

1990

Utah v. Lew Day : Brief of Appellee

Utah Court of Appeals

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BRIEF

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DOCKET NO.

900517-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

:

Plaintiff/Appellee,

:

v.

:

LEW DAY,

:

Defendant/Appellant.

:

900517-CA
Case No. ~~900419~~-CA
Priority No. 2

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION OF MANSLAUGHTER, A
SECOND DEGREE FELONY, IN VIOLATION OF UTAH
CODE ANN. § 76-5-205 (1990) IN THE SIXTH
JUDICIAL DISTRICT COURT, IN AND FOR PIUTE
COUNTY, STATE OF UTAH, THE HONORABLE DON V.
TIBBS, JUDGE, PRESIDING.

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STATE OF UTAH,	:	
	:	Case No. 900419-CA
Plaintiff/Appellee,	:	
	:	Priority No. 2
v.	:	
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	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 900517-CA
v. :
LEW DAY, : Priority No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (1990). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1990).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did the trial court properly deny defendant's requested jury instruction on the additional lesser included offense of negligent homicide? The trial court's decision that a defendant is not entitled to a lesser included offense instruction is a conclusion of law. Carpet Barn v. State of Utah, 786 P.2d 770, 775 (Utah Ct. App. 1990). A trial court's legal conclusion is not accorded any particular deference and is reviewed for its correctness. City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah), cert. denied, 111 S.Ct. 120 (1990).

2. Was defendant adequately represented at trial in accord with his sixth amendment right to effective assistance of

counsel? Review of this issue is based on a determination of whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Frame, 723 P.2d 401, 405 (Utah 1986).

3. Was the prosecutor's discussion of the evidence and inferences therefrom in closing argument proper? In reviewing an allegation of prosecutorial misconduct, this Court must determine whether the prosecutor's remarks called the attention of the jury to matters "they would not be justified in considering in reaching the verdict and, if so, whether there is a reasonable likelihood" that the remarks "so prejudiced the jury that there would have been a more favorable result absent the misconduct." State v. Speer, 750 P.2d 186, 190 (Utah 1988); State v. Tillman, 750 P.2d 546, 559-61 (Utah 1987). In determining whether a remark is prejudicial the alleged misconduct must be viewed in light of the totality of the trial and the trial court's ruling on this matter will not be overturned absent an abuse of discretion. Speer, 750 P.2d at 190.

4. Did defendant fail to preserve his allegation of improper juror witness contact by failing to object to the alleged contact when he became aware of it during the course of trial? The Utah Supreme Court has held that "invited error [] is procedurally unjustified and viewed with disfavor, especially where ample opportunity has been afforded to avoid such a result. State v. Parsons, 781 P.2d 1275, 1285 (citing State v. Tillman, 750 P.2d 546, 560-61 (Utah 1987)).

Notwithstanding defendant's apparent waiver, assuming this Court considers defendant's allegations of impropriety, was the incidental and inconsequential juror witness contact sufficient to raise a presumption of prejudice? A rebuttable presumption of prejudice arises from unauthorized contact between jurors and trial witnesses and/or court personnel which goes beyond "a mere incidental, unintended, and brief contact." State v. Pike, 712 P.2d 277, 280 (Utah 1985); State v. Jonas, 793 P.2d 902, 908 (Utah Ct. App. 1990), cert. denied, 804 P.2d 1232 (Utah 1990).

5. Was the evidence presented at trial sufficient to sustain defendant's conviction for the lesser included offense of manslaughter? The power of this Court to review a jury verdict challenged on the sufficiency of the evidence is "quite limited." State v. Moore, 802 P.2d 732, 738 (Utah Ct. App. 1990). The evidence, along with the reasonable inferences from it, must be viewed in the light most favorable to the jury verdict. State v. Gardner, 789 P.2d 273, 285 (Utah 1989), cert. denied, 110 S.Ct. 1837 (1990). Where the defendant has failed to marshal all the evidence in support of the jury's verdict and then demonstrate that even viewing it in the light most favorable to the verdict, the evidence is insufficient to support the verdict, this Court may properly decline to consider the sufficiency of the evidence adduced. State v. Moore, 802 P.2d at 738-39 (Utah Ct. App. 1990).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies is included in the body of this brief.

STATEMENT OF THE CASE

Defendant, Lew Day, was charged with one count of murder in the second degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1990) (Record [hereinafter R.] at 1). On March 30, 1990, defendant was convicted by a jury of the lesser included offense of manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (1990) (R. at 195). Defendant was sentenced May 3, 1990, to the indeterminate term of not less than one year nor more than 15 years with credit for time served (R. at 243). In addition, defendant's sentence was enhanced by one year for use of a firearm (R. at 243).

Defendant subsequently filed a motion for new trial on May 23, 1990 alleging, among other things: improper juror witness contact; new exculpatory evidence (R. at 246-52).¹ The trial court denied defendant's motion in a memorandum decision on August 16, 1990 on the ground that defendant was unable to "point to clear definitive evidence. . . ." The trial court stated that "proper investigatory work" had been conducted and defendant's

¹ Defendant was represented by Marcus Taylor and David Blackwell at trial. Shortly after filing the motion for new trial, Taylor filed a motion to withdraw as counsel (R. at 293, 314). In an order issued June 13, 1990, the trial court granted Taylor's request to withdraw and appointed James L. Shumate to represent defendant (R. at 304). Shumate subsequently filed a memorandum in support of a previous motion that Taylor had filed requesting the appointment of an investigator and, in addition, requested a hearing on the new trial motion (R. at 323-43). The trial court denied the motions in a memorandum decision (R. at 398-424).

alleged grounds for a new trial relating to "'newly discovered evidence' or 'new exculpatory evidence' have been examined and found wanting. In truth, much of what has been proffered is not newly-discovered evidence" (R. at 401, 415).

The trial court similarly denied defendant's claims concerning improper juror contact on the grounds that the limited contact between juror Grover Smith and the State's witness, deputy Robert Nalwalker, was "authorized by the Court" and "did not relate to the merits of the case in any way" nor did it "involve discussion of any personal or private matters such that it would breed a sense of familiarity" (R. 416-18; a copy of the trial court's Memorandum Decision In Re Post-Trial Motions is attached hereto as Addendum A).

STATEMENT OF THE FACTS

On the morning of August 9, 1989, Lewis Sudweeks and David Kile, the victim in this case, finished loading a truck for their employer at the Vidrine Sawmill in Escalante, Utah, before taking the rest of the day off to drive to Circleville, Utah in Sudweeks's pickup truck (Transcript of jury trial, March 28, 1989 [hereinafter T.] at 464-466; Transcript of preliminary hearing, November 2, 1989 [hereinafter P.H.] at 88). Upon arriving in Circleville later that evening, Sudweeks and Kile went to the home of Evan Wiltshire, where, after having "a few drinks," they spent the night (T. at 466). The next morning, August 10, 1989, Sudweeks drank some beer while Kile and Wiltshire drank some vodka before all three left in Wiltshire's truck and drove to a local C-Mart where Wiltshire purchased "a cold pack of beer" (T.

at 470, 467). After leaving C-Mart the three friends stopped at Larry's Service Station in Circleville to talk to the defendant, Lew Day (T. at 470). Defendant then joined Sudweeks, Kile and Wiltshire and the four men decided to go "riding around" (T. at 470). Sudweeks and Kile waited at the service station for Wiltshire to drive his truck home and return with defendant in his truck to pick them up (T. at 470). With defendant behind the wheel, the four men decided to drive to Junction, Utah, where they purchased more beer and gas for defendant's truck (T. at 471).² The foursome then headed north toward Piute Reservoir near Marysvale, Utah, continuing to drink along the way (T. at 471-472).

The men stopped up Bullion Canyon, just outside Marysvale, to drink some more beer and talk about hunting and fishing (T. at 472). Defendant expressed a desire to "ride up over the top of the mountain" until Sudweeks told him that he (Sudweeks) and Kile had to be back to work in Escalante the next morning (T. at 472-473). Approximately one hour passed before the men drove back to Marysvale to purchase more liquor (T. at 473, 505).³ After leaving the liquor store defendant drove to a bar at the south end of Marysvale where the four men did some more drinking and shot pool for approximately one hour (T. at

² Defendant occupied the driver's side of the truck with Sudweeks seated next to him, then Kile and Wiltshire by the passenger door (T. at 471).

³ Cleora Petersen, who runs the Marysvale liquor store, testified that Wiltshire purchased 2 liters of Canadian Host and one / half gallon of vodka, as well as another liquor she could not recall, at approximately 1:00 p.m. on August 10, 1989 (T. at 636-639).

473-74, 508).⁴ The men then drove to Sue's Bar at the north end of Marysville where they did more drinking and shot more pool (T. at 474).⁵ After leaving Sue's Bar at approximately 5:00 p.m., defendant apparently drove south east out of Marysville toward Thompsonville Road (T. at 475).⁶ As they drove slowly southward along Thompsonville Road the men continued drinking and talking, stopping approximately three different times to urinate (T. at 476-78).

The foursome stopped to urinate a fourth time just north of a gate leading to the Henrie property on the east side of Thompsonville Road (T. at 478; a copy of State's Exhibit #6 depicting the scene of the shooting is attached hereto as Addendum B). Defendant got out of the truck first and said "Wait a minute," as he reached in and removed a .22 caliber rifle and a .270 caliber rifle from a gun rack in the cab of his truck before the other men could exit the vehicle (T. at 185-187, 478). After defendant removed his rifles, Sudweeks got out followed by Kile

⁴ Sudweeks estimated that they had each had approximately five to eight beers apiece before even entering the bar (T. at 508).

⁵ Emma Sue Tiller, who runs Sue's Bar, testified that defendant, Sudweeks, Kile and Wiltshire arrived at the bar between 3:30 p.m. and 4:00 p.m. (T. at 607). She further testified that in her opinion Wiltshire was "drunk," and "Kile and Lewis Sudweeks were well on their way. And of the three, Lew Day was the soberest" (T. at 608). In response to the prosecutor's question asking whether she had observed any argument between the men, Tiller related an incident between Kile and Wiltshire (T. at 608). Apparently Kile attempted to take a drink of Wiltshire's whiskey and Wiltshire told him to ask first (T. at 608). Defendant went over to talk to the two men, after which they appeared to "mellow" (T. at 608, 642, 647, 650).

⁶ Although Sudweeks testified that defendant headed south east out of Marysville after leaving Sue's Bar, several of the bar patrons who observed the men that evening testified that they watched defendant's truck head west (T. at 643, 648, 651).

(T. at 478). Wiltshire, who had apparently passed out, remained seated next to the passenger door of defendant's truck (T. at 158, 252, 478). Defendant stood in front of the truck holding both of his rifles while Kile apparently walked southeast away from the truck toward the Henrie gate to urinate (T. at 478, 481). Sudweeks urinated while standing behind the open driver's side door of defendant's truck (T. at 478, 484). From that vantage point, Sudweeks observed defendant make a comment to Kile, who had his back to defendant, and then point the .22 caliber rifle and shoot Kile in the head (T. at 482). Although Sudweeks heard two shots fired he was not sure whether Kile fell after the first or second shot (T. at 483).

After shooting Kile, defendant stated, "I'll have all you bastards in a pile before the night's over," as he began walking north toward his truck and Sudweeks (T. at 483-485, 547-48). Sudweeks slipped back behind the truck and squatted down (T. at 486-89). When defendant stooped over in the cab of the truck, apparently reaching for something on the floor boards, Sudweeks ran southwest away from the truck toward US-89 and up a steep bank which dropped off farther south near the Morrill ranch house (T. at 486-89). Sudweeks heard gunshots as he ran away from the truck and gravel "flew up" under his feet (T. at 494).

Just as the sun was going down on the evening of August 10, 1989, Harold Morrill observed Sudweeks approach his house from a kitchen window and stepped outside on the porch to see what was going on (T. at 616). Sudweeks, who was winded from his run up the bank, had slowed to a walk by the time he reached the

Morrill home (T. at 532).⁷ Sudweeks sat down on the Morrill porch and told Harold that defendant had "flipped out" and had been shooting at him (T. at 489-90; 616). He then asked for Dale Morrill, Harold's father (T. at 617, 620). When Harold told Sudweeks that his father was "up moving sprinklers" Sudweeks asked Harold to go back to the truck with him to talk to defendant (T. at 490, 617). Harold declined, explaining that he couldn't leave his children (T. at 616). Sudweeks then told Harold that he "was going back to make sure that [he] had seen what [he] seen" (T. at 528). Sudweeks didn't tell Harold that he thought Kile had been shot at that time because he "wanted to make sure he knew what he was talking about" (T. at 529).⁸ After Harold went back inside to check on his children, Sudweeks apparently remained sitting on the porch for a short while before walking east along the lane that leads to the Morrill home and climbing back up the bank to look at the scene of the shooting near Henrie's gate (T. at 491-92, 623).

As he looked toward Henrie's gate from the top of the embankment near the Morrill home, Sudweeks saw Kile "still laying in the road," and observed that Kile's feet appeared to be

⁷ Harold testified that Sudweeks was still holding a beer as he approached the house and that he sat on the porch sipping the beer as he told Harold about defendant (T. at 617-620). Sudweeks testified that he was unable to recall having had a beer in his hand when he first talked to Harold that evening (T. at 529).

