as this case
8 goes. And as far as our client is now concerned
9 certainly to questions about her participating in
10 the crime is completely irrelevant.

11 If the question is what did she observe, I
12 think that's a proper question. But if she's asked
13 to give -- if she's being asked to give information
14 that's incriminatory, that simply shouldn't be
15 allowed to happen. She's entitled to counsel.

16 *THE COURT:* She's entitled to counsel.
17 It's certainly relevant what she may have done. How
18 she may have assisted her husband certainly would be
19 relevant. I don't agree with that part of what you
20 said. If she's going to admit to a crime or be
21 asked to admit to a crime in open court on the
22 record then of course she's entitled to be advised
23 by independent counsel and then make the choice as
24 to whether she wants to exercise her Fifth Amendment
25 right or not. I would agree.

1 So Mr. Lemcke, rather than have you explain
2 that you're going withdraw the question because the
3 answer may incriminate the witness --

4 MR. LEMCKE: I'll just withdraw the
5 question.

6 THE COURT: I'll just simply indicate to
7 the jury that I've sustained the objection for now.
8 And if you want to pursue another line of
9 questioning. But I will permit you to ask her
10 whether she had the understanding Mr. Jiminez was
11 going to purportedly conceal himself. Any objection
12 to that?

13 MR. LEMCKE: Your Honor, one thing before
14 we bring the jury back in. I'm getting, although
15 counsel wants to call me names and things, what I'm
16 getting right now, unconscionable and everything
17 else, I'm getting stereoced. And this is
18 Mr. Shapiro's witness and Mr. Finlayson has to --
19 you know, he can consult with Mr. Shapiro but we
20 can't have two people up and down objecting. It's
21 too hard to keep track of and it's basically unfair.

22 THE COURT: And I agree. I think what
23 we'll have to do is designate one counsel to deal
24 with a particular witness. And if there's
25 cross-examination that the counsel questioning that

1 you, Mr. Lemcke, what evidence do you have that
2 Mr. Jiminez may have been involved in some violent
3 behavior except that he admitted to in Los Angeles
4 and that which is the subject of this lawsuit?

5 MR. LEMCKE: The entries on his rap sheet
6 that include things again as resisting arrest and
7 aggravated assault that would put him in violent
8 situations. And again, what we're talking about,
9 you know, is the basis of the doctor's opinion and
10 is not a question that was used. So I don't think
11 we'd have to proffer it, but we will, we'll proffer
12 the entire FBI rap sheet.

13 THE COURT: That's as much as I'll require.
14 Let's bring the jury back in and resume
15 then with the cross-examination of Miss Jiminez.
16 But please don't ask her whether she herself did
17 anything that would have been illegal, simply what
18 she observed her husband do.

19 MR. LEMCKE: All right.

20 THE COURT: Yes, Ms. Jiminez, let's have
21 you retake your seat at the witness stand, please.

22 MR. SHAPIRO: Judge, one question before
23 the jury comes?

24 THE COURT: Sure.

25 MR. SHAPIRO: A lot of -- this line of

1 questioning --

2 THE COURT: Do you want to approach the
3 bench?

4 MR. SHAPIRO: Yes.

5 THE COURT: Bring them in.

6 (Side-bar conference.)

7 THE COURT: All right, for the record the
8 jury is again back. And we've had our discussions.
9 And counsel for the State, I'll sustain the
10 objection that was made earlier by defense counsel
11 and ask you to move to a new line of questioning.

12 MR. LEMCKE: All right, thank you, your
13 Honor.

14 Q (BY MR. LEMCKE) After that particular
15 morning of October 20th, 1996, what did you observe
16 your husband do to conceal himself from the law over
17 the next year or so?

18 A In what way? I don't understand the
19 question.

20 Q All right, then let me break it down. Did
21 you observe your husband conceal himself from arrest
22 or leave to avoid arrest after the killing of
23 Mr. Miera?

24 A Yes.

25 Q How long was he gone?

Addendum F

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1 witness objects to, then one of you can object, one
2 of you can address the objection.

3 MR. LEMCKE: And if we're going to be
4 called to approach, could that rule be in effect as
5 well?

6 THE COURT: Pardon?

7 MR. LEMCKE: If we're going to be called to
8 approach the bench, could that rule be in effect as
9 well?

10 THE COURT: The one attorney that's dealing
11 with that particular witness I would ask to approach
12 the bench, make objections, argue the objections.

13 MR. FINLAYSON: We've been trying to do
14 that. It's a little bit hard when Mr. Lemcke asks
15 an improper question, we sort of react and jump up.
16 We do -- I do have a motion I need to make.

17 THE COURT: Let's do that now while the
18 injury is out. It makes sense to do that. Go
19 ahead.

20 MR. FINLAYSON: Your Honor, we're going it
21 make a mistrial motion at this point. There have
22 been a couple of problems. Mr. Lemcke at every
23 point in this trial before -- instead of before
24 asking a possibly improper question he blurts it
25 out. Had -- we've had a problem today with

1 Mr. Lemcke telling Detective Chidester to play the
2 video over and over while Dr. Rothfeder is
3 testifying.

4 THE COURT: Let me just ask you to flesh
5 that out a little. Your objection was that
6 apparently the detective played the videotape,
7 Plaintiff's Exhibit No. 1, continuously during the
8 cross-examination of Dr. Rothfeder?

9 MR. FINLAYSON: Playing it and at
10 Mr. Lemcke's request doing that from our
11 understanding of Detective Chidester. We do object
12 to that.

13 THE COURT: Okay. And that objection was
14 noted and sustained. They were asked to discontinue
15 the conduct.

16 MR. FINLAYSON: Mr. Lemcke asked yesterday
17 when Mr. Jiminez was on the stand, you've used false
18 names before, holding a sheet of paper up. We've
19 provided a case to your Honor, State versus Palmer
20 at 860 P2d 339, that indicates asking -- that the
21 simply manner of asking the question, and I think
22 the discussion starts on page 5, unsupported
23 innuendo is prosecutorial misconduct. And actually
24 this case was reversed based on that. And that's
25 what that was, your Honor, it was prosecutor

1 innuendo.

2 Mr. Lemcke does not have admissible
3 evidence to prove that, at least he didn't properly
4 to the Court. And that is prosecutor misconduct
5 under Palmer. We objected to that. Your Honor had
6 him not further ask any questions about that until
7 we could provide you law on that. I think it's very
8 clear that that's improper. That it is prosecutor
9 innuendo and we would make a mistrial motion at this
10 point based on our client's Fifth, Eighth,
11 Fourteenth amendments of the United States
12 Constitution and based on the state constitution.

13 **THE COURT:** All right.

14 **MR. FINLAYSON:** In addition to that, today
15 Mr. Lemcke, knowing that we had -- at the time that
16 we talked about that, we also talked about whether
17 or not Mr. Lemcke could talk to -- could ask any
18 questions about the fact that it was a crime to
19 conceal a weapon. Your Honor hadn't ruled on that
20 yet and Mr. Lemcke on cross-examination of
21 Ms. Jiminez blurts out, You realize that concealing
22 a weapon is a crime, and having the weapon was a
23 crime.

24 **MR. LEMCKE:** Actually, that's not true,
25 your Honor, I never got to that question.

1 MR. FINLAYSON: Regardless, that was an
2 improper question. There are -- it is improper
3 under 404(b) evidence, prior crime evidence. We are
4 entitled to notice that that was going to be brought
5 up. It was not charged conduct. The State has no
6 purpose getting into uncharged conduct. If they had
7 wanted to charge that, then they should have charged
8 it in the beginning and given us notice that they
9 were going to go into that. It has no relevance to
10 the case whatsoever, other than to bash Mr. Jiminez'
11 character and Ms. Jiminez' character. That's
12 totally improper. It obviously has no probative
13 value whatsoever as to what happened in this
14 incident.

15 The fact that -- the question about where
16 the weapon was, I don't even think is relevant. But
17 before this happened, the question whether it was
18 concealed, whether he walked up or not certainly has
19 some relevance and that was asked. But to go on and
20 interject, you know, he's not even asking the
21 question, he's simply testifying, you are aware that
22 that's a crime, is improper and irrelevant and
23 prejudicial to our client.

