

1990

Utah v. Germonto : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Utah v. Frederick Joseph Germonto*, No. 900375.00 (Utah Supreme Court, 1990).
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BRIEF

DOCKET NO. 900375

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff/Appellee,

vs.

FREDERICK JOSEPH GERMONTTO,

Defendant/Appellant.

Case No. 900375

Priority No. 2

REPLY AND SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from a judgment and conviction for criminal homicide, murder in the second degree, a first degree felony; for robbery, a second degree felony, and for forgery, a second degree felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge presiding.

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FILED

MAR 10 1993

CLERK SUPREME COURT
UTAH

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STATE OF UTAH,)	
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Plaintiff/Appellee,)	
)	
vs.)	
)	
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REPLY AND SUPPLEMENTAL BRIEF OF APPELLANT

INTRODUCTION

The jurisdictional statement, issues presented for review, statement of the case, and facts have all been previously presented. (LDA Br. at 1-6; Supp. Br. at 1-3).¹ After the State filed its response brief, this Court granted appellant additional time to address in his reply brief an issue which had been previously raised in a different context. The Court has also granted the State time to respond on this issue in its new context. Therefore, appellant presents this brief in reply to some of the issues raised by the State in its response and to address the first issue concerning jury unanimity in the context of ineffective assistance of counsel.

¹Four prior briefs have been filed in this case. Salt Lake Legal Defenders filed an opening brief which will be referred to as LDA Br., defendant filed a pro se brief which will be referred to as Pro Se Br., alternative counsel, appointed after LDA's withdrawal, filed a supplemental opening brief which will be referred to as Supp. Br., and the State has filed a response to all of the briefs which will be referred to as State Br.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

Any constitutional provisions, statutes, or rules relevant to the disposition of this appeal are set forth in the text or addenda of this brief.

ARGUMENT

POINT I

THE HOMICIDE VERDICT VIOLATED MR. GERMONTO'S RIGHT TO A UNANIMOUS JURY VERDICT. MR. GERMONTO'S COUNSEL WAS INEFFECTIVE FOR NOT RAISING THE ISSUE.

In its opening brief, Salt Lake Legal Defender Association (LDA) raised an issue concerning the nonunanimous nature of the jury verdict in this case. The trial court instructed the jury on all four possible variants of second degree murder, i.e. a knowing and intentional homicide, or a homicide committed as a result of the actor's intent to cause serious bodily injury to another, or depraved indifference homicide, or a homicide committed during the commission of an enumerated felony. The trial court did not instruct the jury that it must be unanimous on which variant of second degree murder it found. While this issue has been settled with respect to the first three variants of second degree murder by prior case law from this Court, the issue presented in this case, whether all four variants of second degree murder can be presented to a jury without a concomitant unanimity instruction is an issue of first impression.

Mr. Germonto's trial attorneys did not object to the lack of a unanimity instruction nor did they propose that a unanimity

instruction be given. When LDA raised the issue in its brief it did not specifically allege either plain error or ineffective assistance of counsel. Rather the LDA brief relied on an apparent exception to the plain error rule which had been enunciated by this Court in State v. Breckenridge, 688 P.2d 440, 443 (Utah 1983) and State v. Jameson, 800 P.2d 798, 802-03 (Utah 1990). In Jameson, 800 P.2d at 802-03, this Court stated it was "obliged to consider [an issue] based on a constitutional question and [where] defendant's liberty is at stake." This proposition originated in State v. Breckenridge, 688 P.2d 440, 443 (Utah 1983). Current counsel, alternate counsel appointed after LDA's withdrawal, did not withdraw either of the preceding briefs and allowed them to stand as written, believing that the issue raised by LDA concerning jury unanimity was based on sufficient reasonable grounds articulated in Breckenridge and Jameson.