⁸ Harold testified that although he had asked Sudweeks to come inside, Sudweeks declined saying he would wait on the steps (T. at 617). Harold also testified that after Sudweeks told him that defendant had been shooting at him, he asked for a ride home, as well as for Harold to go back with him to the truck to talk to defendant (T. at 616). Harold did not hear any shots that evening (T. at 620).

"shaking," and "kicking" (T. at 493). Sudweeks then ran back to the Morrill's, stumbling down the embankment in his haste (T. at 493). Without knocking, Sudweeks burst inside the Morrill home, knocking the door off its hinges as he entered (T. at 494, 618-19, 629). Dale Morrill had just returned from changing sprinklers when Sudweeks burst through the door to his home and told him to "get in touch with the Sheriff" (T. at 494, 629).⁹ At the time he burst through the door Sudweeks appeared "really scared" and "hysterical" (T. at 618-19, 630). It took Dale and Harold approximately five minutes to calm Sudweeks down so that they could understand him (T. at 630). Apparently Sudweeks did not tell Dale that he thought defendant had shot Kile until things had calmed down a little later in the evening, after the ambulance had arrived, and he was waiting for his brother to come and get him (T. 631). Like his son Harold, Dale Morrill did not hear any of the shots fired that night (T. at 632).

Piute County Sheriff Brent Gottfredson arrived at the Morrill home shortly after 9:00 p.m. that evening in response to information that there had been a shooting nearby (T. at 141, 150). After talking to Sudweeks and the Morrills, Sheriff

⁹ Harold was not sure how long Sudweeks was gone from the porch before he burst through the door that evening (T. 618-23). After speaking briefly with Sudweeks, Harold went inside the house to retrieve his daughter from the bathtub; when he came back outside, Sudweeks was gone (T. at 618). Harold testified that his father, Dale Morrill, arrived home approximately 10-15 minutes after that (T. at 618). He had just started telling his father about Sudweeks first visit when Sudweeks burst through the door (T. at 618). During cross-examination, Harold said that it was possible that Sudweeks could have been gone for approximately 20 to 30 minutes (T. at 620). Sudweeks testified that he was gone less than 10 minutes (T. at 559).

Gottfredson headed north toward the Henrie gate to investigate the shooting (T. at 158). Stopping his vehicle approximately 40 feet south of Kile's body, Sheriff Gottfredson approached the scene and noticed that the driver's side door of defendant's truck was open and that Wiltshire, who appeared to be unconscious, was sitting inside (T. at 158, 163, 252). Determining that Kile was still alive, Sheriff Gottfredson called for an ambulance and began administering first aid (T. at 158-59). After the ambulance left with Kile and Wiltshire, Sheriff Gottfredson began to search the surrounding area for evidence (T. at 159, 217).

As part of his investigation that evening, Sheriff Gottfredson checked the location of defendant's truck by measuring the distance between Kile's body and the truck and noting its relationship to the road and Henrie's gate (T. at 161).¹⁰ As he began to look around the area, Sheriff Gottfredson discovered two .22 caliber brass casings that evening, one approximately 18 inches north of the blood spot left by Kile's head and another one approximately four inches south of the blood

¹⁰ Kile's body was found lying approximately 23 feet from defendant's truck which was parked on the east side of Thompsonville Road facing south (T. at 162, 169, 263-64). Blood from Kile's head wound left a stain approximately 10 feet west of the north post of Henrie's gate (T. at 161, 263-64). A urine stain was observed on the ground near the driver's side door of defendant's truck (T. at 271).

Defense witness Paul Hampton, the wrecker operator who towed defendant's truck from the scene, testified that State's Exhibit 2, a drawing of the scene used to facilitate testimony, did not comport with his memory of the positioning of defendant's truck which he believed was a little further south than it appeared on the exhibit (T. at 720-721). The State conceded that the exhibit was not drawn to scale (T. at 727).

spot (T. at 163).¹¹ Sheriff Gottfredson marked the location of the shell casings he discovered that night by drawing an X in the dirt with his foot (T. at 266). Although the area around the Morrill ranch house and Henrie's gate apparently experienced a light rain the night of the shooting, those marks were still present the next morning, August 11, 1989, when Sheriff Gottfredson returned to the scene to continue his investigation and make more precise measurements (T. at 266; P.H. at 29).

Approximately, four officer's assisted in the investigation and search for defendant that evening (T. at 218). Sheriff Gottfredson told the officers assisting him in the investigation to keep the general public away from the scene and road blocks were set up in Garfield County at the junction of US-89 and highway 20 in Marysvale (T. at 258, 324). Deputy Robert Nalwalker patrolled an area west and north of the shooting including US-89 (T. at 302-304). At approximately 2:00 a.m. on the morning of August 11, 1989, Deputy Nalwalker was headed south on Thompsonville Road approximately 50 yards north of Henrie's

¹¹ William Albrecht, Jr., a specialist in firearms identification for the Federal Bureau of Investigation (FBI) testified that the .22 caliber brass casings discovered by Sheriff Gottfredson were fired from defendant's .22 caliber rifle (T. at 370-75). Sheriff Gottfredson located three other rounds west of the south post of Henrie's gate, approximately 13-14 feet from the blood spot (T. at 168). Albrecht testified that although these three rounds had all come from the same gun, they had not come from defendant's .22 caliber rifle (T. at 370).

Deputy William L. Brewer of the Sevier County Sheriff's Office assisted in the investigation of the shooting the night of August 10, 1989, and he also discovered two .22 caliber shell casings approximately 10-15 feet west and a little south of the blood spot (T. at 202). Albrecht testified that the casings were the same as those discovered by Sheriff Gottfredson and had also been fired by defendant's .22 caliber rifle (T. at 375).

gate, when he heard someone yell, "Hey, how about a lift," from the east side of the road (T. at 304-05).¹² Suspecting the yell had come from defendant, Deputy Nalwalker proceeded to the Morrill home where he called for backup (T. at 306). Accompanied by trooper Wayne Boltis, Deputy Nalwalker returned to Henrie's gate where the headlights of his vehicle shone on defendant as he climbed through a rail fence on the east side of Thompsonville Road (T. at 306, 333). Defendant was subsequently arrested and transported to the Sevier County Jail (T. at 152, 307; Transcript of motion in limine hearing, March 21, 1989 [hereinafter M.T.] at 17). A search of defendant's pocket shortly after his arrest uncovered four .22 caliber cartridges, as well as a full box of .22 caliber ammunition (T. at 307-10).

The investigation of the shooting continued near Henrie's gate early the next morning, August 11, 1989, (T. at 256, 310-11). Apparently, no officers were stationed at the scene of the shooting following the arrest of defendant at approximately 2:00 a.m. on August 11, 1989, until officers began searching the fields east of Thompsonville Road some time prior to 8:00 a.m. that morning (T. at 256-58, 307-10). Deputy Nalwalker, and approximately 10 other officers, began by searching the area east of Thompsonville Road (T. at 235-37, 310-11). After Sheriff Gottfredson arrived, at approximately 8:00 a.m., the search moved to the west side of Thompsonville Road (T.

¹² While Deputy Nalwalker had been using his search light to search the adjacent sagebrush and low hills earlier, he had turned it off a short while before hearing the yell (T. at 304). At the time he heard the yell, no police identification lights were operating (T. at 304).

at 312). There the searchers picked up a track approximately 15 to 100 yards from the scene of the shooting, which appeared to be heading in a northwesterly direction away from Thompsonville Road (T. at 173, 312). The track, which appeared to have been made by a small pair of western cowboy boots eventually led the searchers to the crest of a small hill overlooking the scene of the shooting where they discovered defendant's rifles, a pack of Marlboro cigarette's of the type defendant smoked, a Marlboro cigarette butt and defendant's lighter (T. at 174-87, 234, 285, 314-316, 438-39). After a comparison of the boots defendant was wearing at the time of his arrest with the tracks they had discovered that morning, the searchers determined that the tracks had been made by defendant's boots (T. at 174-75, 315).¹³

The bullet fragments subsequently removed from Kile's head were sent to the FBI for analysis and determined to be brass coated .22 caliber fragments that were consistent with having been fired from defendant's .22 caliber rifle¹⁴ (T. 386-88). After a metal elements analysis it was determined that the bullet fragments removed from defendant's head were composed of elements

¹³ Approximately five months after the shooting Deputy Nalwalker examined two pairs of Sudweeks's work boots and determined that they were not consistent with the tracks he had followed the morning of August 11, 1989 (T. at 319, 458-69). Deputy Nalwalker also examined four pairs of boots which Sudweeks rarely wore and kept at his family homestead in Kingston, Utah, and determined they were also inconsistent with the tracks followed the morning of August 11, 1989 (T. at 256, 356-7, 550).

¹⁴ Although defendant's .22 caliber rifle arrived intact for analysis at FBI headquarters in Washington D.C., the gun stock was apparently damaged in the mail on its way back to the Salt Lake County Sheriff's Department from FBI headquarters (T. at 177-79). The FBI encountered no difficulties in conducting tests on defendant's .22 caliber rifle (T. at 177-79; 370-75).

identical to the .22 caliber ammunition found in defendant's pocket; thus, the FBI was able to conclude that the fragments had come from the same box of ammunition (T. at 402-04).

Other evidence will be presented in the body of this brief, as pertinent to specific arguments.

SUMMARY OF THE ARGUMENT

The trial court properly denied defendant's requested instruction on the additional lesser included offense of negligent homicide. Defendant was not entitled to have the jury instructed regarding negligent homicide because he has not and cannot indicate a rational basis in the evidence upon which the jury could have legally acquitted him of both the charged offense of second degree murder and the lesser included offense of manslaughter on which they were properly instructed. Although evidence of defendant's voluntary intoxication was admissible to negate the mens rea of murder in the second degree, the jury could not properly rely on it to negate the culpable mental state of either recklessness or negligence. Thus, although the jury acquitted defendant of second degree murder because of intoxication, it could not have similarly acquitted defendant of the lesser included offense of reckless manslaughter. Defendant presented no additional evidence to suggest that he was otherwise unaware of the risk of death from mishandling and/or firing a .22 caliber rifle.

Defendant was not denied his sixth amendment right to the effective assistance of counsel. Although defendant raises a myriad of possibilities as to what defense counsel could have

done, he asserts that defense counsel's performance was ineffective with absolutely no discussion of the defense actually presented on his behalf, or how that defense, even assuming it was deficient, was also prejudicial.

Defendant's allegations of prosecutorial misconduct in closing argument are similarly unsupported by a careful review of the record. As a general rule, counsel for each side has considerable latitude in commenting on the evidence and the inferences and deductions arising therefrom in closing argument. The prosecutor's closing argument in this case was properly within this latitude and defendant has failed to demonstrate that the prosecutor called the attention of the jurors to matters outside the record, nor has he demonstrated that the alleged misstatements so prejudiced the jury that there was a strong likelihood of a more favorable result absent the prosecutor's remarks.

Defendant's allegation of improper juror witness contact has not been preserved for review by this Court. Because defense counsel was aware of the alleged improper contact during trial and took no action to challenge the alleged impropriety at that time, this Court may properly decline to review defendant's allegation on the ground of waiver. Even assuming this Court determines to look past defendant's waiver, the brief contact between Deputy Nalwalker and juror Smith did not amount to an improper "conversational contact," nor was it sufficient to breed an improper "sense of familiarity." Rather it was an incidental and inconsequential contact insufficient to raise a presumption of prejudice.

Finally, the evidence is sufficient to sustain defendant's conviction for the lesser included offense of manslaughter. Although defendant asserts that introduction of additional evidence might possibly have implicated someone else as the shooter, he has wholly failed to marshal the evidence in support of the jury's verdict and then demonstrate that even viewing the evidence in the light most favorable to the verdict, the evidence is insufficient to support it. Therefore, this Court need not and should not consider defendant's challenge to the sufficiency of the evidence against him.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUESTED INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF NEGLIGENT HOMICIDE.

Defendant asserts that because the jury convicted him of the lesser included offense of manslaughter instead of murder in the second degree, "it is easy to see that [he] could have been convicted on the lesser-included offense of [n]egligent [h]omicide if the jury had been so instructed." In support of his assertion defendant merely notes that the "evidence in the case was clear that [he] was highly intoxicated at the time." (Br. of App. at 4). Defendant's minimal and conclusory analysis in support of his argument does not merit review by this Court. State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); State v. Sterger, No. 900078-CA slip op. at 4 n.2 (Utah Ct. App. March 6, 1991) (court declined to rule on defendant's arguments due in part to his failure to provide any meaningful analysis). Should

this Court determine that defendant's conclusory assertions merit review, the trial court's denial of defendant's requested instruction on negligent homicide was proper.¹⁵

In State v. Baker, 671 P.2d 152 (Utah 1983), the Utah Supreme Court set out an evidence-based standard for determining whether to instruct a jury regarding a lesser included offense at the defendant's request. Id. at 157. The Court determined that a defendant's requested lesser included instruction must be given if (1) the statutory elements of greater and lesser included offenses overlap to some degree, and (2) the evidence provides a "rational basis" for acquitting the defendant of the charged offense and convicting him of the included offense. Id. at 158-59; State v. Standiford, 769 P.2d 254, 266-67 (Utah 1988). See also Utah Code Ann. § 76-1-402(4) (1990).¹⁶ Applying the Baker standard to the facts of this case, defendant was not entitled to

¹⁵ At the outset of the State's analysis it is helpful to clarify the proceedings below. Defendant initially requested that the trial court instruct the jury solely on the offense charged, murder in the second degree, and that the trial court not instruct the jury on the lesser included offense of manslaughter (T. 817-18). In the event the trial court denied his request, defendant made an alternative request that the jury be allowed to consider not only the lesser included offense of manslaughter, but the lesser included offense of negligent homicide as well (T. at 818). The trial court subsequently instructed the jury as to the elements of murder in the second degree and manslaughter, but declined to give a negligent homicide instruction on the ground that there was no evidence to support the giving of such an instruction (T. at 820).