24 Your Honor sustained our objection, but I
25 believe that we're getting -- that with the two

1 problems that we've got so far, I don't think the
2 Court can instruct the jury to dis -- I think the
3 Court certainly could instruct them to disregard it,
4 but I don't think they can any longer. I think that
5 there's been too many instances of that and I'll ask
6 you that based on his constitutional right to a fair
7 trial, his due process rights, that his right to --
8 and to testify and not be asked questions such as
9 unsupported innuendo, those have been violated and
10 we would ask that you declare a mistrial.

11 THE COURT: Okay. And the prosecutor's
12 response?

13 MR. LEMCKE: Well, your Honor, counsel has
14 presented the Palmer case this morning. Going back
15 to the question on what happened yesterday when the
16 defendant was on the stand for the limited purpose
17 of introducing his medical records, or what counsel
18 says purport to be his medical records, he admitted
19 at that time that he used a false name and lied. At
20 this point having the FBI rap sheet that lists his
21 other aliases that he's used, I asked him about
22 whether or not he has other -- ever used other false
23 names.

24 Now counsel gets up and objects and he says
25 that I need to have evidence to support that. I

1 have his FBI rap sheet. I don't have evidence that
2 you could use for collateral impeachment were the
3 defendant to deny that. But I do have the right
4 based on evidence to ask him that question.

5 As to what happened today when the doctor
6 was on the stand, I had the right to inquire about
7 the basis for his opinion and with the defendant
8 asking about two prior instances -- or the defendant
9 telling the doctor about two prior instances of
10 violence he had been involved in, I inquired about
11 the rest. Again, we had the fire storm. But that's
12 proper to examine the basis.

13 When we had this witness, Miss Jiminez, on
14 the stand, as we still do, I asked her if she
15 knew -- or in fact, we went through the conduct, the
16 conduct which is criminal. I asked her about having
17 the concealed gun, about this and that, I asked her
18 whether or not she knew that was a crime, that was
19 objected to, that wasn't answered.

20 But this is not improper questioning in
21 terms of uncharged criminal conduct. If I would
22 have gone through and charged everything that could
23 have been charged here, two counts of concealing
24 evidence, interstate flight, being a restricted
25 person in possession of a firearm, having a

1 concealed loaded firearm, I would have heard howling
2 about, oh, you're just a terrible prosecutor,
3 overreaching, trying to charge everything. The
4 conduct is part of this criminal episode. The fact
5 that it is criminal doesn't mean we don't get to
6 inquire about it.

7 THE COURT: Let me stop you there,
8 Mr. Lemcke. I think most of what you said the
9 defense counsel would agree with. They would agree
10 that the conduct itself may be a part of the
11 episode, it may be relevant, but it's a
12 characterization as illegal conduct. How is that
13 relevant and how does that help the trier of fact
14 decide in this case whether the defendant is guilty
15 of the crimes of homicide and attempted homicide?

16 MR. LEMCKE: It goes to that, your Honor,
17 because the defense has raised from opening
18 statement this contention of who was the aggressive
19 party. Who was that. The defendant illegally being
20 possessed of a firearm, the defendant criminally
21 concealing the firearm, the defendant going out into
22 the public, knowing that he was -- had others at an
23 advantage that they were unaware of. It goes to
24 this entire question of aggressiveness and who was
25 the initial aggressor. If, you know, if we even get

1 beyond the legality of it and let that go, the fact
2 that he has it and the fact that he has it concealed
3 and the fact that he goes out this way, goes to the
4 aggressive nature of the conduct. And that's where
5 we are.

6 I'd also refer the Court to the Palmer case
7 in subparagraph 5, where the prosecutorial
8 misconduct is the prosecutor asked the defendant
9 to -- about his questioning and his preparation with
10 his attorneys and said, he didn't tell you to face
11 the jury and tell you exactly what to say. That is
12 a complete innuendo question. That has nothing to
13 do with conduct.

14 When we are talking about the defendant's
15 conduct in getting a firearm that he's not entitled
16 to have because of his status, about concealing it,
17 about going out and then going and concealing the
18 evidence to this particular crime, they are relevant
19 to the crime. We're talking about whether or not
20 they're illegal. I think I agree probably isn't
21 relevant to this jury.

22 THE COURT: Okay.

23 MR. LEMCKE: But to say that this is the
24 Palmer case is just -- it just isn't true.

25 THE COURT: I think I understand. Counsel,

1 just briefly in response?

2 MR. FINLAYSON: Just briefly, your Honor.
3 I'm sorry, I forgot the other objection and I'm glad
4 that Mr. Lemcke brings it up. I objected when he
5 talked about did he tell you about any prior
6 violence that he was involved in with Dr. Rothfeder.
7 Again, it's the innuendo. It is exactly innuendo,
8 every one of those three instances have been
9 innuendo. One, you've used false names before. Now
10 I think for the record we need Mr. Lemcke to proffer
11 to the Court what admissible evidence he had for
12 those three innuendos, first the false --

13 THE COURT: Let me ask you about that
14 before I ask Mr. Lemcke to do anything. I read the
15 Palmer case and just quickly skimmed it, but the
16 concern there, I'm looking at page 5, the right-hand
17 column, about the very middle of the column it says,
18 Generally it's error to ask an accused a question
19 that implies the existence of a prejudicial fact
20 unless the prosecution can prove the existence of
21 the fact. Otherwise the only limit on the line of
22 questioning be with the prosecution's imagination.
23 And then the last paragraph of that sentence says,
24 Hence, we can conclude the prosecutor's questions
25 which imply in the culpatory facts that were

1 unsupported by that would support error.

2 And I would agree with you and Mr. Lemcke
3 and rule that before you can ask questions that
4 would be prejudicial, you have to have evidence that
5 proves it. But I think Mr. Lemcke's point is a good
6 one too, and that is that the question in this
7 particular case wasn't just a product of his
8 imagination because he has an FBI rap sheet that
9 shows that the defendant has used several aliases.

10 Now, according to the Palmer case, before
11 he can ask the defendant about that he has to have
12 the evidence that can prove the existence of the
13 fact. And that would imply that he has to have
14 admissible evidence. But we're not talking about a
15 case where Mr. Lemcke just fished something out of
16 the air that he pulled something from his
17 imagination in order to discredit the defendant. Is
18 that fair?

19 MR. FINLAYSON: I haven't seen what he's
20 proffered or what he's -- there's been no proffer to
21 me or to the Court of what exactly he's looking at.
22 He flashed some piece of paper that I haven't seen a
23 copy of it, that's what I'm saying. I think we
24 need -- on those three instances we need to know
25 whether Mr. Lemcke does have admissible evidence. I

1 agree with you, if he had whatever he was sent by
2 the FBI as a rap sheet that may not be out of his
3 imagination, but I don't think this case is based on
4 imagination. I think what they're saying is that --
5 that's one of the big problems with that is that
6 otherwise if they don't make some rule like that,
7 then you could just out of your imagination come up
8 with a great way of cross-examining somebody and
9 make him look really bad.

10 THE COURT: Sure.

11 MR. FINLAYSON: But it's certainly not the
12 rule. The rule is that there has to be admissible
13 evidence before that can be asked. And I ask that
14 that evidence be proffered to the Court on all three
15 of those instances. Including prior -- whether he
16 has certified copies of prior violent convictions.

17 THE COURT: Okay. Did you have anything
18 else by way of response?

19 MR. FINLAYSON: No.

20 THE COURT: Mr. Lemcke, did you have
21 something you wanted to add?

22 MR. LEMCKE: Well, your Honor, first of all
23 it would only apply to Mr. Jiminez because Palmer
24 applies to that, which is asking the accused. In
25 terms of asking the doctor, that's the -- what data

1 he had that goes to the basis of his opinion, that's
2 clearly a proper question.

3 We have instances of the defendant involved
4 in conduct and they're not convictions but they're
5 involved in conduct, one of them which was
6 originally charged as an aggravated assault with a
7 knife. And when the doctor is talking about his
8 basis for his opinion of the condition of the
9 defendant's head because of prior violence done to
10 it, then what he knows about the prior violence done
11 to the defendant's head is proper basis for his
12 opinion.