¹⁶ Utah Code Ann. § 76-1-402(4) provides:

The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

have the jury instructed on the additional lesser included offense of negligent homicide. Admittedly, murder in the second degree, manslaughter and negligent homicide stand in a greater and lesser included offense relationship, State v. Crick, 675 P.2d 527, 529-30 (Utah 1983); however, the evidence of intoxication presented at trial provided a rational basis for acquitting defendant solely of the charged offense of second degree murder. Defendant has not and cannot indicate a rational basis in the evidence upon which the jury could have legally acquitted him of the included offense of manslaughter and convicted him of the additional lesser included offense of negligent homicide.

At trial, the State presented evidence that defendant deliberately pointed a .22 caliber rifle at the victim's head and fired approximately two shots, one of which was fatal (T. at 478-84). After shooting the victim, defendant turned toward the State's witness, Lewis Sudweeks, and stated, "I'll have all you bastards in a pile before the night's over" (T. at 483-85, 547-48). This evidence demonstrates defendant's knowledge of the risk of death, if not an actual intent to kill. See Standiford, 769 P.2d at 254 (noting that 107 stab wounds indicated at least a knowledge of the risk of death).¹⁷

As part of his defense to the charge of second degree murder, defendant presented evidence of his intoxication the night of the shooting which resulted in an alleged "alcohol

¹⁷ The jury was properly instructed on the elements of both murder in the second degree and reckless manslaughter (see Jury Instructions # 11, 17, 18).

blackout" (T. at 672). During closing argument, defense counsel argued that defendant's intoxication was a factor for the jury to consider in deciding between second degree murder and manslaughter (Transcript of closing argument, March 30, 1990 [hereinafter C.A.] at 41-42).¹⁸ Although defendant also attacked Sudweeks's credibility and the quality of the police investigation, he presented no additional evidence to suggest that he was unaware of the risk of death from mishandling and/or firing a .22 caliber rifle.

As previously noted, voluntary intoxication may negate the mens rea of murder in the second degree; however, it does not negate the culpable mental state of either recklessness or negligence. Standiford, 769 P.2d at 265 (citing Utah Code Ann. § 76-2-306 (1990)).¹⁹ "[I]ntoxication, even when sufficient to negate a culpable mental state, does not absolve a person from all criminal liability." Id. at 266. Thus, although the jury acquitted defendant of second degree murder because of intoxication, it could not have similarly acquitted defendant of the lesser included offense of manslaughter for which the

¹⁸ The jury was properly instructed concerning evidence of defendant's intoxication (see Jury Instruction # 19).

¹⁹ Utah Code Ann. § 76-2-306 provides:

Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense; however, if recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense.

culpable mental state is recklessness.²⁰ State v. Royball, 710 P.2d 168, 170 (Utah 1985) (voluntary intoxication does not absolve a defendant of criminal responsibility for reckless criminal acts); State v. Bryan, 709 P.2d 257, 260 (Utah 1985) (where the requisite mens rea of the manslaughter charge is recklessness, court held that evidence of defendant's alcoholic blackout was immaterial). Defendant presented no additional evidence to demonstrate that he was somehow unaware of the risk of death from mishandling a .22 caliber rifle. Thus, in light of section 76-2-306, defendant has not demonstrated a rational basis in the evidence upon which the jury could have legitimately acquitted him of the included offense of manslaughter. Therefore, defendant cannot meet the second prong of the Baker standard and the trial court properly denied his requested negligent homicide instruction.

POINT II

DEFENDANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Defendant, who was charged with the offense of second degree murder and ultimately found guilty of the lesser included offense of manslaughter, appears to assert that he was denied the effective assistance of counsel at trial because his trial counsel failed to: (1) conduct an adequate investigation to

²⁰ The trial court's manslaughter instructions borrowed the statutory language of Utah Code Ann. § 76-5-205 (1990):

Criminal homicide constitutes manslaughter if the actor recklessly causes the death of another.

(Jury Instructions #11, 18).

determine whether defendant was a secretor and to attack the State's failure to have the State's witness, Lewis Sudweeks, similarly tested; (2) attack an alleged inconsistency between the State's theory of the case as presented at the preliminary hearing and the theory ultimately presented at trial; (3) adequately impeach Sudweeks's testimony; (4) point out that an alleged "substantial" rainstorm "may have obliterated" evidence and (5) call certain witnesses who may have testified regarding defendant's "positive mental attitude" the day of the shooting (Br. of App. at 5-13). Defendant levels these allegations with absolutely no discussion of the defense actually presented by trial counsel or how that defense was either deficient or prejudicial.

A defendant who raises a claim of ineffective assistance of counsel must show both that counsel rendered a deficient performance in some demonstrable manner and that a reasonable probability exists that but for counsel's deficient performance, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); State v. Carter, 776 P.2d 886, 893 (Utah 1989); State v. Frame, 723 P.2d 401, 405 (Utah 1986). A "[d]efendant must prove that specific, identified acts or omissions fall outside the wide range of professionally competent assistance. The claim may not be speculative, but must be a demonstrative reality[.]" Frame, 723 P.2d at 405. And, the deficient performance must be so prejudicial as to "to undermine confidence in the reliability of the verdict." Id.

Here, defendant fails to meet either the deficient performance prong or the prejudice prong of the Strickland test. As to his claim regarding counsel's failure to determine whether or not he was a secretor and to attack the State's failure to have Sudweeks similarly tested, defendant fails to identify how counsel's conduct was deficient, nor does he articulate how it was prejudicial beyond his speculative, unsupported assertion that it was a "crucial fact" that "could have been pointed out to the jury in order to separate" him "from the site where the rifles were recovered." Defendant further asserts that "[i]f Mr. Sudweeks was tested for secretor status, the results could have established substantial reasonable doubt in this case" (Br. of App. at 8).²¹ Even assuming defense counsel could have introduced evidence that defendant was a secretor, it cannot reasonably be argued that defendant's case was prejudiced as a result.²² The jury was presented with additional, significant and substantial evidence connecting defendant to his discarded rifles which were discovered by following a track determined to

²¹ Defendant speculates that because 85% "of the male population of the United States has a physiological characteristic of being a secretor," and because "no ABO antigen activity was present on the cigarette" butt found near defendant's rifles, his trial counsel may have been able to show that defendant had not smoked the cigarette butt, if defendant had been tested, and found to be a secretor.

²² Defendant vaguely asserts that his trial counsel did not inform him of the "cigarette butt analysis" or other "forensic reports." Notwithstanding the fact that there is no record support for defendant's assertion, he fails to identify how counsel's performance was deficient, and does not articulate how it was prejudicial beyond speculating that had the information been shared, "the trial outcome would likely have been different" (Br. of App. at 11).

have been made by defendant's boots to the crest of a small hill overlooking the scene where searchers also discovered defendant's cigarette lighter and a pack of Marlboro cigarettes of the type defendant smoked (T. at 174-87, 234, 285, 314-16, 438-39).

Defendant next asserts that the State's theory of the case as presented at the preliminary hearing differed from the theory ultimately presented at trial (Br. of App. at 8-11). As before, defendant fails to identify how this alleged inconsistency rendered his trial counsel's performance deficient, nor does he articulate how it was prejudicial beyond making wholly speculative and unsupported assertions (Br. of App. at 9-10). In support of his argument defendant relies solely on two completely unsubstantiated sketches of the "preliminary hearing scenario" and the "trial scenario" as viewed by defendant's wife which, although attached to his brief, are not part of the record on appeal. It is well settled that this Court cannot consider matters outside of the record. State v. Cook, 714 P.2d 296, 297 (Utah 1986); State v. Bingham, 684 P.2d 43, 46 (Utah 1984).

According to defendant, the State's theory at the preliminary hearing was that the victim had been shot "from some short distance from his body and that two .22 caliber casings, also found a short distance from Mr. Kile's body, were most likely the casings connected to the fatal shot" (Br. of App. at 8). At trial, defendant asserts the "State changed its theory by moving the truck and relying on the second pair of cartridges as

having been connected to the fatal shot" (Br. of App. at 9).²³ Contrary to defendant's apparent assertion, at no time, either at the preliminary hearing or at trial, was the State's theory of defendant's guilt tied to the location of any particular .22 caliber shell casing relative to the location of the victim's body (P.H. at 34-37A and T. 163-68, 201-08). Moreover, neither the preliminary hearing transcript nor the trial transcript support defendant's allegations which appear to wholly ignore the testimony of the State Medical Examiner, Dr. Grey, who testified at both the preliminary hearing and at trial that the fatal shot could not have been fired at close range (P.H. at 57; T. at 567).

Nonetheless, defendant asserts that while the .22 caliber shell casings discovered by Deputy Brewer approximately 10 to 15 feet away from the victim may have been consistent with Dr. Grey's findings, they are inconsistent with the pictures drawn by his wife (Br. of App. at 10). Relying solely on these wholly speculative and unsubstantiated sketches depicting the preliminary hearing and trial as viewed by his wife, defendant asserts that "it becomes almost certain that these 'second' casings represent the fatal shot or shots" and that Sudweeks "implicated himself at the preliminary hearing because he did not know of the FBI test results on the 'second' pair of casings. By

²³ The "second pair of cartridges" referred to by defendant appear to be the two .22 caliber shell casings discovered by Deputy Brewer the night of the shooting approximately ten to 15 feet south and west of the bloodstain created by the victim's head wound. Although these particular casings had not been analyzed by the FBI prior to the preliminary hearing, they had been analyzed by the time of trial and were determined to have been fired from defendant's .22 caliber rifle.

the time of trial, Sudweeks had to move the truck to continue to shift the blame to the Defendant, and he did" (Br. of App. at 10).²⁴ Although defendant attempts to support his allegations by attacking the consistency of Sudweeks's testimony between the preliminary hearing and trial, he fails to cite to any specific instance of Sudweeks's inconsistency (with reference to the location of the truck or the parties involved) in the record, which wholly fails to support his allegations.²⁵ Defendant's

²⁴ Totally lacking in record support for his claims, defendant asserts that Sudweeks "told two substantially different versions of the facts, [taking] advantage of the tie between the .22 caliber rifle and both pairs of shell casings" (Br. of App. at 9). According to defendant, Sudweeks's alleged inconsistency is of "vital importance" to his case because "Dr. Gr[e]y, the medical examiner[,] who did not testify at the preliminary hearing, testified at trial that the fatal shot had come from more than three feet away" from the victim's body (Br. of App. at 9). However, as previously noted, and contrary to defendant's assertions, Dr. Grey did testify at the preliminary hearing and his testimony there was entirely consistent with his testimony at trial (P.H. at 51-70; T. at 565-94). At both proceedings Dr. Grey testified that the cause of death was a gunshot wound to the head (P.H. at 59; T. at 568). He further testified that it was not possible to determine the exact range from which the fatal shot was fired, which could have been fired from anywhere within an indeterminate range of from 5 to 50 feet, but not less than three feet from the victim (P.H. at 57; T. at 567).

²⁵ Defendant further asserts that his trial counsel failed to preserve alleged inconsistencies in the State's theory through diagrams, visual exhibits or verbal description which "made it almost impossible to convincingly impeach" Sudweeks's testimony implicating defendant as the shooter, or to "adequately describe the prejudice suffered. . . ." (Br. of App. at 10-11). In addition, defendant notes that his trial counsel did not obtain any "expert testimony on forensic medicine to discuss the angles of shots in view of the two inconsistent theories offered by the State" (Br. of App. at 12). However, as previously noted, defendant fails to point to any specific inconsistencies in the record. Moreover, Sudweeks testified consistently both at the preliminary hearing and at trial that he saw defendant shoot Kile from his vantage point behind the driver's side door of defendant's truck, that defendant was standing in front of the truck, and that Kile was standing south and east of the truck, near the Henrie gate (P.H. at 102-05, 139-49; T. at 478-82).

speculative assertions together with his lack of record support simply fail to demonstrate either deficient performance by his trial counsel or prejudice to his defense.

Defendant further attacks the adequacy of his trial counsel's impeachment of Sudweeks's testimony on the ground that counsel "failed to adequately investigate the relationship between David Kile, Bobby Cox, and Lewis Sudweeks," and therefore "failed to point out an important motivation for Mr. Sudweeks rather than Mr. Day to be the person to shoot David Kile" (Br. of App. at 12). Again, defendant's bald assertion is totally devoid of record support. Contrary to defendant's allegation, his trial counsel fully investigated the alleged "affectionate" relationship between the victim, David Kile, and Sudweeks's apparent common law wife at the time of the shooting, Bobby Cox. Kile's relationship with Cox was brought out during trial through the testimony of defense witnesses, William L. Christiansen and Lori Franklin, who testified that they had observed Cox and Kile drinking together on several occasions (T. at 744-45, 766). Franklin further testified that she had observed affectionate acts between Cox and Kile including "kissing," "hugging," and "putting their hand on each other's legs" (T. at 772-786). Franklin also testified she had heard a conversation between Cox and Sudweeks during which Sudweeks called Kile a "low life" and stated "that somebody should give him a blanket party in the near future" (T. at 766). Defendant does not suggest what further investigation should or could have been conducted, nor does he mention what, if any, additional evidence could have been

presented. In light of the above, defendant's frivolous and unsupported allegations establish neither deficiency nor prejudice and are without merit.