13 In terms of what was asked to the defendant
14 yesterday, which is the only question in front of
15 us, I had some evidence, I had the FBI rap sheet.
16 Mr. Finlayson got that in his discovery. He's had
17 that for a long time. The fact that, you know, he
18 hadn't looked at it in a while is not my fault. And
19 like I say, I had evidence upon which to ask the
20 question --

21 THE COURT: Does the -- let me interrupt
22 you, Counsel. I'm sorry to interrupt.

23 MR. LEMCKE: I did not have the collateral
24 evidence that would be required to impeach him.

25 THE COURT: But does the FBI rap sheet list

1 aliases for Mr. Jiminez?

2 MR. LEMCKE: It does.

3 THE COURT: Go ahead. Anything else?

4 MR. FINLAYSON: Well, no. I've got -- I
5 don't know how many volumes of discover I've got on
6 it. It's irrelevant. It's not admissible evidence.
7 An FBI rap sheet is not admissible evidence.

8 THE COURT: I agree.

9 MR. FINLAYSON: And we already had -- I
10 mean, add to that the fact that you've ruled, we had
11 Judge Noel rule and then you ruled that no prior
12 crimes or anything of that such nature can come in
13 on my client. And with those rulings he's getting
14 up and asking questions -- it may not be that he's
15 asking Mr. Jiminez while he's on the stand, instead
16 he's asking the doctor, has he told you about any
17 prior violence that's he's been involved in. He's
18 up there asking his wife, don't you realize that's a
19 crime. That's still innuendo against my client.
20 And so the Palmer case does apply to those.

21 It's not just when our client is on the
22 stand. It's innuendo that involves our client that
23 make him look bad. It still goes to the same thing.
24 He doesn't have had admissible evidence for any of
25 that. And I think what I'm getting from Mr. Lemcke

1 is he still doesn't think there's any problem with
2 that and we're going to have a continuing problem
3 where myself and Mr. Shapiro, I don't know how
4 Mr. Lemcke termed it, but a whirl wind where we jump
5 up and have to object. The jury is sitting there
6 watching that, the question is out there, we don't
7 have any choice but to object because we waive the
8 whole issue if -- from the appellate court
9 standpoint if we don't. And the jury sees us jump
10 up and object and Mr. Lemcke has everything he wants
11 right then. He has the innuendo. He has us jumping
12 up. He has the jury looking at that and the jury
13 saying, wow, there's something that they don't want
14 us to know.

15 And regardless of whether you sustain our
16 objection or not, that innuendo is in there. And
17 all of those occasions that's happened and
18 Mr. Lemcke even when he goes to ask her whether she
19 knows she was involved in concealing and that kind
20 of a crime, doesn't have the forthrightness to
21 before you ask that question inquire whether we have
22 a Fifth Amendment issue with our client, with our
23 witness.

24 There are states that make that an ethical
25 rule that you can't ask a question that you have

1 some knowledge will respond in a Fifth Amendment
2 right without bringing that up to the Court. That
3 should have been brought up to the Court. And this
4 is over and over happening again and it's getting to
5 the point where the jury is thinking that all of our
6 witnesses have something wrong with them. And we --
7 we're trying to hide something.

8 MR. LEMCKE: Your Honor --

9 MR. FINLAYSON: I can't -- there's no way
10 the Court and there's no way I can fix that problem.

11 THE COURT: Okay. Well, I think I
12 understand and I'm ready to rule. It's the
13 defendant's motion, I've given them the last word.
14 So I'll try to address them and hopefully cover
15 everything. And I'll start first of all with the
16 request that we discussed yesterday by the
17 prosecution to ask Mr. Jiminez on cross-examination
18 about his use of other aliases and I'll sustain the
19 defendant's, in effect, motion in limine to that
20 question.

21 Based on my reading of the Palmer case
22 which seems to say that before that kind of question
23 can be asked, before a question can be asked that
24 impugns in some way the defendant, the prosecution
25 would have to have proof that would be admissible of

1 the fact that question would elicit. So I sustain
2 the motion in limine and ask the prosecutor not to
3 do that.

4 In fact, I would agree with Mr. Finlayson,
5 Mr. Lemcke, that any time that you're going to ask a
6 question that may be even remotely controversial, I
7 would ask that we approach the bench, iron that out
8 beforehand rather than just try the question and
9 have the objection made and then have the kind of
10 problem where we have to excuse the jury and do this
11 again and again or approach the bench. I agree, I
12 would like to have you come forward first and then
13 we can resolve it.

14 I'm going to deny the motion for mistrial
15 however because, number one, with respect to
16 Mr. Lemcke's question yesterday to Mr. Jiminez about
17 his use of aliases, it seems to me that's mitigated
18 somewhat by the fact that Mr. Jiminez had admitted
19 on direct examination he used an alias and admitted
20 on cross-examination he lied and gave his health
21 care provider false information. And Mr. Lemcke
22 then attempted to follow-up, at least that's one way
23 you could look at it, that same question that the
24 defense even asked him with other questions about
25 possible other aliases.

1 And I'd further conclude based on what I've
2 heard proffered here today that there are aliases
3 listed on the FBI rap sheet and although
4 Mr. Lemcke -- or the State rather doesn't have
5 admissible evidence that the defendant has used
6 other aliases, there was some basis for that
7 question, the aliases listed on the FBI rap sheet.
8 And the harm to -- the unfair harm to the
9 defendant's case does not, based on that problem
10 alone, require a mistrial.

11 Second, the request for mistrial based on
12 questions to Mrs. Jiminez about whether she was
13 aware that concealing a weapon is a crime, I agree
14 that the fact that Mr. Jiminez may have brought with
15 him a weapon into the store, that it was concealed
16 and how he used it, may go to his state of mind.
17 And the question of whether or not he was the
18 initial aggressor or not, the jury may find it
19 relevant that he was armed in the first place in
20 determining whether or not he or the assailants were
21 the aggressors. So the evidence itself, the
22 conduct, would be relevant. The fact that it may be
23 characterized as illegal would not be relevant. And
24 I sustained the objection.

25 The witness is not required to answer and

1 again it's my judgment that there wasn't sufficient
2 unfair harm to the defendant's case such that a
3 mistrial would be warranted.

4 Thirdly, the question to Dr. Rothfeder
5 today about whether the defendant had informed him
6 during their consultation about other injuries
7 sustained as a result of violence, or words to that
8 effect, again other kinds of head injuries or
9 similar injuries that would have had a concussive
10 impact that Mr. Jiminez may have suffered would be
11 relevant.

12 The question or the part of it as to
13 whether they were sustained as the part of some
14 violent behavior would not be relevant. And again I
15 sustained the objection, finding that that part of
16 the answer would not be relevant. Whether he had
17 head injuries from any source that may have had this
18 concussive impact was relevant, but not how he
19 received them. But again there's not enough unfair
20 damage to Mr. Jiminez' case based on that question
21 to warrant a mistrial. And I'll deny the motion on
22 all three grounds.

23 But again Mr. Lemcke, I will emphasize in
24 the future bring those questions to the bench so we
25 don't face this situation again.

Addendum G

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Third Judicial District

THE STATE OF UTAH,

Plaintiff,

VS.

JOSE MARIO JIMINEZ,

Defendant.

MAR 16 2000

Shirley Carlson

CASE NO. 961022250

Jury Trial

VOLUME IV

BEFORE THE HONORABLE ROBIN W. REESE

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 16, 1999

REPORTED BY: Jody Edwards, CSR, RPR, RMR, CRR

238-7378

FILED

Utah Court of Appeals

APR 17 2000

ORIGINAL

Julia D'Alessandro
Clerk of the Court

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1 THE COURT: Again for the record the ten
2 jurors are present as well as the parties.

3 And counsel, we're now to the point of the
4 closing summary. So Counsel for the State, would
5 you like to make an argument?

6 MR. LEMCKE: The State would, your Honor.

7 THE COURT: You can proceed.

8 MR. LEMCKE: Thank you, your Honor,
9 Mr. Jiminez, Counsel, ladies and gentlemen of the
10 jury.

11 I hope you'll pardon me for skipping over
12 the grand eloquence flourish and just kind of
13 getting right down to the cases. What we have is a
14 fairly unique case because of the evidence that is
15 here. The State has charged Mr. Jiminez with one
16 count of murder, a firearm enhanced murder, and two
17 counts of attempted murder, again firearm enhanced,
18 for the death of Henry Miera that took place on
19 October 20th, 1996, and the shootings that took
20 place with, we contend, to kill or the attempt to
21 kill Anthony Montoya and Manuel Rios that same time,
22 same place.