Relying on State v. Templin, 149 Utah Adv. Rep. 14 (Utah 1990), defendant appears to further assert that his trial counsel was ineffective for not calling certain witnesses to testify at trial concerning his "positive mental state and good attitude" the morning of the shooting (Br. of App. at 12). However, there is simply no indication in the record that either Peggy Palmer, Pat Yero or Jim Willis would have testified concerning defendant's positive attitude the morning of August 10, 1989 had they been called at trial. Moreover, defendant has not demonstrated how, in view of the overwhelming evidence against him, testimony regarding his alleged positive attitude would have had anything other than a negligible effect on the jury. Because defendant has not demonstrated either deficiency or prejudice, his claim of ineffectiveness is without merit. Id. at 17 n.26 (defendant did not meet burden of demonstrating there was a reasonable probability of a different result at trial where he failed to provide reviewing court with any evidence concerning what the witness would have testified to had he been called during trial).

Finally, defendant asserts that his trial counsel was ineffective for failing to elicit testimony concerning an alleged rainstorm which "may have obliterated substantially important evidence" (Br. of App. at 7, 12-13). Again defendant's vague assertion is wholly lacking in record support. Although evidence

of a light rain was presented at the preliminary hearing, there is no indication in the record that any evidence was obliterated as a result (P.H. at 29).²⁶ Because defendant has failed to point to any specific, identified acts or omissions that fall outside the wide range of professionally competent assistance, his allegations of ineffectiveness are without merit.

POINT III

THE PROSECUTOR PROPERLY DISCUSSED THE
EVIDENCE AND THE INFERENCES AND DEDUCTIONS
ARISING THEREFROM DURING CLOSING ARGUMENT.

Defendant asserts that the prosecutor misstated in closing argument the actual time period that Harold Morrill testified defendant was gone from his porch the night of the shooting. He further asserts that the prosecutor misstated in closing argument that the State's witness, Lewis Sudweeks, submitted to a blood alcohol test (Br. of App. at 13). A careful review of the record demonstrates that defendant's assertions of prosecutorial misconduct are without merit.

In reviewing an allegation of prosecutorial misconduct, this Court must determine whether the prosecutor's remarks called the attention of the jury to matters "they would not be justified in considering in reaching the verdict and, if so, whether there is a reasonable likelihood" that the remarks "so prejudiced the jury that there would have been a more favorable result absent the misconduct." State v. Speer, 750 P.2d 186, 190 (Utah 1988);

²⁶ Significantly, Sheriff Gottfredson testified that he marked the location of shell casings discovered the night of the shooting with his foot and that those markings still were present when the investigation was continued the following morning (T. at 266).

State v. Tillman, 750 P.2d 546, 559-61 (Utah 1987). In determining whether a remark is prejudicial the alleged misconduct must be viewed in light of the totality of the trial and the trial court's ruling on this matter will not be overturned absent an abuse of discretion. Speer, 750 P.2d at 190.

As a general rule, counsel for each side has considerable latitude and may discuss fully from their viewpoints the evidence and the inferences and deductions arising therefrom in closing argument. Tillman, 750 P.2d at 560 (citations omitted). The prosecutor's closing argument in this case was properly within this latitude and defendant has not demonstrated that he called the attention of the jurors to matters outside the record, nor has defendant demonstrated that the alleged misstatements so prejudiced the jury that there was a strong likelihood of a more favorable result absent the prosecutor's remarks.²⁷ During the course of closing argument, the prosecutor

²⁷ Moreover, the jurors were instructed that argument by the attorneys was not evidence in the case:

You must not consider as evidence, any statement of counsel made during this trial; however, if counsel for the parties stipulate you will regard that fact as being conclusively proved.

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

You must not consider any evidence that was rejected or any evidence that was stricken.

A question is not evidence, and may be considered only as it supplies meaning to the

made the following observation concerning the testimony of Harold Morrill:

Harold Morrill didn't testify that Lew Day was gone 20 to 30 minutes. That's not a correct statement of the evidence. What he said was, "I left him (Sudweeks) on the porch, went in and took care of my children. When I came out, he was gone." He didn't know if he (Sudweeks) left 30 seconds before--

(C.A. at 78). At this point in the prosecutor's closing argument, defense counsel objected, asserting that Harold Morrill had actually testified that defendant was gone 20 to 30 minutes (C.A. at 78). The trial court overruled defense counsel's objection, stating that "[t]he jury heard the testimony[;] [t]hey can rely on their joint memory" (C.A. at 79). The prosecutor then continued his argument as follows:

Harold Morrill talked about what he did. He went in the bathroom, took care of his little girl, got her out of the tub, put her pajamas on, got the boy out, wrapped him in a towel, and walked back out. That's all he said he could remember doing.

He said, "I did not look at my clock. Any estimate, any time I give is an estimate. That's what I did. I don't know when Sudweeks left. All I know is when I come out, he was gone."

Now that could have been 30 seconds. It could have been 5 minutes. The evidence isn't clear on that. But it is clear that when he came back, he was scared to death.

(C.A. at 79). Although defendant claims the prosecutor's statements were erroneous, his assertion is not supported by a

²⁷ Cont. answer.

(Jury Instruction #5).

review of Harold Morrill's testimony at trial (T. at 617-623; a copy of Harold Morrill's testimony is attached hereto as Addendum C). Harold Morrill was not sure how long Sudweeks was gone from his porch (T. at 618-23). After speaking briefly with Sudweeks, Harold went inside the Morrill home to retrieve his daughter from the bathtub; when he came back outside, Sudweeks was gone. (T. at 618). Approximately 10 to 15 minutes later, Harold's father, Dale Morrill, arrived home and Harold began telling him about Sudweeks's first visit (T. at 618). Shortly thereafter, Sudweeks returned (T. at 618). On cross-examination, Harold agreed with defense counsel that it was possible Sudweeks could have been gone for approximately 20 to 30 minutes (T. at 620). However, at no time did Harold Morrill emphatically state that he was certain defendant was gone from the porch for 20 to 30 minutes and no less; rather, that time period was merely a possibility. Sudweeks testified that he was gone less than 10 minutes (T. at 559). Based on the foregoing testimony, it cannot reasonably be argued that the prosecutor misstated the evidence, specifically the testimony of Harold Morrill. Rather, the prosecutor's comments amounted to nothing more than the wholly appropriate drawing of inferences and deductions from ambiguous testimony.

Defendant's additional allegation of prosecutorial misconduct is similarly unsupported by a careful review of the record. Defendant asserts that the prosecutor improperly stated that Lewis Sudweeks had been given a blood alcohol test, when in fact he had not (Br. of App. at 13). However, defendant failed to object to this alleged misstatement at trial; therefore, he is

barred from raising it on appeal. State v. Johnson, 774 P.2d 1141, 1147 (Utah 1989). Assuming this Court decides to address defendant's argument, the following analysis is provided by the State.

The prosecutor stated in pertinent part as follows:

All the evidence in this case stacks the intoxication level like this: Evan is the most drunk, Lew Day is the least. All the witnesses, all the tests, they wanted us to test Evan Wiltshire. What would that change in this case if Evan Wiltshire had been tested and shown to have an obvious high high level of intoxication?

If you test Lew--we tested Lew Sudweeks. Lew Sudweeks had a high level of intoxication in between Lew Day and Evan Wiltshire. Those are smokescreens that will not help you in your deliberation.

(C.A. at 80-81). Although the prosecutor's observation was clearly prefaced by an "If," the comment is admittedly ambiguous. However, even assuming the prosecutor misstated the evidence, the effect of a such a misstatement was likely negligible in view of the overwhelming evidence that all four men had been drinking heavily. In any event, defendant has failed to demonstrate that the prosecutor's remarks prejudiced him such that there was a likelihood of a more favorable result.

POINT IV

DEFENDANT'S ALLEGATIONS OF IMPROPER JUROR/WITNESS CONTACT HAVE NOT BEEN PRESERVED FOR REVIEW BY THIS COURT; ALTERNATIVELY, REVERSAL ON THAT GROUND IS NOT WARRANTED.

On appeal to this Court, defendant appears to assert that there was improper contact between the State's witness, Deputy Robert Nalwalker, who also assisted in the trial

proceedings, and juror Grover Smith (Br. of App. at 14).

However, in denying defendant's motion for new trial, the trial court expressly found that defense counsel had specifically waived the issue of alleged improper juror/witness contact (R. at 416-18).

During a lunch recess in the course of defendant's trial March 26-30, 1990, Deputy Nalwalker observed juror Smith emerge from the men's restroom (R. at 264). Aware that the other jurors had already been taken to lunch by court personnel, Deputy Nalwalker approached Smith and asked him to wait, stating that he would ask the judge what to do about Smith's being left behind (R. at 264-265, 308). After consulting with the judge, Deputy Nalwalker informed Smith that the judge had instructed him (Nalwalker) and the county clerk (who was serving as bailiff) to drive Smith to the cafe where the other jurors were eating (R. at 265, 308-09). Deputy Nalwalker, the bailiff and juror Smith then drove, "without conversing," approximately one or two miles to Dayna's Cafe where Smith joined the other jurors (R. at 265; 308-09; copies of affidavits filed by Deputy Nalwalker and Grover Smith are attached hereto as Addendum D).

In support of defendant's motion for new trial filed May 23, 1990, defense counsel, David Blackwell, filed an affidavit with the trial court stating that he had observed two conversations between juror Smith and Deputy Nalwalker during a trial recess (R. at 258-59). However, at a hearing on the matter held June 7, 1990, defense counsel, Marcus Taylor, advised the trial court that he and Blackwell had discussed the matter and

decided not to raise any objection to the contact between Smith and Nalwalker (R. at 416). In a memorandum decision denying defendant's new trial motion, the trial court expressly found that the issue of alleged improper contact between Deputy Nalwalker and Smith had been waived:

Defense counsel were aware of the contact in question and made a decision not raise any question in relation thereto. The Court concludes this constituted a waiver. It would not be appropriate for defense counsel to invite error, albeit by silence, and then to rely thereon. State v. Parsons, 781 P.2d 1275, 1285 (Utah 1989).

(R. at 416-18; see Addendum A). In State v. Parsons, 781 P.2d 1275 (Utah 1989), relied upon by the trial court, defense counsel specifically waived any prejudice resulting from conversation between a juror and a witness and then subsequently attempted to assert that contact was prejudicial on appeal. In determining that the issue of alleged improper juror witness contact had been "affirmatively, knowingly, and intentionally" waived, the Utah Supreme Court held that "'invited error' (if there were any) 'is procedurally unjustified and viewed with disfavor, especially where ample opportunity has been afforded to avoid such a result'" Id. at 1285 (citing Tillman, 750 P.2d at 560-61). Similarly, because defendant's trial counsel were aware of the contact between juror Smith and Deputy Nalwalker during trial and took no action to challenge the alleged impropriety at that time, this Court may properly decline to review defendant's allegation of improper juror witness contact on the ground of waiver.

Notwithstanding defendant's apparent waiver, assuming this Court determines to reach the merits of his allegation, the

trial court did not abuse its discretion in denying defendant's new trial motion and/or his request for an evidentiary hearing because the brief contact between Deputy Nalwalker and juror Smith was incidental and inconsequential, raising no presumption of prejudice.²⁸ State v. Jonas, 793 P.2d 902, 909 (Utah 1990). Contrary to defendant's apparent assertion, the facts do not present an improper "conversational contact[]" between a juror and a trial witness or court personnel. Id. Cf. Logan City v. Carlsen, 799 P.2d 224 (Utah Ct. App. 1990) (conversation between bailiff and juror concerning the "sensitive subject of sentencing" amounted to more than a brief, incidental contact, triggering a presumption of prejudice and bailiff's testimony, standing alone, was not sufficient to show that the jury had not in fact been prejudiced). In the present case, as in Jonas, "no 'conversation' took place, in the normal sense of an 'oral exchange of sentiments, observations, opinions [or] ideas.'" Id. (citation omitted). Deputy Nalwalker merely approached Smith and asked him to wait while he inquired of the judge what to do about the fact that court personnel had already taken the other jurors

²⁸ Although the trial court considered the issue of alleged improper juror witness contact waived, for the apparent purpose of refuting the allegations of impropriety in defendant's new trial motion, the trial court found that, assuming a presumption was legitimately raised, the State adequately rebutted the presumption with the filing of affidavits by Deputy Nalwalker and juror Smith explaining the incidental and inconsequential nature of the contact (R. at 416-18). It is the State's position that it was not necessary for the trial court to assume that a presumption of prejudice was raised in denying defendant's motion. As discussed with greater detail in the body of this point, the contact between Deputy Nalwalker and juror Smith was simply not an improper "conversational contact" sufficient to raise a presumption of prejudice.

to lunch. Thus, although Deputy Nalwalker's initial approach of juror Smith was not authorized by the trial court, it was within the scope of his duty to assist in the trial proceedings and cannot reasonably be characterized as "verbal contact beyond mere civilit[y]." Id. at 909. Furthermore, Deputy Nalwalker's second approach of juror Smith was clearly authorized by the trial court (R. at 417). When he returned a few moments later, Deputy Nalwalker merely informed juror Smith that the judge had requested that he (Nalwalker) and the bailiff drive Smith to the cafe where the other jurors were eating lunch (R. at 265, 308-09). Deputy Nalwalker, the bailiff and juror Smith then drove, "without conversing," approximately one or two miles to Dayna's Cafe where Smith joined the other jurors (R. at 265; 308-09).

Based on the foregoing, it is clear that Deputy Nalwalker did not engage Smith in conversation or otherwise conduct himself in a manner which would have had the affect of breeding a sense of familiarity that could clearly effect Smith's judgment as to Nalwalker's credibility. Id. at 908; cf. State v. Pike, 712 P.2d 277, 279-80 (Utah 1985) (conversation concerning personal incident between witness who was arresting officer as well as an eyewitness held sufficient to breed an improper sense of familiarity). The incidental nature of the initial contact, the subsequent authorization by the trial court, the presence of the bailiff and the complete lack of conversation, substantive or otherwise, demonstrate that defendant's allegations of improper contact are without merit and need not be reviewed by this Court.

POINT V

THE EVIDENCE WAS SUFFICIENT TO CONVICT
DEFENDANT OF THE INCLUDED OFFENSE OF
MANSLAUGHTER.

In points V and VI of his brief, defendant appears to allege that the evidence was insufficient to convict him of the included offense of manslaughter. However, he levels this allegation with absolutely no discussion of the evidence actually presented or how that evidence was deficient. Rather, defendant appears to attack the lack of additional evidence which might possibly have implicated someone else as the shooter. He appears to further allege that certain evidence introduced at trial could not have been in existence.²⁹

The power of this Court to review a jury verdict challenged on the sufficiency of the evidence is "quite limited." State v. Moore, 802 P.2d 732, 738 (Utah Ct. App. 1990). The evidence, along with the reasonable inferences from it, must be viewed in the light most favorable to the jury verdict. State v. Gardner, 789 P.2d 273, 285 (Utah 1989), cert. denied, 110 S.Ct. 1837 (1990). Thus, this Court requires defendants challenging the sufficiency of the evidence on appeal to marshal all the evidence in support of the jury's verdict and then demonstrate that even viewing it in the light most favorable to the verdict, the evidence is insufficient to support the verdict. Moore, 802 P.2d at 738-39 (adopting the "marshal the evidence" standard for

²⁹ Although defendant argues that Sheriff Gottfredson's markings indicating the location of certain shell casings were eliminated by rain, Sheriff Gottfredson testified that the markings were still present the morning after the alleged rain (T. at 266).

use in criminal appeals from jury verdicts where sufficiency of the evidence is at issue). Where, as here, the defendant has wholly failed to marshal the evidence, this Court need not and should not consider the challenge to its sufficiency. Id.

CONCLUSION

Based on the foregoing, the State respectfully requests this Court to affirm defendant's conviction.

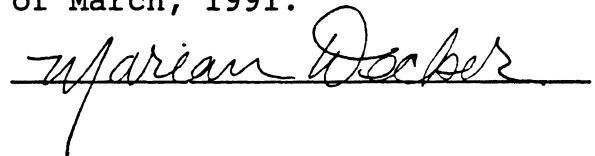
RESPECTFULLY submitted this 18th day of March, 1991.

PAUL VAN DAM
Utah Attorney General


MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to J. McArthur Wright, attorney for appellant, P.O. Box 367, St. George, Utah 84770, this 20th day of March, 1991.



ADDENDA

ADDENDUM A

FILED
PIUTE COUNTY, JUNCTION, UTAH

AUG 20 1990
Valerie H. Brown Clerk

By _____ Deputy

IN THE SIXTH JUDICIAL DISTRICT COURT OF PIUTE COUNTY

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

LEW DAY,

Defendant.

MEMORANDUM DECISION IN RE
POST-TRIAL MOTIONS

Case No. 89-CR-19

I N T R O D U C T I O N

Subsequent to the trial and the pronouncement of sentence herein, the Defendant filed a Motion for a new trial. As grounds the Motion alleged:

1. Improper conversation between witness and juror.
2. Improper conversation between witness and prospective juror.
3. Improper conversation between juror and Clerk official.
4. New exculpatory evidence.
5. Newly-discovered evidence (victim's shirt).
6. Newly-discovered evidence (lead fragment).

The wife of the Defendant subsequently filed an affidavit calling into question the adequacy of representation by defense counsel David Blackwell and Marcus Taylor of Richfield, Utah.

This resulted in a motion to withdraw and for appointment of substitute counsel for Defendant. The motion to withdraw was granted, and with approval of Defendant and his wife, as well as the County, the Court appointed James L. Shumate of Cedar City, Utah to proceed with representation.

Other post-sentencing motions were also filed, and at the time hereof there remains pending before the Court the following:

1. Two State's Motions to strike defense affidavits or portions thereof which do not comply with the Rules of Evidence; and further, to strike, naked or unsupported factual allegations which appear in defense Motions or Memoranda.

2. A defense Motion for the appointment of a private investigator.

3. A defense Motion for an evidentiary hearing.

4. The defense Motion for a new trial.

Both sides have filed numerous affidavits which will be discussed hereafter. Most of the affidavits are not contradictory. With only one or two exceptions, the affidavits filed by the State contain clarifying, explanatory or supplemental information not contradicting the factual allegations contained in the defense affidavits.

The four Motions came before the Court at Junction, Utah, on Monday, July 30, 1990. At that time counsel stipulated that the affidavits on file could be treated by the Court as proffered and accepted proof reflecting the actual testimony which the affiants would give (subject to the Rules of Evidence) should they be called to testify, and that the Court could make findings of fact based thereon.

With the foregoing as a backdrop the Court will proceed to consider the merits of the four pending Motions.

I. MOTION TO STRIKE

Various defense pleadings as well as affidavits contain hearsay, rumor, innuendo, speculation and assumptions. As such the State's motions to strike may be well taken. Nevertheless the Court has determined to deny the motions and to evaluate both supported and unsupported allegations and to leave the same in the record for purposes of appellate review. In this regard the Court gives an expansive construction to the recent Supreme Court ruling in State v. Hadfield, 128 Utah Adv. Rep. 6 (1990) which is discussed more extensively hereafter.

II. MOTION FOR APPOINTMENT OF PRIVATE INVESTIGATOR

Defendant seeks appointment of a private investigator for the purpose of interviewing Ms. Bobbie Cox and Mr. Bo-Jon Reef. The stated purpose of the investigation would be to inquire as to an alleged post-trial statement by State's witness Lewis Sudweeks to the effect, "Looks like I got away with another one".

The record reveals that subsequent to the trial herein, the defense hired a private investigator by the name of Blaine Pectol. The results of Pectol's investigation are contained in two reports prepared by him and filed herein. The reports indicate that Pectol conducted numerous interviews including interviews of Ms. Bobbie Cox and Mr. Bo-Jon Reef and further investigated the crime scene, reviewed all of the evidence in the trial and generally investigated post-trial rumors, suggestions

and second-guessing.

The record further discloses post-trial investigation by Piute County Sheriff Brent Gottfredson which he conducted as a matter of public duty and as a result of the reports, accusations and matters brought to his attention by the Defendant's wife or by the various post-trial pleadings filed by the defense. He likewise interviewed Ms. Bobbie Cox to whom the statement, "Looks like I got away with another one," was allegedly made.

The defense theory that the perpetrator of the crime was State witness Lewis Sudweeks was advanced at trial and rejected by the jury. Additional evidence thereof would be cumulative and not new. The post-trial investigation by the private investigator and the County Sheriff have failed to add any credibility to this defense theory. The statement in question purportedly made by the said witness comes to the Court in the form of hearsay, twice and thrice removed, without any corroboration or contextual framework. It is a statement which by nature is susceptible of different meanings and defense counsel in Open Court at the time of the hearing hereon candidly acknowledged that he could not project the results of additional inquiry if a private investigator were appointed.

It appears to the Court that the defense is seeking to embark on a sort of "fishing expedition" stimulated principally by rumor, innuendo, speculation and wishful thinking. The defense is unable to point to clear definitive evidence, but rather to the possibility that something might be discovered.

Since this arises in a post-conviction setting, the timing seems inappropriate.

The record further discloses that prior to the trial herein the attorneys who represented Defendant through trial, to-wit: Marcus Taylor and David Blackwell, conducted considerable investigatory work; that they traveled to Marysvale, Junction, Circleville, Panguitch and Escalante and interviewed numerous witnesses, including most of those whom the defense now would call at an evidentiary hearing in support of its Motion for a new trial and particularly one Bobbie Cox.

The Court is satisfied that proper investigatory work has already been conducted in this case, both before and after the trial; that it has been conducted not only by the office of the County Sheriff but also by defense counsel and a private investigator hired for the defense. All three have interviewed the said Bobbie Cox at least once and such interviews have been conducted both before and after the trial.

The Court is not satisfied that appointment of a private investigator is warranted or would be productive and accordingly the motion therefor is denied.

III. MOTION FOR EVIDENTIARY HEARING

The Court has considered the Motion for an evidentiary hearing in light of the recent decision in State v. Hadfield, supra. That decision is not entirely clear as to the quality of evidence which must be laid before the Court as a foundational premise for an evidentiary hearing. It seems to suggest that

"proffered evidence" or "allegations about new evidence", if they are sufficiently persuasive, may be adequate even though they fail to comply with the Utah Rules of Evidence. The opinion does make clear that the Utah Rules of Evidence would govern at the evidentiary hearing, but strict adherence when evaluating whether or not to convene the hearing appears not to be mandated.

Based on the foregoing construction of the Hadfield decision, the Court determined not to strike the naked, factual allegations which appear in various pleadings filed by the defense and further determined to leave intact the various defense affidavits even though in some instances they involve hearsay, once, twice or thrice removed, as well as opinion, speculation and conjecture which fail to conform to the Rules of Evidence.

In a Memorandum filed with the Court the defense has listed nineteen witnesses it would propose to call at an evidentiary hearing and the testimony that would be given by each. The names of the witnesses, a brief indication of their testimony and the Court's response follow:

1. Blaine Pectol, a private investigator, would purportedly testify that he was hired by a friend of Defendant's to conduct a post-trial investigation. He reviewed all of the trial evidence, located a small lead fragment in a gatepost at the crime scene which had not previously been discovered, and interviewed a number of witnesses some of whom are listed hereafter as potential witnesses at an evidentiary hearing. The specific testimony of the potential witnesses is summarized hereafter.

As to the proffered evidence from Pectol, the Court determines as follows:

(1) The purported testimony of Blaine Pectol is essentially hearsay sometimes thrice removed with the exception of testimony about the location of the metal fragment in the gatepost at the crime scene.

(2) The State's evidence, as depicted on Exhibit #2, indicated that Defendant fired two shots at the victim with the gatepost in the background.

(3) If the metal fragment located in the gatepost was fired from the Defendant's weapon such would be consistent with and corroborative of the State's evidence. If not, it has no apparent relevancy.

(4) The Pectol testimony as indicated by his reports would be cumulative of theories already advanced by the defense during trial and fails to shed any appreciable additional light thereon.

(5) The information contained in the Pectol reports even if produced through proper witnesses is not such as to render a different result probable on retrial.

The Court also notes that at the hearing hereon there was admitted by stipulation a report from the Federal Bureau of Investigation indicating that the lead fragment found in the gatepost could not be connected to the victim nor to the Defendant's weapon. As such it appears irrelevant.

2. George Steven Bird, is expected to testify that Deputy Sheriff Robert Nalwalker made statements about the evidence in a cafe prior to commencement of the trial.

With respect to the proffered testimony of George Steven Bird the Court determines:

(1) Bird testified at the trial and any evidence he could give is not newly-discovered as and

for the reason that it could have been discovered with reasonable diligence prior to trial.

(2) Assuming the occurrence of the events described by Bird there is no showing that they had any impact on the trial.

3. Vickie Barton would purportedly testify that prior to the trial she heard Bo-Jon Reef state that he heard State witness Lewis Sudweeks make threats against the victim if the latter did not stay away from Sudweeks' girlfriend Bobbie Cox.

With respect to the proffered testimony of Vickie Barton, the Court determines as follows:

(1) The proffered Vickie Barton testimony would be inadmissible as hearsay twice or thrice removed.

(2) Even if admitted, the testimony is cumulative of a theory already advanced at trial by the defense.

(3) The testimony of Vickie Barton is not newly discovered and with reasonable diligence could have been discovered prior to the trial.

(4) The testimony of Vickie Barton is not such as would render a different result probable on retrial.

4. Bo-Jon Reef would purportedly testify that he heard State witness Lewis Sudweeks make threats against the defendant and also that the victim was having a love affair with Bobbie Cox.

With respect to the proffered testimony of Bo-Jon Reef, the Court determines as follows:

(1) Bo-Jon Reef was interviewed by Private Investigator Blaine Pectol. The information given Pectol does not support the claim regarding his testimony.

(2) There is an absence of any credible evidence before the Court which would indicate that Bo-Jon Reef would testify in the manner indicated.

(3) The purported testimony of Bo-Jon Reef even if admitted would be cumulative of a theory already advanced by defense at trial.

(4) The testimony of Bo-Jon Reef is not newly discovered and with reasonable diligence could have been discovered prior to the trial.

(5) The purported testimony of Bo-Jon Reef is not such as to render a different result probable on retrial.