23 We have these -- this we'll get into a few
24 minutes, all our charges are built around what are
25 called elements. It's important for you to remember

1 that each of these elements is important. If we
2 don't prove all the elements, we haven't proven our
3 case. The State is required to prove everything
4 beyond a reasonable doubt. This is our burden, this
5 is what we must do.

6 We have again a fairly unique piece of
7 evidence in this videotape. You, unlike almost any
8 other jury I can think of, have gotten to witness
9 the actual killing take place. There is little
10 doubt mechanically about some of the things that
11 have happened here. There is little doubt --
12 there's no doubt what happened in terms of the death
13 of Mr. Miera, in that he was shot twice in the side
14 with a .45 caliber pistol that was fired by
15 Mr. Jiminez at him. There is no doubt that
16 Mr. Jiminez, who fired at these other people, fired
17 approximately seven rounds that we know.

18 There is some dispute in somethings,
19 including some sequential things that happened here.
20 The dispute is two sided. On the one side you have
21 Mr. and Mrs. Jiminez who have given us their
22 versions of the events. On the other side you've
23 had Mr. Montoya literally who is speaking to us from
24 the dead in the interview, and Mr. Rios who came
25 here to court. And there are some important

1 distinctions in what they say happened.

2 The Jiminezes in very brief summary, and
3 we'll get into that in a second, said that, in fact,
4 when they got to the 7-Eleven that Mr. Jiminez was
5 given some bad words by the three people. That he
6 got into a confrontation with them. That he was
7 struck and that he came up with a gun.

8 Mr. Montoya and Mr. Rios have told us a
9 somewhat different sequence. They told us that,
10 yes, there was the verbal confrontation. That
11 everybody went to get in on it. That, in fact, at
12 one point the defendant was, and again Mr. Rios put
13 this three different ways at the three different
14 times of his testimony, going for a gun, he was
15 punched about the time that Rios saw the gun, and he
16 was reaching for a gun. Maybe I have those wrong
17 one or another, but anyway, he said that the
18 defendant was going for a gun.

19 The defendant indeed told us at that point
20 in time that he had a -- the .45 caliber automatic
21 stuck in his pants with the T-shirt or the shirt
22 over it. That when he saw that Mr. Montoya threw
23 the punch, that the defendant got up shooting and
24 then again that he does shoot Mr. Miera, he shoots
25 at the other two, he chases them in front of the car

1 and the rest of the sequence of what happened.

2 You have a number of different charges that
3 you are to consider. Not may consider, but you must
4 consider. There's no particular sequence that you
5 are to consider them in. You don't look at one and
6 say, well, this, that, then we move to the other.
7 You look at them in a package. We start with the
8 death of Henry Miera, which is essentially the
9 essence of what we're doing today.

10 We have on the one hand murder. And murder
11 is -- and again that is on or about on the 20th day
12 of October, 1996, in Salt Lake County, State of
13 Utah, the Defendant, Jose Mario Jiminez, caused the
14 death of Henry D. Miera. All the evidence is of
15 that. That's the time. That's the place. It's in
16 Salt Lake County. This is the man who shot, and
17 that's the man who died. And it was those bullets
18 that caused his death.

19 That the defendant then and there caused
20 the death, intentionally or knowingly is the next
21 element of murder, or intending to cause serious
22 bodily injury to another, committed an act clearly
23 dangerous to human life, which act caused the death
24 of Henry D. Miera, or acting under circumstances
25 evidencing depraved indifference to human life, the

1 defendant engaged in conduct which created a grave
2 risk of death to another and caused the death of
3 Henry D. Miera, and that the defendant did so
4 unlawfully without legal justification.

5 Shooting someone in the side -- and there's
6 an instruction in there about intent, that intent
7 can be inferred when you shoot someone in the side,
8 twice in the torso, twice, it can be clearly
9 inferred that you were trying to kill them. Or that
10 you were tending to cause serious bodily injury to
11 someone by shooting them twice in the side, or that
12 shooting someone twice in the side is an act of
13 depraved indifference to their particular human
14 life.

15 Then we get to the idea that the defendant
16 did so unlawfully without legal justification. We
17 move then into the concept of legal justification.
18 Among these that is mentioned in this is defense of
19 self; was the defendant, Mr. Jiminez, defending
20 himself or was he defending another, his wife.

21 If, in fact, you find that he was defending
22 himself, committing -- or acting in self-defense, as
23 defined by the law, in the shooting of Mr. Miera, in
24 the shooting at Mr. Montoya, in the shooting at
25 Mr. Rios, Mr. Jiminez is entitled to an acquittal.

1 If you find that -- or if you find a reasonable
2 doubt that Mr. Jiminez did this acting in
3 self-defense as defined by the law, you ought to
4 acquit him. I will argue to you and I will tell you
5 in a minute why, in fact, that is not the case.

6 Then we move to two other counts, to the
7 manslaughter counts. Under the laws of the State of
8 Utah there are two circumstances which say if you
9 kill somebody and it would otherwise be murder, but
10 you are acting under extreme emotional disturbance
11 or incomplete or imperfect self-defense, which are
12 defined, then even though it would have been murder
13 and all the elements are met, that you should find
14 this person -- convict them of manslaughter, which
15 is a lesser offense than murder. But again, if he's
16 acting in complete or perfect self-defense, he's
17 entitled to an acquittal.

18 But you have to look at the definitions
19 that take place in incomplete self -- or
20 self-defense, incomplete self-defense and extreme
21 emotional disturbance. And then you have the duty,
22 it is your job to go back over to the evidence this
23 doctor told you. These are things that you have to
24 consider, that's what you're here for. Do the facts
25 fit the situation as described by the Jiminizes or

1 by Mr. Montoya and Mr. Rios?

2 When you talk about self-defense, complete
3 self-defense, you're entitled to defend yourself
4 against another, against such other's eminent use of
5 unlawful force against you or the third person.
6 However, you are entitled to -- excuse me, you are
7 entitled to use force against that person, deadly
8 force, force that is intended or likely to cause
9 death or serious injury only under the law if you
10 reasonably believe that force is necessary to
11 prevent death or serious bodily injury to you or
12 another.

13 And a person is not justified in
14 self-defense if he's attempting to commit,
15 committing, or fleeing from the commission of a
16 felony or he was the aggressor.

17 Then we get into the count -- the idea of
18 imperfect self-defense where under circumstances
19 where the actor reasonably believes the
20 circumstances provide a legal justification or
21 excuse for his conduct, although the conduct is not
22 legally justifiable or excusable under the
23 circumstances. In other words, I'm defending
24 myself, but he does so inappropriately. But he has
25 reason that he's legally entitled to do so

1 appropriately and the law says he's not.

2 Extreme emotional distress must be
3 triggered by something external to the accused.
4 Such disturbance, extreme emotional disturbance,
5 therefore cannot have been brought by the
6 defendant's own particular mental processes or by
7 his knowing or intentional involvement in a crime.

8 When we go back to the two circumstances,
9 the two versions of events, let us look at the event
10 of the Jiminezes in their version. They got there,
11 Mr. Jiminez was cold cocked just out of the blue by
12 Mr. Rios. Was he defending himself when he got up?
13 Did Mr. Rios remain? Possibly. Was there some --
14 was there himself to defend? Yes. Was there his
15 wife to defend? Yes.

16 Look again at the other version of events,
17 the Rios/Montoya version of the vents. That at the
18 time Manuel Rios throws the punch, the defendant was
19 going for a gun. He was going to get into what had
20 been a verbal altercation, a name calling match,
21 looking at each other, going, have you got a
22 problem? I don't have a problem. Have you got a
23 problem? What are you going to do about it? I was
24 going to introduce a gun, a firearm to a
25 name-calling contest. Was pulling it out.

1 Interestingly enough in the Montoya/Rios
2 version of events, there is a good example of
3 self-defense, complete self-defense under the law of
4 the State of Utah, and that self-defense is on
5 behalf of Manuel Rios who seeing someone coming up
6 with a gun, throws a punch at that person before
7 they could come up with a gun. And as you will see
8 when you look at the tape, he throws that punch and
9 immediately he turns his heels and he runs.