5. Grover Smith, who served as a juror, would purportedly testify that the jury did not receive an express instruction on the right of the jury to find the Defendant innocent.

With respect to the proffered testimony of Grover Smith, the Court determines as follows:

(1) The testimony of Grover Smith regarding jury instructions would be irrelevant.

(2) The jury instructions speak for themselves and their adequacy or inadequacy is a matter of law.

6. Bill Christensen, who testified for the defense at trial, would purportedly testify that State witness Lewis Sudweeks, while under the influence of alcohol, stated to his girlfriend, Bobbie Cox, who later repeated it to Christensen, "Looks like I got away with another one,". Further, that Sudweeks and Cox had violent fights. Further, that Sudweeks told him the shirt belonging to the victim, along with a hat belonging to one Evan Wiltshire and gloves belonging to the Defendant

burned up in Sudweeks' pickup truck.

With respect to the purported testimony of Bill Christensen, the Court determines as follows:

(1) The implication that the perpetrator of the crime was Lewis Sudweeks rather than the Defendant was advanced at trial and rejected by the jury.

(2) Matters in relation to the victim's shirt were raised and argued at trial along with questions regarding other items in the Defendant's pickup, the impoundment and inventory thereof, etc.

(3) The matter of fights between Lewis Sudweeks and Bobbie Cox was likewise a subject of evidence at trial.

(4) The purported testimony of Bill Christensen is cumulative of evidence and theories already advanced by the defense at trial and are not such as to render a different result probable on retrial.

7. Buddy Ross would purportedly testify that he heard Bobbie Cox in a fight with Lewis Sudweeks after the trial state that she knew that Lewis Sudweeks had killed David Kile.

With respect to the proffered testimony of Buddy Ross, the Court determines as follows:

(1) There is nothing in the record from which the Court can ascertain the basis under which the defense advances the purported testimony of Ross. There is no statement as to who talked with Ross or to whom Ross provided this information.

(2) The expression of an opinion by Bobbie Cox regarding who committed the crime is not admissible.

(3) Bobbie Cox has been interviewed before and after the trial by the private investigator and the County Sheriff and the interviews have not produced any evidence which corroborates or lends credibility to the purported testimony of Ross.

(4) The matters concerning which Ross would purportedly testify, even if property introduced in evidence, are cumulative of theories already advanced and rejected, and are not such as to render a different result probable on retrial.

8. Lorie Franklin would purportedly testify that she had a threatening and intimidating contact with Lewis Sudweeks after the trial at which time Sudweeks reportedly said, "You did what you had to do; well, I did what I had to last summer".

With regard to the proffered testimony of Lorie Franklin, the Court determines as follows:

(1) Lorie Franklin was a witness for the defense at trial and gave testimony which called into question the credibility and veracity of Lewis Sudweeks and further cast him in a negative and derogatory light.

(2) Though inappropriate, a post-trial intimidating and threatening confrontation between Sudweeks and Franklin is of limited if any relevancy.

(3) The statement, "You did what you had to do; well, I did what I had to do last summer", is susceptible of different meanings and requires conjecture and speculation.

(4) There is no evidence before the Court that would make clear the meaning of the alleged statement.

(5) The defense effort to shift blame to State witness Lewis Sudweeks was clearly advanced at trial and rejected by the jury.

(6) The Lorie Franklin testimony, even if properly admitted, is not such as would render a different result probable on retrial.

9. Leland Millett, who served as a juror, would purportedly testify regarding the jury deliberations. There is nothing attributed to Millett that suggests any impropriety in the

deliberations or that seriously threatens the verdict. The purported testimony comes to the Court in the form of the notes of the private investigator, Blaine Pectol, regarding his telephone conference with Leland Millett.

With regard to the proffered testimony of Leland Millett the Court determines as follows:

(1) The information before the Court regarding Millet is entirely hearsay based on the Pectol report.

(2) Even if the statements attributed to Millet were properly before the Court they would not form an adequate basis to upset the jury verdict.

10. Bobbie Cox would purportedly testify that she is a live-in girlfriend of Lewis Sudweeks; that there are some discrepancies between the testimony of Sudweeks and things he has told her, e.g. what happened to the victim's clothing and the location of the Defendant's pickup along with other items which appear to have no relevancy at all to this case.

With regard to the proffered testimony of Bobbie Cox the Court determines as follows:

(1) The Court notes the absence of any indication that Bobbie Cox would offer evidence that Lewis Sudweeks was the perpetrator of the homicide. This is striking since the proffers from the other witnesses which implicate Sudweeks base such implication on statements purportedly made by or to Bobbie Cox.

(2) The purported testimony advances defense theories which were rejected by the jury.

(3) Bobbie Cox was interviewed by defense counsel before the trial and could have been called as a witness by either side. Evidence she could give would not be "newly discovered."

(4) The testimony of Bobbie Cox, if properly admitted, would be cumulative and not such as to render a different result probable on retrial.

11. Larry John Norman would purportedly testify that prior to the homicide he heard Lewis Sudweeks threaten the life of the victim.

With regard to the proffered testimony of Larry John Norman the Court determines as follows:

(1) The purported testimony of Larry John Norman is directly contradictory to the information which he supplied the private investigator, Blaine Pectol, and the County Sheriff as reflected by the report of the former and affidavit of the latter.

(2) The record reveals that Norman has been interviewed several times both before and after the trial and any evidence he could now give could have been discovered with reasonable diligence prior to the trial and would not qualify as "newly-discovered".

(3) Even if Norman were to testify as purported, such testimony would be cumulative of a theory already advanced by the defense at trial.

(4) Even if Norman were to testify as purported, such testimony is not likely to render a different result probable on retrial.

12. Linda King would purportedly testify that Lewis Sudweeks had made threats against the victim if he didn't stay away from Bobbie Cox.

With regard to the proffered testimony of Linda King, the Court determines as follows:

(1) The basis for the proffer on King is an interview conducted by the private investigator Pectol. In the interview King states that her source is Larry John Norman whose proffered testimony is summarized immediately above. The statements given the private investigator and the Sheriff by Larry John Norman contradict the information King claims to have received from Norman.

(2) Even if the King testimony could somehow be elevated to a level of admissability it would be cumulative of a theory already advanced by the defense at trial and rejected by the jury.

(3) The testimony of Linda King even if properly admitted would not be such as to render a different result probable on retrial.

13. Terry Allen Kile, brother of the victim, filed an affidavit stating that after the homicide State witness Lewis Sudweeks delivered to him two articles of clothing which had belonged to the victim. He further indicated that Sudweeks had told him that he had placed a pack of cigarettes in a shirt pocket of the victim, but then realizing he was dead, removed the cigarettes.

With respect to the affidavit of Terry Allen Kile, the Court determines as follows:

(1) The affidavit of Terry Allen Kile contradicts information he purportedly gave the private investigator Pectol as set forth in the latter's report. He is alleged to have told the private investigator that he did not receive any clothing from Lewis Sudweeks.

(2) The defense has already advanced at trial a theory concerning the presence or absence of clothing, as well as cigarettes and evidence relating thereto would be cumulative and not new.

(3) Both Terry Kile and Lewis Sudweeks testified at trial and the information concerning clothing and cigarettes would have been readily discoverable with reasonable diligence prior to the trial and could have been produced at the trial. Accordingly, such evidence is not "newly discovered".

(4) Lewis Sudweeks was examined and cross-examined extensively at trial regarding every detail of his account and any inconsistencies therein were the subject both of much evidence and argument. Additional evidence in this regard would be cumulative and not

such as would likely render a different result probable on retrial.

14. Nancy Christensen would purportedly testify that she attended the trial on one day and observed jurors who fell asleep. She will also testify that Lewis Sudweeks has made inconsistent statements.

With regard to the proffered testimony of Nancy Christensen, the Court determines as follows:

(1) The Court takes judicial notice of all proceedings involving the jury in Open Court and Mrs. Christensen's purported testimony adds nothing thereto.

(2) The Court finds no impropriety in the conduct of the jury in Open Court.

(3) The theory of inconsistent statements by State witness Lewis Sudweeks was advanced and argued extensively by the defense at trial.

(4) Nancy Christensen was at the trial and would have been available as a witness and any testimony she could give would not be "newly discovered".

(5) There is nothing in the purported testimony of Mrs. Christensen which is likely to render a different result probable on retrial.

15. Pat Yero, who was subpoenaed by the defense at trial, has filed two affidavits herein regarding alleged juror misconduct. Those affidavits are discussed elsewhere. A defense memorandum indicates that she would also testify that she saw a deputy sheriff talk with other witnesses after the Court's exclusionary order was entered. Further, she claims to have seen Lewis Sudweeks upstairs during the trial sitting outside the open courtroom door and listening to the testimony from inside the courtroom.

With regard to the proffered testimony of Pat Yero, the Court determines as follows:

(1) The proffered testimony of Yero regarding the conduct of witnesses is general and wholly lacking in specificity. There is no indication as to when, how long or substance. The Yero affidavits filed several months ago make no reference to the alleged problems now raised by proffer.

(2) During the course of trial the Court frequently cautioned jurors, witnesses and members of the public and no violations or improprieties were reported to the Court.

(3) Pat Yero as well as other persons named in Defendant's Memorandum have previously submitted letters and materials to this Court evidencing their friendship with and support of Defendant. Some have also appeared as sureties on the Defendant's bail bond. While they have been liberal and conclusionary in their general criticism, none have come forward in a timely manner to identify with specificity any problem or impropriety in the conduct of the trial.

(4) The Court has not received any indication from counsel for either side or from any Court personnel which would tend to establish impropriety in the proceedings.

(5) While the Court has accepted proffers in keeping with what it understands to be the spirit of the Hadfield decision, it is of the opinion that the proffers must allege specific facts which, if subsequently established at an evidentiary hearing, would warrant relief. The Court is of the opinion that it is not enough to "flock shoot" or to come forward months later and throw out some general accusations.

16. Terry V. Mason would purportedly testify that she is the sister-in-law to the Defendant and that she was called as a witness by surprise. Further, she would testify that the Sheriff and his deputy had made inconsistent statements.

With regard to the proffered testimony of Terry V. Mason, the Court determines as follows:

(1) Terry Mason was called as witness for the purpose of identifying a cigarette lighter belonging to Defendant and after the Court had ruled that the Defendant's wife could not be called nor could the Sheriff testify as to identification of the lighter by the wife.

(2) It was proper to call Terry Mason for the purpose identified even though she had not previously been listed as a witness.

(3) Any other information which Terry Mason could have given would not be "newly discovered" and should have been produced at the trial.

(4) Any testimony which Terry Mason could give regarding inconsistent statements would be cumulative and not new and would not be such as to render a different result probable on retrial.

17. Kent Mason would purportedly testify that he observed jurors sleeping during the presentation of the evidence.

With respect to the proffered testimony of Kent Mason, the Court takes judicial knowledge of the conduct of the jury during Open Court and finds no impropriety therein.

18. David Blackwell, a defense attorney, has filed an affidavit regarding alleged juror misconduct which is discussed elsewhere herein.

19. Joseph Johnson, a member of the venire has filed an affidavit regarding a conversation with the Sheriff during the jury selection process. The same is discussed elsewhere herein.

* * *

The cumulative impact of the testimony of all of the foregoing identified witnesses is not such as to render a different result probable on retrial, State v. Harris, 513 P.2d 439 (Utah 1973); and this is so even disregarding the fact that

much of the testimony would not be "newly discovered", State v. Hawkins, 16 P2d 713 (Utah 1932), and much would be subject to exclusion as being irrelevant, immaterial or based upon hearsay once, twice or thrice removed and not reasonably calculated to lead to discovery of the truth.

The Court is satisfied that the conviction of the Defendant is supported by an "unimpeachably fair and even-handed process". State v. Hadfield, supra, at p. 8. Further, the Court does not have any "suspicion that justice may have been miscarried because of a lack of enlightenment on a vital point, which the new evidence will supply". State v. Harris, supra, at 439-440.

Accordingly the Court concludes that an evidentiary hearing would not serve a useful purpose, and the motion therefor is denied.

IV. MOTION FOR NEW TRIAL

The merits of the defense motion for a new trial has been necessarily addressed to a major extent in the preceding discussion. Specifically, the alleged grounds for a new trial relating to so-called "newly discovered evidence" or "new exculpatory evidence" have been examined and found wanting. In truth, much of what has been proffered is not newly-discovered evidence (see State v. Williams, 712 P.2d 220, Utah 1985) but is cumulative, irrelevant, or inadmissible (see State v. Gellatly, 449 P.2d 993, Utah 1969).

The Court now turns to the grounds for a new trial which alleged (1) improper conversation between witness and juror, (2)

improper conversation between witness and prospective juror, and
(3) improper conversation between juror and clerk official.

The Court approaches this area of inquiry with knowledge of recent rulings by the Supreme Court and the Court of Appeals in State v. Larocco, 742 P.2d 89 (Ut. App. 1987); State v. Erickson, 749 P.2d 620 (Utah 1986) and State v. Pike, 712 P.2d 277 (Utah 1985). The Court is aware of the standard as enunciated in the Pike case that:

A rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors, which goes beyond a mere incidental, unintended, and brief contact. At pg. 280.

The Defendant claims two improper contacts with jurors occurred in this case. They will be examined in turn.

JUROR GROVER SMITH. Co-defense counsel David Blackwell has filed an affidavit stating that during a recess of the trial he personally observed two conversations between Grover Smith and Deputy Sheriff Robert Nalwalker. The affidavit is dated May 23, 1990 and was filed some 50 days after the trial concluded. At a hearing herein held on June 7, 1990, co-defense counsel Marcus Taylor advised the Court that he and Mr. Blackwell had discussed the contact which Blackwell had observed and had determined there was no problem associated therewith and accordingly made a decision not to raise any objection in relation thereto. Plaintiff has filed three affidavits by Deputy Nalwalker, County Clerk Valeen Brown and juror Grover Smith which do not contradict the Blackwell affidavit, but clarify and explain the conversations referred to therein. Counsel stipulated that the Court

could treat the affidavits as testimony. Simply stated, at a noon recess juror Grover Smith emerged from the men's room and discovered the other jurors had been taken to a local cafe for lunch. Smith briefly discussed the problem with Deputy Nalwalker, who went to the Judge's chambers and asked for instructions. The Judge directed that Deputy Nalwalker and the County Clerk (who with consent of all counsel served as a baliff) should transport juror Smith to the cafe. Nalwalker reported the Court's instructions to Smith and the three traveled to the cafe in silence.

With respect to juror Grover Smith the Court determines as follows:

(1) The affidavits on file are not contradictory but are in harmony with each other.

(2) There is not an issue of any material fact regarding the contact between juror Grover Smith and Deputy Robert Nalwalker.

(3) There was no conversation between the juror and the Deputy other than that which was required to identify the fact of the juror's needing to be transported to a local cafe and of the arrangements made in relation thereto.

(4) Other than for the identification of the problem the contact was authorized by the Court and consisted of carrying out the express directive of the Court.

(5) The contact did not relate to the merits of the case in any way.

(6) The contact did not involve discussion of any personal or private matters and was not such that it would breed a sense of familiarity.

(7) Taken together, the affidavits which are complimentary, explanatory and clarifying, and not contradictory, satisfactorily rebut the presumption

that prejudice to the Defendant resulted from the contact between juror Smith and Deputy Nalwalker.

(8) Defense counsel were aware of the contact in question and made a decision not to raise any question in relation thereto. The Court concludes this constituted a waiver. It would not be appropriate for defense counsel to invite error, albeit by silence, and then to rely thereon. See State v. Parsons, 781 P.2d 1257 (Utah 1989)

JUROR LESLIE SMITH/MARY MIKE CISERELLA. The defense has filed two affidavits of one Patricia Yero claiming a conversation between a juror and a person in the clerk's office regarding personal matters. The State has filed three affidavits by County Clerk Valeen Brown, juror Mary Mike Ciserella and alternate juror Leslie Smith which clarify and explain the conversation. The Yero (defense) affidavits describe a conversation in which a young, slender juror with long black hair had a discussion with a person in the clerk's office about their boys sleeping over, about the juror having work to do at home, and about the juror's desire to have the trial concluded. The defense affidavits do not indicate the identity of the person in the clerk's office and are unclear as to the identification of the juror. The second Yero affidavit assumes that the juror was Mary Mike Ciserella.

The three affidavits filed by Plaintiff establish with certainty that the alleged improper conversation was between Leslie Smith, an alternate juror, and one Zina Wiltshire an employee from the office of the public health nurse who was temporarily assisting in the office of the county clerk while the regular clerk personnel were involved with the trial. Leslie

Smith, the alternate juror, is young, slender, with long black hair and has a boy the same age as Zina Wiltshire. Leslie Smith has, by affidavit, acknowledged a conversation with Zina Wiltshire which is consistent with the description of the conversation contained in the two Yero affidavits filed by the defense. On the other hand, Juror Mary Mike Ciserella is blonde and pregnant, does not have a boy, has only two small daughters ages two and three and one-half years and, by affidavit, has denied any conversation with anyone in the clerk's office regarding boys and the other items mentioned in the Yero affidavits. The affidavit of the County Clerk reaffirms that Zina Wiltshire substituted in her office on the day when Yero was paid a witness fee and that Leslie Smith was paid by the two vouchers issued on the same date, immediately prior to the voucher issued to Yero.

As heretofore noted counsel stipulated that the Court could treat the affidavits as proffered testimony accepted by both sides and could proceed to make findings of fact based thereon. After careful consideration of the testimony thus admitted, the Court determines as follows, to-wit:

(1) Zina Wiltshire, an employee in the office of the public health nurse temporarily assisted in the county clerk's office on March 28, 1990.

(2) Zina Wiltshire was not regularly associated with the county clerk's office, was not a witness in the proceedings and had no involvement with the trial.

(3) The county clerk's records reflect payment to Patricia Yero on March 28, 1990, and further reflect that alternate juror Leslie Smith was paid for jury service immediately prior to payment of Yero's witness fee.

(4) Alternate juror Leslie Smith fits the description contained in all of the affidavits as to the person that had the alleged improper conversation with the clerk official. Mary Mike Ciserella does not fit the description.

(5) The alleged improper conversation did in fact take place between Zina Wiltshire who was assisting temporarily in the clerk's office and alternate juror Leslie Smith and did not involve juror Mary Mike Ciserella in any way.

(6) Since Leslie Smith was an alternate juror and did not participate in the deliberations no prejudice could have resulted therefrom and accordingly the Court need not inquire further.

PROSPECTIVE JUROR JOSEPH JOHNSON

The final claim of an improper contact is alleged to have occurred between Sheriff Brent Gottfredson and one Joseph Johnson, a member of the venire.

Joseph Johnson has filed an affidavit claiming he was one of 16 potential jurors who remained available for jury selection after the completion of challenges for cause. He states that at a recess before exercise of preemptory challenges the Sheriff asked him his name. Johnson responded and the Sheriff told him he still could not place him. Johnson then told the Sheriff who his mother and grandfather were and that he had lived most of his life in Circleville. That is the whole of the conversation. Johnson was stricken with the State's first preemptory challenge.

The State has not filed a counter affidavit, though the transcript of the jury selection proceedings reflects different timing. The Court record reflects that the Court took a 10 minute recess prior to seating the 16 jurors who ultimately were

passed for cause. There was no further recess thereafter until the jury was fully impaneled. Prior to taking the recess the Court stated "why don't we take a 10 minute recess right now folks. Let me just indicate, please don't go out and talk about this case with anyone. Talk about other things, but not about this case." (Transcript of Proceedings, Jury Selection, p. 76) Accepting Johnson's statement regarding the conversation, this would have been the latest time in the proceedings that it could have occurred. The conversation alleged by Johnson does not violate the Court's caution.

The Court further takes judicial notice of a letter of April 15, 1990, submitted to it by Joseph Johnson while the Defendant was awaiting sentencing. In the letter from Joseph Johnson to the Court he states "I truly believe I could have been fair, but looking back maybe I shouldn't have been on the jury after all. Because as I said, I have known both Lew [the Defendant] and Lewis [the prosecution's eyewitness] for years and I know Lew is a good man and I know what Lewis is." [Emphasis by Johnson] Vickie Barton, mother of Joseph Johnson, also filed a letter with the Court in behalf of the Defendant prior to sentencing and has been named as a potential defense witness should an evidentiary hearing be held. With respect to the alleged improper contact between the Sheriff and Joseph Johnson the Court determines as follows:

- (1) There is no material issue in relation to the conversation between Joseph Johnson and the Sheriff which occurred at a recess prior to the panel being seated and passed for cause.

(2) Neither the Sheriff nor Joseph Johnson violated the Court's instructions to avoid talking about the case.

(3) The Sheriff asked Johnson for his name. It was given. The Sheriff stated he still didn't place Johnson and so Johnson told him who his mother and grandfather were. Johnson also stated he had lived in Circleville most of his life. Nothing else was said.

(4) Joseph Johnson was stricken in a preemptory challenge exercised by the State.

(5) There is no evidence that the State's exercise of its preemptory challenge was improper in any way.

(6) The letter from Joseph Johnson to the Court of April 15, 1990, suggests a personal bias by Joseph Johnson in favor of the Defendant and against the eyewitness for the Plaintiff.

(7) Joseph Johnson offered no information during the jury selection process and in response to questions by the Court or counsel which would have revealed his prejudice or bias in favor of the Defendant.

(8) There is nothing in the record to evidence the basis on which the State exercised its preemptory challenges, but it appears that it may have advanced the interests of fairness and justice by striking a potential juror who subsequently appears to have had a built-in bias in favor of the Defendant and against a key state witness.

CLAIM OF INADEQUATE REPRESENTATION

While not originally advanced as a basis for a new trial, the affidavit of the Defendant's wife, Arva Lee Day, calls into question the adequacy of representation by defense counsel Marcus Taylor. The affidavit contains excessive hearsay, unsupported opinions and conclusions and highly-generalized and factually unsupported allegations regarding discovery. With respect to this affidavit and the allegations therein contained, the Court determines as follows:

(1) There is nothing in the record which would suggest anything other than full compliance with discovery requests.

(2) This Court has heard hundreds of cases during the last seventeen years, including numerous homicide cases, and at the conclusion of this trial expressed the opinion, and restates it here, that this is perhaps the best tried case on the part of both the prosecution and the defense that this Court has heard.

(3) This Court is not aware of any fact or factor which would tend to establish that this Defendant did not receive thorough and competent legal representation.

(4) The Court has appointed new counsel to handle Defendant's appeal and/or pre-appeal motions. This is based on Defendant's request and upon his dissatisfaction with prior counsel, and not upon any evidence that Defendant was not well represented prior to appointment of new counsel.

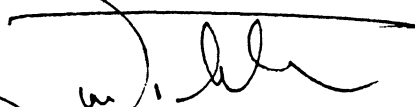
C O N C L U S I O N

The Court concludes that there is an inadequate basis for granting a new trial herein. The Defendant was properly represented and fairly tried. Piute County is small in population (some 1500 people) as is Junction Town where the county seat is located (some 200 people). Great care was taken to guard against potential problems. There are limited restroom facilities in the Courthouse and only two small cafes in town to service the needs of all who participated in the trial. The Court issued directives giving jurors preferential access to restroom facilities and encouraging the jurors to eat at one cafe and others involved with the trial to eat at the other cafe or elsewhere. On more than one occassion the Court arranged to have meals prepared and brought to the Court House for the jurors.

Frequent admonishments were given to the jury and all others associated with the trial and a high level of cooperation and professionalism was exhibited. The Defendant was fairly tried and convicted by a jury of his peers and there is no basis for granting a new trial.

This is a final Order, and accordingly, the Defendant is again admonished of his right to appeal within the time allowed by law.

DATED this 16th day of August, 1990.

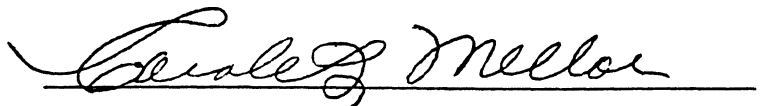

DISTRICT JUDGE

AFFIDAVIT OF MAILING

I hereby certify that a full, true and correct copy of the above and foregoing MEMORANDUM IN RE POST-TRIAL MOTIONS was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid on the 17th day of August, 1990, addressed as follows:

Mr. K. L. McIff
Piute County Attorney
P. O. Box 100
Richfield, Utah 84701

James Shumate
Attorney at Law
P. O. Box 623
Cedar City, Utah 84720



ADDENDUM B

Rifles, Depression
in ground



EST.
150 YDS
VICTIM TO
RIFLES

23' in front of
Pickup
VICTIM

EST
120 YDS
VICTIM TO
RIFLES

Telephone
Pole

MORRILL
HOUSE

To Thompson

Fence

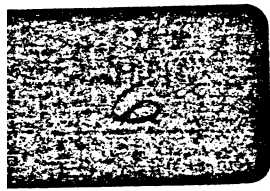


NORTH

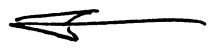
DAY P/U
FACING SOUTH

gate post
GATE

Harris
Home



To SR 89



Not to Scale
Bent Southward

ADDENDUM C

1 person?

2 A No.

3 MR. BLACKWELL: Thank you. That's all.

4 MR. McIFF: No further questions.

5 THE COURT: Thank you, Officer.

6 Call your next witness.

7 MR. McIFF: I will call Harold Morrill.

8 [BAILIFF SUMMONED WITNESS FROM OUTSIDE COURTROOM]

9 THE COURT: If you'll raise your right hand and be
10 sworn, sir.

11 [WITNESS SWORN]

12 THE COURT: You may be seated here, Mr. Morrill.

13 HAROLD MORRILL, called and sworn for Plaintiff, testified
14 as follows:

15 DIRECT EXAMINATION

16 BY MR. McIFF:

17 Q Mr. Morrill, would you please state your full name
18 and address.

19 A Harold Darrell Morrill Marysvale, Utah, 10-Mile
20 Ranch, Marysvale Valley.

21 Q You testified at the preliminary hearing in this
22 matter, did you not?

23 A Yes, I did.

24 Q Between then and now you had an accident where you
25 sustained an injury to your face; is that correct?

1 A Yes. I did.

2 Q Were you residing at the 10-Mile Ranch on August
3 the 10th, 1989?

4 A Yes, I was.

5 Q Who occupied that home?

6 A My dad lived in it then.

7 Q Your parents lived there?

8 A Yeah. They did then. They've moved since then.

9 Q Were you staying with them at the time--?

10 A Yes, I was.

11 Q --with your children?

12 A Um-hm. With my little boy and little girl. We'd
13 just moved out there right before then.

14 Q On the evening of August the 10th, 1989, do you
15 recall what you were doing towards sundown?

16 A Yeah. I was giving my little girl a bath. It was
17 just getting about to their bedtime and I was just getting her
18 and the little boy ready for bed.