10 Now we get into those factors, ladies and
11 gentlemen, that are the external factors that I
12 submit to you will tell you which of these two
13 versions of events is true. And I put them to you
14 rhetorically in a number of questions.

15 First of all, you have seen Manuel Rios.
16 And a fair amount of my questions to you are going
17 to be -- and they're not questions for you to answer
18 me, I don't want you to say this is the question and
19 have you give me answers. These are things that you
20 need to answer among yourselves. You've seen Manuel
21 Rios. He is an enormous man. You have seen the
22 defendant, Mr. Jiminez, he is not that big a man.
23 You've seen on videotape some scale, in fact on two
24 different videotapes, some scale of how big Anthony
25 Montoya, Jr. is. I would submit to you

1 approximately the size of Mr. Jiminez.

2 Were Mr. Jiminez not the aggressor, were he
3 not the person who we now know by his own version
4 had gone ahead, gotten out of the car, pulled up his
5 shirt, stuffed the automatic in his pants, pulled
6 the shirt down and gone and gotten into this
7 situation. We now see by the videotape he's walking
8 in, he hears something, he tells us it's murmurs, I
9 heard murmurs. You hear murmurs, do you go ask
10 someone what's your problem? He went back into the
11 situation. He goes from turning into the Sev, he
12 turns back and goes over there to the car to
13 confront it. He's got the sneaky-peeky, he knows
14 he's got the upper hand nobody knows about.

15 If you are Jose Jiminez and you're not the
16 aggressor and you know that you don't have that
17 hidden gun ready to go, do you get in the face of
18 Manuel Rios? Do you get in the face of Manuel Rios
19 plus Junior Montoya?

20 If you're Manuel Rios, you know what looks
21 on this film to be a pretty good punch, you knock a
22 guy to the ground, and you are not doing that to get
23 away from somebody with a gun, do you throw a second
24 punch? Do you kick him while he's down? Do you
25 maybe do a victory dance over your fallen opponent?

1 Why does a man like Manuel Rios throw the punch,
2 turning on his heels to get out of there unless he
3 was ducking out of the way of the gun?

4 How would Manuel Rios -- and let's go to
5 what we see of the defendant on the night that he
6 kills Henry Miera. He's got that long shirt,
7 T-shirt on, sufficient to cover something the size
8 of a .45 caliber. And Detective Chidester told you
9 the one he showed you is the smallest of the .45
10 caliber version. Unless Jiminez is bringing -- at
11 least bringing the shirt up and having his hand on
12 the gun, how do these guys see it unless the
13 defendant is going for it already?

14 You remember -- you remember Mr. Moyes, not
15 Dr. Moyes, told us that that first bullet hole --
16 remember we went through the whole thing with
17 Dr. Moyes yesterday, and we got the scraping and we
18 got the peeling and we've got the groves and lands
19 and finally get up and ask him on cross, Mr. Moyes,
20 when we get down to the question where is the guy
21 standing when he shot that bullet, oh, he could have
22 been no more than 15 inches off the ground. When is
23 the only time someone was shooting? When the
24 defendant was on the ground.

25 How -- and you look at the time frames, I

1 want you to watch these time frames. And it's such
2 a brief period of time with the shirt that's draped
3 over the gun, you gotta come up, you gotta get it
4 out, you gotta get it pointed. Unless he had his
5 hand on it when he was hit, unless he was going for
6 it before he was hit, how is he able to shoot it in
7 that instantaneous period of time when he's on the
8 ground unless he had it is in his hand when he was
9 going down? Because he was going for it when Manny
10 threw the punch.

11 What else makes sense? Because it's what
12 Mr. Moyes tells us about from where down here that
13 shot came. It's not like all those shots were into
14 the car not out of it. And how quickly it must be
15 down -- if you look at the videotape, you're going
16 to see over these glass doors, Mrs. Jiminez is
17 standing there, Rios is over there when he throws
18 the punch and if you look very, very carefully, you
19 could see some of the muzzle flashes from when the
20 defendant was on the ground. He had that gun in his
21 hand when he hit the ground because he went for it
22 when he was standing up and that's why Manny threw
23 the punch and that's why Manny ran.

24 Manny doesn't run from people. Manny may
25 be a lot of things, but Manny isn't somebody who is

1 going to run from people, especially if he's got
2 somebody like Junior there next to him.

3 You notice this too, Junior is a little
4 slower on the uptake, it takes him just an instant
5 longer to run. And you notice one third thing,
6 which is that car door. Remember counsel saying in
7 his opening argument, well, he hasn't told you about
8 the car door in opening and closing. I didn't tell
9 you about the 7-Eleven clerk ducking down behind the
10 counter either. I didn't tell you about everything
11 you were going to see in the tape. But if you look
12 at when the car door opens and closes, it opens and
13 closes when the defendant is on the ground shooting.
14 Because Henry Miera was trying to get away.

15 There's been these insinuations, innuendo,
16 insinuation, that oh, it was Henry Dennis Miera that
17 had a gun in the car. Let me ask you this. If he
18 had a gun and was pointing it, why didn't he shoot?
19 If he had a gun and was pointing it, why would he
20 open the door? If he had a gun and was shooting it
21 either right or left-handed, how would he get these
22 two parallel shots right through him in the side?
23 Because he didn't. Because he just tried that
24 instant when the gun came out and everybody, oh, my
25 God, it's a gun, we're going to get out of here, he

1 was going to get out of there and went the wrong
2 direction.

3 He opens the door and he closes it. Look
4 at the timing on that. Mr. Jiminez said it was
5 before that, much before that he's opening the door.
6 We're only talking instance, we're only talking
7 seconds. But that's when this all takes place.

8 The defendant comes up shooting. The
9 defendant would say this is self-defense. It is not
10 self-defense by law to bring a firearm to an
11 argument. It is not self-defense by law to shoot
12 someone who punches you, even if they weren't
13 punching you to prevent them from shooting you.

14 It is not self-defense by law to come up
15 with a gun in the inference because we know he
16 killed one man, we know he shot at two others, that
17 he was going to come up there to kill you. To say,
18 well, now it's self-defense. It's not self-defense
19 by law if you are attempting to commit a felony.
20 And killing these people, folks, is a felony.
21 Shooting him is a felony.

22 Extreme emotional disturbance, I was hit,
23 it was pain. The doctor, who is a substantial
24 witness, told us it hurts to get hit in the face.
25 But again, in your instructions, you look at what

1 extreme emotional disturbance is, something external
2 to the accused, it therefore cannot have been
3 brought upon by his own particular mental processes
4 or by his knowing or intentional involvement in a
5 crime.

6 You can't say I'm going to pull a gun on
7 these guys and I get punched and get a surprised
8 punch, I was just disturbed. I was just so
9 distraught at not getting it done in the first
10 place, that somebody hit me in the face, this is
11 disturbing to me, therefore it's an extreme
12 emotional disturbance. I now have license to kill
13 one and trying to kill the other two. No, that's
14 not how it is defined.

15 Imperfect self-defense that he was legally
16 entitled to do that. He wasn't entitled to
17 self-defense because there was no imminent force
18 directed his way. When he comes up shooting, the
19 man who hit him is running away. When he comes up
20 shooting, the other man is trying to run away. When
21 he comes up shooting, the third man is sitting in
22 the car and flinching and getting killed. And that
23 was the guy who wasn't even in the argument.

24 There are reasons to believe and not to
25 believe witnesses. You look at Manuel Rios, would

1 you want to get into a street fight on the wrong
2 side of Manuel Rios? No. Manuel Rios is a violent
3 man. A man with a violent history, violent
4 tendencies. He's in prison now. He has used guns
5 in the past. He came right out on the stand and
6 told you if he'd had a gun would he have thrown a
7 beer bottle? You ask yourself from what you know of
8 Manuel Rios if Manny Rios had been shot at and
9 having his friends shot at and he would have had a
10 gun with him, would he have run away? No. Would he
11 have shot back? Yes.

12 But the defendant is going to say, no, this
13 is imperfect self-defense. It's not imperfect
14 self-defense because you don't even have the
15 foundation for self-defense. There's no force being
16 directed against him. Certainly no force being
17 directed against his wife when he gets up shooting.
18 Everybody else was trying to get the hell out of his
19 way because they'd seen him with a gun.