19 Q Are you acquainted with Lewis Sudweeks?

20 A Yes. I've known Lewis quite a while.

21 Q Look, will you, a the at STATE'S EXHIBIT NO. 1.

22 [INDICATED]

23 We've undertaken to show on that exhibit the Dale Morrill home
24 in the lower lefthand corner--?

25 A Um-hm.

1 [INDICATED ON EXHIBIT]

2 Q --the lane that leads from the east to that home,--

3 [INDICATED]

4 --to the north of that a road up on a hill that goes up to
5 US-89--

6 [INDICATED]

7 --the Thompsonville Road, running north, and a road that goes
8 to the Paul Henrie ranch, running to the southeast;--

9 [INDICATED]

10 --are you familiar with that area?

11 A Yeah.

12 Q Is that a reasonable approximation of the road
13 pattern and other features in that area?

14 [INDICATED EXHIBIT]

15 A Yeah. That looks right.

16 Q Did you have contact with Lewis Sudweeks on the
17 night of August the 10th?

18 A Yeah. He come up to the ranch.

19 Q Where were you when he came?

20 A I was in the kitchen and I looked out the window
21 and I could just see somebody coming up the lane to the house.
22 He was about half way up the lane when I seen him.

23 Q What did you do?

24 A I didn't know who it was at first. And as he got a
25 little bit closer, then I could tell who it was and so I

1 stepped out of the house to see what was going on and talked
2 to him.

3 Q Did you talk with him?

4 A Yeah. I did.

5 Q What did he say?

6 A He told me that--when he got up to the house, he
7 came up to the steps and got to the steps and I asked him what
8 was going on. And he told me that Lew had been shooting at
9 him and he wanted me--he asked where Dad was and he wanted a
10 ride home.

11 Q Anything else he said?

12 A No. Just that that Lew had been shooting at him.
13 He wanted me to go with him back down to the truck and talk to
14 Lew again. But I had my little girl in the bathtub so I
15 couldn't. I told him I couldn't go and I asked him if he
16 wanted to come in the house and sit down, that dad was up
17 moving the sprinklers, and he said no, he'd just wait out
18 there on the steps. So I went back in the house.

19 Q Do you have any way of identifying approximately
20 when that was?

21 A It was--I'm not sure of the time. It was just, you
22 know, in the evening just as the sun was going down. It was
23 either down or, you know, it was dusk. I hadn't looked at the
24 clock, so I'm not sure of the time.

25 Q After you and he had the brief conversation, he

1 wanted you to go back with him, but you weren't able to
2 because you were taking care of your children. What did he do
3 and what did you do?

4 A I went in the house to get Melisa out of the
5 bathtub and put Kevin in.

6 Q What did he do?

7 A He was sitting on the steps when I went in
8 and--excuse me--I went in the house and after I got Melisa
9 out, I come out and he was gone. And my niece was there,
10 Mandy. She was outside hanging clothes and I asked her where
11 he went and she said she didn't know if he'd went up--

12 [INDICATED]

13 --or that way or what.

14 [INDICATED]

15 Q Your dad was not there then?

16 A No.

17 Q And he arrived?

18 A He come in just--I don't know. Probably 10 or 15
19 minutes after that, he come in the house.

20 Q Where did you meet your father?

21 A Just on the porch. I started to tell him what, you
22 know, was going on and, you know, I really didn't know what
23 was going on. I started to tell Dad what Lewis had told me
24 and that's when Lewis come through the door a second time.

25 Q How did he come through the door?

1 A He come through it. He didn't open it or nothing.
2 He knocked it off the hinges and come in. He broke the door
3 off the hinges and just come busting in.

4 Q Were you able to observe his demeanor?

5 A He was scared. He was real scared.

6 Q Did he say anything?

7 A He was saying all kinds of stuff and then he told
8 Dad to call the cops and he just said Lew had shot his buddy.
9 And Dad sat and talked to him then and then called up Brent.

10 Q When you came out of the bathroom, after having
11 taken care of your children, out into the kitchen area, you
12 say he was gone then?

13 A Yeah. He was gone then.

14 Q Do you recall doing anything else before your
15 father came in?

16 A Just I'd got Melisa's pajamas on her and got Kevin
17 out of the tub and I just had him in a towel while I was
18 talking to dad. I was just drying him off and was talking to
19 Dad and that's when Lewis came back.

20 MR. McIFF: I see.

21 You can cross examine.

22 THE COURT: Counsel?

23 CROSS EXAMINATION

24 BY MR. BLACKWELL:

25 Q Okay. I don't want to call you Mr. Morri11. We

1 know each other too well to do that. So, Harold, let me ask
2 you when Lewis came over the first time, he said that Lew had
3 shot at him, but he didn't say anything about David Kile being
4 shot at that time, did he?

5 A No. He didn't.

6 Q Did he state, also, that he wanted a ride to
7 Kingston?

8 A Yes. He did.

9 Q Now you will recall that you testified in
10 preliminary hearing.

11 A Um-hm.

12 Q You also recall that your testimony at that time
13 was that Lewis disappeared off the porch for approximately 20
14 to 30 minutes?

15 A Yeah. It was during the time when I got Melisa out
16 of the tub until dad was there. Probably was somewhere in
17 there.

18 Q 20?

19 A Yes.

20 Q 20 to 30 minutes?

21 A Yeah. Somewhere in there.

22 Q When Lewis showed up, he had a beer in his hand,
23 didn't he?

24 A Yes, he did.

25 Q In fact, he sat and drank that beer as you and he

1 talked.

2 A Yes.

3 Q Did you hear any shots that night?

4 A No. I didn't hear nothing.

5 [COUNSEL CHECKED NOTES]

6 MR. BLACKWELL: That's all I have. Thank you.

7 THE COURT: Counsel?

8 REDIRECT EXAMINATION

9 BY MR. McIFF:

10 Q Mr. Morrill, do you recall at any time that evening
11 looking at a clock?

12 A No. I never did look at a clock. I didn't have
13 any reason to, you know. I was just--

14 Q The times you've given us, are they estimates?

15 A Yes. They are.

16 Q When you left Lewis Sudweeks sitting on your porch,
17 went back in the bathroom, was your daughter in the tub then?

18 A Yes, she was.

19 Q You got her out?

20 A Yes.

21 Q And your little boy, put him in a towel?

22 A Put him in the tub. But in the meantime, while he
23 was in the tub, I got her pajamas and stuff on. Probably took
24 me 5 to 10 minutes. And then I got him out and then dad was
25 there by that time.

1 Q And was Lewis gone by that time?

2 A Yes.

3 Q So whatever time lapse it was, can you remember
4 doing anything other than getting your daughter out and then
5 putting your son in, and then you got her pajamas on and then
6 you got your son out and wrapped him in a towel and walked
7 back out? Lewis was gone and your dad came in?

8 A Yes, however long that took.

9 Q Okay.

10 MR. McIFF: I think that's all. Thank you.

11 RE CROSS EXAMINATION

12 BY MR. BLACKWELL:

13 Q Harold, you also said you went out and talked to
14 Mandy--?

15 A Yeah. I asked her where Lewis had went and she
16 said she didn't know if he'd went down the lane or up the road
17 where dad was changing sprinklers.

18 Q --and took your girl out, and your boy was in the
19 tub?

20 A Um-hm.

21 Q And you also gave him a bath during that time?

22 A Yes.

23 MR. BLACKWELL: That's all I have.

24 FURTHER REDIRECT EXAMINATION

25 BY MR. McIFF:

1 Q Do you have any way of knowing when Lewis Sudweeks
2 left your porch?

3 A I don't.

4 Q You were in the bathroom?

5 A Yeah. By the time I went in--just in the time I
6 went in and got Melisa out of the bathtub.

7 Q And came out with your boy?

8 A Come out--no. I got Melisa out of the bathtub and
9 put Kevin in. And I came out with Melisa and got her pajamas
10 on. When I came out, he was gone then.

11 MR. McIFF: No further questions.

12 THE COURT: Counsel?

13 MR. BLACKWELL: Nothing.

14 THE COURT: Thank you. That's all.

15 May he be excused?

16 MR. McIFF: He may.

17 MR. BLACKWELL: Yes.

18 THE COURT: All right.

19 MR. McIFF: I call Dale Morrill.

20 THE COURT: Would this be a good time to take a
21 recess?

22 MR. McIFF: Fine.

23 THE COURT: Ladies and gentlemen of the Jury, we're
24 about to take a recess for 10 minutes. Once again, it's the
25 duty of this Court to admonish you, you are not to talk about

ADDENDUM D

FILED
PIUTE COUNTY, JUNCTION, UTAH

MAY 29 1990

Valen H. Brew Clerk

By _____ Deputy

KAY L. McIFF
PIUTE COUNTY ATTORNEY
Attorney for Plaintiff
225 North 100 East
Richfield, Utah 84701
Telephone: 801 896-5441

IN THE SIXTH JUDICIAL DISTRICT COURT OF PIUTE COUNTY

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

LEW DAY,

Defendant.

AFFIDAVIT OF ROBERT NALWALKER

Case No. 89-CR-19

STATE OF UTAH)
 : ss.
COUNTY OF SEVIER)

ROBERT NALWALKER, being first duly sworn of oath
deposes and states as follows, to-wit:

1. I reside in Junction, Utah, am of adult age and
serve Piute County as a deputy sheriff.

2. I appeared at and assisted in trial proceedings in
the case State of Utah v. Lew Day, held in Junction, Utah,
beginning March 26, 1990 and continuing through March 30, 1990.

3. At a lunch recess during the course of the trial I
observed one juror, to-wit Grover Smith, emerge from the mens'
restroom. I was aware that the jurors were being taken to lunch

by court officials and I had seen them leave the building, enter motor vehicles and drive away moments before. I was surprised to see Mr. Smith and advised him that the other jurors had gone with court personnel and that he should have been with them. I told Mr. Smith I would go talk to the Judge and see what he wanted us to do. I went to the Judge's chambers, described the problem and asked for direction. The Judge told me to take the county clerk, who served as a bailiff, and deliver Mr. Smith to Dayna's Cafe where the other jurors had been taken. I went back out into the hallway and advised Mr. Smith what the Judge had said and told him that the clerk and I would take him to where the other jurors were located. The three of us entered my motor vehicle on the south side of the courthouse and we traveled without conversing with each other to Dayna's Cafe where Mr. Smith joined the other jurors .

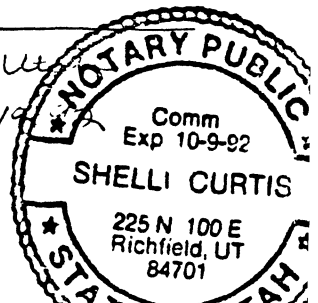
FURTHER AFFIANT SAYETH NOT.

DATED this 25 day of May, 1990.

Robert Nalwalker
ROBERT NALWALKER

SUBSCRIBED AND SWORN to before me this 25 day of May, 1990.

Shelli Curtis
NOTARY PUBLIC
Residing at: Richfield, UT
My commission expires: 10-9-92



AFFIDAVIT OF MAILING

I hereby certify that a full, true and correct copy of the above and foregoing AFFIDAVIT OF ROBERT NALWALKER was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid on the 25 day of May, 1990, addressed as follows:

Mr. Marcus Taylor
Mr. David A. Blackwell
Labrum, Taylor & Blackwell
P. O. Box 728
Richfield, Utah 84701

Stella Curtis

FILED
PIUTE COUNTY, JUNCTION, UTAH

JUN 14 1990
Valen H. Brown Clerk

By _____ Deputy

KAY L. McIFF
PIUTE COUNTY ATTORNEY
Attorney for Plaintiff
225 North 100 East
Richfield, Utah 84701
Telephone: 801 896-5441

IN THE SIXTH JUDICIAL DISTRICT COURT OF PIUTE COUNTY

STATE OF UTAH

STATE OF UTAH,	:	
	:	AFFIDAVIT OF GROVER SMITH
Plaintiff,	:	
	:	
vs.	:	
	:	
LEW DAY,	:	
	:	Case No. 89-CR-19
Defendant.	:	

STATE OF UTAH)
 : ss.
COUNTY OF PIUTE)

GROVER SMITH, being first duly sworn on oath deposes and states as follows:

1. I reside on the south edge of Circleville, Utah, am of adult age and served as a juror in the case State of Utah v. Lew Day.

2. During a lunch recess of the Lew Day trial, I came out of the restroom and noticed the other jurors were gone. I then had a brief conversation with Deputy Nalwalker regarding the fact that other jurors had been transported to a local cafe for lunch. Then deputy Nalwalker told me to wait. He returned in a

few moments and told me that he and the County Clerk would take me to the cafe where the other jurors had gone. I got in the Deputy's car and the three of us drove a mile or so to the cafe. We traveled in silence. I did not have any other conversation with Deputy Nalwalker during the trial.

3. The foregoing is true and accurate.

FURTHER AFFIANT SAYETH NOT.

DATED this 14 day of June, 1990.

Grover Smith
GROVER SMITH

SUBSCRIBED AND SWORN to before me this 14th day of June, 1990.

Calvin H. Brown
NOTARY PUBLIC
Residing at: Circleville, OH
My commission expires: 7-19-91