20 We then consider the credibility of the
21 Jiminezes. A couple with extremely selective
22 memory. Mrs. Jiminez, she remembers I saw the
23 punch, my husband was trying to come in, I saw the
24 whole punch. I didn't see the shooting. I saw the
25 car door. Look at the video. Interesting situation

1 to look at. She comes over and there is the open
2 doorway. Next to that open doorway there's the door
3 now swung open and propped open. So you got the
4 door itself, the wall, she goes over and gets behind
5 it.

6 What else is between her and her husband
7 and the car? One extremely huge hunk of Rios. You
8 take a look at that and you tell me if it is
9 credible that she saw her husband, the punch, the
10 car door, all that. Although she didn't seem to see
11 or remember much else. Didn't know he took the gun
12 with him. Didn't know he had the gun.

13 Mr. Rios -- or Mr., excuse me, Jiminez
14 himself, what he has told us is very interesting of
15 what he can't remember. Oh, he can remember being
16 afraid and being punched and not going for the gun
17 and all this sort of good stuff. He took the gun
18 with him because he was in fear for his life and
19 that of his spouse. He can't remember why he was in
20 fear for his life. He can't remember if he was
21 carrying a concealed firearm earlier that year. He
22 can't remember if it was the year before. He can't
23 remember why he decided to buy it, but it was
24 because he was in fear of his life. It was such a
25 fearful event that he was going to go get this

1 thing, put it in his pants, hide it, and go after
2 people. But he can't tell us what that event was,
3 why he was in fear for his life.

4 He can't remember shooting. He can't
5 remember aiming. He can't remember clearing the
6 jam. He can't remember loading the gun. He can't
7 remember the recoil. He can't remember those things
8 that are important to him.

9 Also I ask you this, in terms of the
10 defendant and his credibility as to the events, you
11 have had a chance to see not only the defendant in
12 this courtroom today and this week with how he
13 presents himself, with how he packages himself in
14 appearance and dress and haircut and glasses and
15 demeanor, in temper or lack thereof, you have seen
16 him in every one of those aspects on October 20th,
17 1996. Is this an honest packaging?

18 Manny Rios was here in chains. Manny Rios
19 should be in chains. But Manny Rios isn't anything
20 except what Manny Rios is. But you have -- and I
21 recall -- I want you to recall Mr. Shapiro's opening
22 statement, and he was talking about the newly -- the
23 couple, not newly married couple, but the couple,
24 they had gotten their child a baby-sitter and they
25 were able to go out for this date. Just your

1 average couple. And on the other hand we had the
2 drunken rowdy trouble making boxers cruising for
3 trouble. Is either one of those portrayals honest
4 now that you know the situation? Or is it part of
5 the packaging?

6 We have had the doctor talk to us about
7 extreme emotional distress. About how pain
8 translates into emotion. He talked to us in very
9 good detail about someone named Sanchez who in 1994
10 was beaten up in Los Angeles, had a depressed skull
11 fracture, the broken jaw, the broken arm. The
12 defendant said, oh, that's me. Sanchez, yeah, I was
13 just lying to my medical providers because I wanted
14 the services I didn't have to pay for.

15 And the doctor also talked in generalities
16 about someone who is hit with a punch like this.
17 One of the reasons he's talking in specifics about
18 '94 and generalities about '96, he -- the doctor had
19 no medical records to work from from what happened
20 in 1996. He said a person might be hit like this,
21 they might react this way. They -- and he looked at
22 the tape and talked about the defendant and he said,
23 trying to find the specific language, that he was
24 not completely aware. Which I questioned him on,
25 and he said, yeah, that's different from being

1 completely unaware. And not completely aware and
2 completely unaware are two ends of the spectrum.
3 And the defendant was somewhere in the middle and he
4 couldn't put him on there.

5 Now I'm going to propose to you a theory
6 and it's one that I hope Manuel Rios will forgive me
7 for. Maybe the punch wasn't all that good. Knocked
8 him down. Even Manny said I thought it knocked him
9 out, but maybe it wasn't that good. He got up
10 shooting. He got up shooting real fast. Maybe the
11 defendant wasn't so hurt as to have this, you know,
12 not knowing where I am, not knowing that I'm
13 shooting, you know, not knowing that these people
14 are there, not knowing that, you know, I'm pulling
15 the trigger, not knowing that I'm aiming. I don't
16 remember aiming.

17 You heard about the recoil on a .45. Boom,
18 boom. I don't know if any of you shoot, that's a
19 couple of pretty good shots together, nice pair of
20 parallel tracks right through poor Mr. Miera. For
21 someone who doesn't remember all this but could
22 remember to chase the people, I mean, he went after
23 them. He just didn't get up shooting and stagger,
24 he went after them. He comes over, boom, boom into
25 the car. It jams, he clears that, he runs around

1 the car after them.

2 He tells his wife, you know, he knows
3 enough, come on, we got to get out of here. Get
4 over there. They locked the car. Got to go over
5 and unlock the car, let her in, drive away. He knew
6 to go over to Amber Fabela's. He knew to hide the
7 car in her garage. He knew to go over to Judy's.
8 He knew to find some people that would help him to
9 get out of town and ditch the gun. He knew he had
10 to do that.

11 What does this say? Two things it says,
12 one, he's pretty aware of what's going on. Two, he
13 doesn't think he needs medical attention for this
14 horrible blow. And he's a man who will seek medical
15 attention, even at someone else's expense. But he
16 did other things. He says, I don't remember killing
17 anyone. I don't remember knowing if anyone was hit.
18 What's he talking about when he gets over to Judy's
19 and Amber Fabela's there? Killed him. I killed
20 him. The defendant has no more told you the truth
21 than he told the truth to his medical providers in
22 Southern California, if indeed those are his medical
23 records.

24 Interestingly enough, the CAT scan, you
25 remember the impressions, no evidence of a skull

1 fracture. No evidence of a broken jaw. No evidence
2 of brain damage. If these, in fact, are his medical
3 records. I think he's lying to the doctor here.

4 Complete self-defense because someone is
5 coming onto you with imminent force is belied by
6 your viewing of the tape. When he's shooting, no
7 one is threatening him. Imperfect self-defense?
8 Kind of interesting in that although his head is so
9 scrambled for all that's going on of this terrible
10 punch he would tell you he suffered, he is reasoning
11 about the legal consequences of shooting at people.
12 Or that he's reasoning about the well-being of his
13 wife who he has taken to all these various
14 occasions, closed a bar with, come on over, and then
15 leaves. Has her participate with him in hiding the
16 car, in and of itself a crime. And then leaves her
17 for a period of years.

18 But yet, oh, no, I'm Jimmy Stewart. I'm
19 the all-American virtue. I'm just trying to defend
20 fair womanhood. That's not true. And the extrinsic
21 things, the idea of Manuel running, the idea of him
22 getting in Manuel's face, the idea that how does he
23 start shooting that quickly if he doesn't already
24 have the gun in his hand when he's hit.

25 By his version he gets knocked down on the

1 ground, then he has to go for the gun. What did he
2 have to do to go for the gun? Pull the shirt up,
3 get the gun out, get it pointed. There's not enough
4 time for that. He had the gun in his hand when he
5 went down. He's just going for it when he's hit
6 because Manny Rios is telling you the truth, because
7 Junior is telling you the truth.

8 Oh, I thought I saw a person pointing a gun
9 at me. And even though somebody may say, oh, this
10 is the OJ Simpson crime scene so this, so that.
11 People were able to find five or six projectiles,
12 they're like that. Guns would have been found.
13 There was no gun. There was no -- the trash cans
14 were searched. It was searched. There was no gun.
15 And if Miera has a gun, why doesn't he shoot when he
16 sees the other guy going down with a gun? And if he
17 has a gun, why doesn't he shoot? Why does he even
18 bother to open the door? If he's got a gun and is
19 pointing it, oh, no, I'm pointing it, so I will
20 wait, I'll open the door, I'll get on out, I'll do a
21 good job, I'll shoot. Okay, get back in. No, no,
22 it makes no sense.

23 You got to view the deportment of both the
24 defendant and his wife on the stand. And from those
25 things they chose not to remember, you should choose

1 not to believe them in any of this. You should
2 choose to realize there is no self-defense because
3 there was no imminent force because this is in
4 reaction -- this is the defendant himself committing
5 the crime and not allowed to commit -- or to call it
6 self-defense. That he is the aggressor in this
7 because all these things are there. That he is not
8 entitled to the extreme emotional disturbance of
9 something that's the product of his own actions.
10 That he is not entitled to imperfect self-defense
11 because he wasn't entitled to self-defense in the
12 first place.

13 And this idea that he was somehow reasoning
14 it through is completely contradictory to the other
15 defense he's trying to put on. He got up, he was
16 able to know what he was doing enough to put two
17 parallel bullet tracts through the chest of Henry
18 Dennis Miera.

19 With the medical records, even if we give
20 the defendant the benefit of the doubt that those
21 were his medical records, they were still not the
22 medical records detailing the injuries that took
23 place at the 7-Eleven. They were something that
24 happened some years before that. Again, we don't
25 have any medical records of the night because he

1 choose not to seek help. He sought to flee. He
2 knew he must flee. As the instructions tell you,
3 that is an indication of his guilty heart.

4 Ladies and gentlemen, again look at all the
5 evidence. Watch the tape. Watch it among
6 yourselves a few times. Look at when these things
7 are happening, the sequence at which times they're
8 happening. Who has told you what happened when.
9 Realize the things about having to get the gun out
10 from behind the shirt. Realize the packaging today
11 as it is today and as it was then. Look at the
12 sequence of when that door is opened. Look at how
13 quickly he's shooting after he's hit. Look at Rios
14 turn his heels and run, almost in one simultaneous
15 motion with the left hook. And realize that what
16 happened later that night was that the defendant not
17 out of gallantry towards his wife, no not out the
18 fear for himself, but just out of anger and perhaps
19 out of meanness went ahead and flat killed Henry
20 Dennis Miera, did so with a handgun. And shot at
21 and tried to kill Manuel Rios and Junior Montoya.

22 It is not a contest between which couple
23 you prefer to have dinner with. It is a contest
24 between which actually happened. And it is a
25 contest between who, in fact, has been

1 straightforward with you, which witnesses told you
2 the truth. That is why I believe you will find the
3 defendant guilty of murder, guilty of attempted
4 murder, guilty of a second count of attempted
5 murder, and guilty in each of those three counts of
6 using a firearm in the commission of those acts.
7 Thank you.

8 THE COURT: Counsel for the defendant.

9 MR. FINLAYSON: Your Honor, could we
10 approach briefly before?

11 THE COURT: Yes.

12 (Side-bar conference.)

13 THE COURT: All right, Counsel for the
14 defense, if you'd like to make your closing
15 statement.

16 MR. FINLAYSON: Thank you, your Honor.

17 Try as I'm sure that you will, because I
18 know that you're going to follow the law, you may
19 never be able to put yourself in the shoes of my
20 client that night. But that's the law. As judges
21 of my client, as judging the facts and bringing back
22 a verdict on my client, the law is that -- and all
23 the law mentions, the circumstances arising here,
24 the law is that you must put yourself in the shoes
25 of my client in those same circumstances.

Addendum H

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Third Judicial District

THE STATE OF UTAH,

Plaintiff,

VS.

JOSE MARIO JIMINEZ,

Defendant.

MAR 16 2000

Shirley Nielsen

CASE NO. 961022250

Jury Trial

VOLUME IV

BEFORE THE HONORABLE ROBIN W. REESE

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 16, 1999

REPORTED BY: Jody Edwards, CSR, RPR, RMR, CRR

238-7378

FILED

Utah Court of Appeals

APR 17 2000

ORIGINAL

Julia D'Alesandro
Clark of the Court

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1 Scott and juror Michael Ross. You are excused at
2 this time. You are not permitted to deliberate. We
3 thank you for your service.

4 Again, it's an unfortunate thing to have to
5 do it, but you have helped us just by serving to
6 this point in the proceedings and we appreciate it.
7 If you'd like to remain, watch the final outcome,
8 you may do so. But only those eight who are to
9 serve as jurors can deliberate on the case. So
10 thank you.

11 I'll ask those eight members to follow the
12 deputy into the jury room.

13 (The following proceedings were held in
14 open court out of the presence of the
15 jury.)

16 THE COURT: You can be seated. For the
17 record, Counsel, let me just ask, in fact, it was
18 Mr. Scott and Mr. Ross, isn't that correct, that
19 were the alternate jurors?

20 MR. LEMCKE: As we understood, your Honor.

21 MR. FINLAYSON: That's the way we
22 understood it, your Honor.

23 THE COURT: Okay, just so we're clear.
24 Counsel for the defendant, you indicated that you
25 wanted to make a motion for mistrial.

1 The record should reflect the jury has been
2 excused and this would be an appropriate time to do
3 that. Go ahead if you would like.

4 MR. FINLAYSON: Your Honor, during
5 counsel's opening part of his closing argument he
6 referenced the character of our defendant, accusing
7 us of packaging him as a Jimmy Stewart. Talking
8 about Rios being in chains as he should be at the
9 prison and our client sitting out here in the suit
10 and glasses and comparing him to the video. He's
11 not allowed to comment on the character of our
12 client. It was never a point put at issue by us.
13 We approached the bench and objected to that.

14 THE COURT: You did.

15 MR. FINLAYSON: And asked that there be a
16 mistrial.

17 We also took exception to -- we also take
18 exception to Mr. Lemcke's bringing up the concealed
19 weapon as showing our client's propensity to disobey
20 the law, which I think is exactly what all the
21 404(b) and 609 evidence is exactly trying to keep
22 out. And that is trying to try Mr. Jiminez on the
23 merits and not on his propensity to disobey the law.
24 We would ask for a mistrial for that as well.

25 And that -- and I think I've made my

1 objection clear on when Mr. Lemcke started into the
2 fact that the jury had not been dealt with in a
3 straightforward manner. I think he -- that the jury
4 could take that and it is certainly reasonable for
5 them to take that that we were hiding something from
6 them or that I have done something improper in this
7 trial. It's your Honor's province to decide whether
8 there's something improper going on and I take
9 exception to that.

10 THE COURT: Thank you.

11 Mr. Lemcke, your response to the motion for
12 a mistrial on those three ground?

13 MR. LEMCKE: Your Honor, first of all
14 there --

15 THE COURT: Pardon me.

16 MR. LEMCKE: There are three grounds and
17 the idea that -- we talked about the deportment of
18 the defendant, you know, here and there. And that
19 those are different affects is proper comment on the
20 deportment of a witness. The defendant did take the
21 stand in this particular case. His credibility is
22 clearly at issue. We, in fact, attacked his
23 credibility. In fact, the second -- or the third
24 thing that counsel complains about is that we talked
25 about --

1 THE COURT: Being unfairly dealt with.

2 MR. LEMCKE: Oh, that the jury was not
3 being dealt straightforward with.

4 THE COURT: Or straightforward.

5 MR. LEMCKE: And that is simply talking
6 about I don't think that the defendant and his wife
7 were telling them the truth. I was not commenting
8 on Mr. Finlayson. If Mr. Finlayson has some ill at
9 ease with that, I apologize to him. I do not even
10 apologize for the process, though. Because I think
11 I'm entitled to comment on the defendant, as any
12 other witness, whether or not I believe he's telling
13 the truth. And I think that so much of what he said
14 was transparently false and that is the comment on
15 that.

16 The other issue is -- deals with Manuel
17 Rios being in chains. That was mentioned at a
18 different time. To hear counsel's complaint it
19 would be, well, here is the defendant over here in a
20 suit, and here is Manuel in chains. No, I talked
21 about Manuel a lot. In fact, to comment in my
22 rebuttal, where counsel said, oh, he's an NFL
23 lineman, I said he's not an NFL lineman, he's a USP
24 inmate. We've never sold him as a church warden.
25 We've only let Manuel be Manuel.

1 And to somehow cobble together the comments
2 on Manuel as a backside comment on the defendant, I
3 don't know if that shows something of the mind set
4 of counsel, it's more so than what happened actually
5 in court. So I don't think that his comments are at
6 all well made. And his motion for mistrial
7 certainly isn't.

8 THE COURT: Did you want to comment on the
9 second ground?

10 MR. LEMCKE: Which was?

11 THE COURT: The firearm, the -- counsel
12 said --

13 MR. LEMCKE: Oh, on the firearm. The
14 problem with that was that in his close
15 Mr. Finlayson went into a speech about, well,
16 there's a second amendment. We're not talking about
17 whether people are entitled to have them or not,
18 there are permits. They had nothing to do with the
19 case, the second amendment or people having permits.
20 We never got into that. We weren't going to get
21 into that. And I have a right to rebut and come
22 back and talk about we didn't talk about permits.
23 We talked about the fact that he concealed a weapon
24 and went into this. And that he has, among other
25 things, a propensity for crime and aggression. And

1 that was, you know, clearly central to the issues of
2 this case.

3 So to somehow come out as this is
4 everything that's said when I reference the
5 defendant is somehow 403 or 404(b), is fallacious.
6 I get to comment on the defendant as a witness and I
7 get to comment on the defendant as an actor. And
8 that is what the issue is about. And to simply
9 complain about everything that comes in against
10 their client is violative and only there to smear
11 him, just isn't true.

12 THE COURT: Okay. It's your motion,
13 Counsel.

14 MR. FINLAYSON: Nothing else on that. I
15 guess I should -- I forgot to put one thing on the
16 record. I'll submit those.

17 THE COURT: Okay.

18 MR. FINLAYSON: But when we -- we did
19 approach the bench when Mr. Lemcke indicated that he
20 believed I'd mischaracterized the law.

21 THE COURT: On aggravated assault.

22 MR. FINLAYSON: On aggravated assault. And
23 I think I'd ask the Court to instruct them on the
24 statute of aggravated assault. And Mr. Lemcke, I
25 don't remember what you asked for the judge to do.

1 MR. LEMCKE: Your Honor, I asked you
2 actually to do nothing. Except, you know, I did not
3 object to you saying that the law of aggravated
4 assault was not a part of this case. And that the
5 different counsels disagree on certain issues in
6 this, which is true. Also it should be part of the
7 record that it was the defense who didn't want
8 aggravated assault instructed in this particular
9 manner. The instructions say that they contain all
10 the law that's necessary and Mr. Finlayson chose to
11 go beyond the jury instructions to get into an issue
12 of law that we weren't -- that apparently they
13 weren't set up for.

14 THE COURT: I guess we could just deal with
15 this last one, give the jury a supplemental
16 definition of aggravated assault, if you wanted to
17 do it.

18 MR. LEMCKE: I would object, Your Honor.

19 MR. FINLAYSON: That's what I'd ask for.

20 THE COURT: But you wanted me to, as I
21 understand it, Mr. Finlayson, from our discussion
22 here, you wanted me to tell the jury that your
23 characterization of aggravated assault was correct,
24 and I wasn't prepared to do that.

25 MR. FINLAYSON: No, I did ask the Court

1 then to instruct them -- I'd read off the statute is
2 what I had done to instruct them on serious bodily
3 injury and aggravated assault because that's what I
4 had read off of.

5 MR. LEMCKE: But at that point, your Honor,
6 counsel said broken teeth constitute various bodily
7 injury under the law and that is absolutely
8 incorrect.

9 THE COURT: Counsel, I appreciate what you
10 were both arguing at this time. And it's at least
11 arguable whether or not that Mr. Jiminez was a
12 victim of an aggravated assault. So I hesitate to
13 tell the jury that definitively. So I guess my
14 question now is aggravated assault has been
15 explained -- it's been relied on by the defense as
16 an explanation as to why they feel self-defense was
17 necessary. Wouldn't it be helpful to now tell the
18 jury in a brief instruction what aggravated assault
19 is and let them decide for themselves?

20 MR. LEMCKE: I wouldn't think so, your
21 Honor.

22 THE COURT: And why would you feel that
23 way?

24 MR. LEMCKE: Well, because, again, you
25 know, it is not the statute, the law which was read,

1 but it is the interpretation in the case law that
2 matters whether or not this idea of broken teeth
3 being serious bodily injury is there.

4 THE COURT: Well, what we --

5 MR. LEMCKE: Unless we want to start
6 reading the several cases that deal with this.

7 THE COURT: No, my suggestion is that we
8 just define aggravated assault, nothing more. Not
9 make any -- not instruct the jury as to whether
10 broken teeth are or are not --

11 MR. FINLAYSON: That's what I would like,
12 your Honor.

13 MR. LEMCKE: And we would object to it. We
14 think it's surplusage and we think that they've gone
15 into the jury box now, it's an invasion.

16 THE COURT: I'm not sure that it's an
17 invasion. I'll consider, It counsel, if you'd look
18 to draft the instruction having nothing more than
19 the elements of aggravated assault. I'll take a
20 look and I'll take a look whether or not it's legal
21 at this point to add a supplemental instruction to
22 the jury.

23 MR. FINLAYSON: Thank you, your Honor.

24 THE COURT: Now, in terms of the motion for
25 mistrial, I'll deny it. First of all, the comments

1 of the prosecuting attorney explaining to the jury
2 that, in fact, Mr. Jiminez is not Jimmy Stewart, if
3 I've characterized his description truthfully, is in
4 my judgment not a comment on the character of
5 Mr. Jiminez. Again in opening arguments and during
6 Mr. Jiminez' own testimony, the defendant attempted
7 to present to the jury an appearance or an image of
8 what Mr. Jiminez was like and what his intention
9 was. It's not inappropriate for the prosecutor to
10 make an effort to contradict that image. And in my
11 judgment, that's what Mr. Lemcke was trying to do.

12 On the second ground, commenting that I
13 believe something to do with the propensity to
14 violate the law as shown by carrying an illegal
15 firearm. It's a touchy area, I grant, but on the
16 other hand the defense implied through its closing
17 argument that Mr. Jiminez had a second amendment
18 right to carry a firearm.

19 It didn't quite go that far, but said words
20 to the effect of to the jury that haven't they heard
21 about the second amendment. The clear implication
22 is that the defendant has a constitutional right to
23 have this gun. Apparently there's some evidence
24 that he doesn't have a constitutional right to have
25 a gun for various reasons. Among them possibly

1 because he's an illegal alien.

2 The State didn't make that comment and, in
3 fact, couldn't have made that comment in my
4 judgment. It would have been misconduct for them to
5 do so. But to follow-up and explain as they do that
6 the issue is not so much that the defendant has a
7 constitutional right to have a gun, but as to what
8 the gun may show about his state of mind and who, in
9 fact, was the aggressor. Which I think was the
10 essence of what the prosecutor was saying, and again
11 in my judgment is not prosecutorial misconduct. And
12 I deny the motion for a mistrial on those grounds.

13 And thirdly, the prosecutor's statement
14 that he didn't feel that the jury was being dealt
15 with in a straightforward manner or an honest
16 manner, Mr. Finlayson, I think if counsel had said
17 that I think the prosecutor is lying to you -- or
18 the defense counsel, rather, is lying to you or
19 misrepresented something to you, I would agree. But
20 his statements can be construed that the defendant
21 himself was lying or the defense witnesses were
22 lying and the jury wasn't being told the truth. He
23 didn't accuse you personally of anything, and
24 therefore again it wouldn't be prosecutorial
25 misconduct in my judgement. There is no reason to

1 declare a mistrial and so I won't.

2 But I'll consider submitting an aggravated
3 assault instruction if you can draw one up quickly.
4 And I'll try to take a look at the law to see if it
5 would be appropriate even though the jury has been
6 sent to the jury room to deliberate to add that
7 instruction at this point.

8 We'll be in recess.

9 MR. FINLAYSON: Thank you.

10 MR. LEMCKE: And your Honor, before I'd
11 submit that I'd ask the Court to look at -- I
12 believe there's case law, it was Justice Zimmerman.
13 I can't remember the case, but he said that things
14 like broken fingers, broken noses and I believe
15 broken teeth do not arise to an aggravated assault
16 level.

17 THE COURT: Your argument there is that by
18 law -- as a matter of law this couldn't be an
19 aggravated assault.

20 MR. LEMCKE: Correct.

21 THE COURT: I'm not prepared to tell the
22 jury that, Counsel. Let me just explain to them
23 what aggravated assault is and draw their own
24 conclusion.

25 MR. FINLAYSON: Your Honor, it appears that