In its response brief, the State argues that according to a recent case issued by this Court, this Court is now prohibited from considering the jury unanimity claim because it was not properly preserved in the trial court and not properly raised on appeal. The case relied on by the State is State v. Brown, 201 Utah Adv. Rep. 4 (Utah 1992), in which this Court stated that the Breckenridge language "has resulted in some confusion regarding the waiver/procedural default rule. . . . We do not intend in Breckenridge to carve out an additional exception to our traditional plain error standard, and we now

expressly disavow any implications to that affect." 201 Utah Adv. Rep. at 5. The State argues that Brown applies directly to the issue raised by LDA and because it was not raised in another context, the issue should not be considered by this Court. However, by its order this Court has allowed the sides to address the issue in other contexts.

Furthermore, Mr. Germonito contends that Brown does not foreclose consideration of an issue raised in such a manner as was raised by the LDA brief. Rather, Brown, merely states that rather than considering such an issue under a constitutional standard, such issues would be reviewed "using the plain error standard." Brown, 201 Utah Adv. Rep. at 5. Mr. Germonito asserts that when this standard is applied, the trial court committed plain error. While the LDA brief did not use the words "plain error" or "manifest injustice," an examination of LDA's brief arguably shows that the plain error standard was met in this case.

Additionally, Mr. Germonito now asserts that his trial counsel was ineffective for allowing the jury to be instructed on all four variants of second degree murder without a concomitant unanimity instruction. Under either a plain error standard or an ineffective assistance standard, Mr. Germonito was prejudiced by the failure of the trial court to require a unanimous jury verdict.² To demonstrate a claim of ineffective assistance of

²"Plain error" is a recognized exception to the general rule that errors must ordinarily be preserved in the trial court. Utah R. Evid. 103(b). To substantiate a finding of plain error, the

counsel, the defendant must demonstrate deficient performance which resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Templin, 805 P.2d 182, 186 (Utah 1990). The Strickland court stated that deficient performance occurs when counsel has "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 87. Prejudice requires a showing that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 486 U.S. at 687.

At the time of the trial in this case, the case law on jury unanimity was well established in this state. Several cases had addressed the issue of unanimity with respect to jury verdicts in second degree homicide cases. Counsel should have been aware of those cases and also should have known that none of the cases addressed the issue raised by this case; i.e. whether a jury could have been instructed on all four variants of second degree homicide without a specific unanimity instruction. Counsel's failure to raise the issue via either an objection to the instruction or by offering an additional instruction constituted deficient performance.

appellate court must find from a review of the record that it should have been obvious to the trial court that it was committing error and that the error was harmful in that it affected the substantial rights of the defendant. Brown, 201 Utah Adv. Rep. at 5. In this case the plain error standard and the ineffective assistance standard are quite similar. The LDA brief covers the inherent error and the resultant prejudice. Therefore, the analysis in this brief deals only with ineffective assistance of counsel but much of it also applies to the plain error standard of review.

Utah Code Ann. §76-5-203 (1990) is the second degree homicide statute that was in effect at the time of the trial in this case. That statute states:

- (1) Criminal homicide constitutes murder in the second degree if the actor:
 - (a) intentionally or knowingly causes the death of another;
 - (b) intending to cause serious bodily injury to another he commits an act clearly dangerous to human life that causes the death of another;
 - (c) acting under circumstances evidencing a depraved indifference for human life, he engages in conduct which creates a grave risk of death to another and thereby causes the death of another;
 - (d) while in the commission, attempted commission, or immediate flight from the commission or attempted commission of aggravated robbery, robbery, . . . burglary, . . . causes the death of another person other than a party as defined in §76-2-202.

In State v. Standiford, 759 P.2d 254, 259 (Utah 1988), this Court held that the first three variants of second degree murder were logically equivalent. Previously, in State v. Russell, 733 P.2d 162 (Utah 1987), the Court held that a jury need not be unanimous in deciding which of the first three variants of second degree murder is applicable in any particular case because the variants are virtually equivalent. In a concurring opinion, Justice Stewart indicated his concern that the lead opinion might be applied to crimes other than second degree murder. Justice Stewart concluded that "because their mental states are so highly similar, from the point of view of mental functioning and culpability, I think the jury was, for essential constitutional purposes, unanimous on the mens rea element." 733 P.2d at 170. After an extensive analysis of the

Utah provisions and comparison with the Model Penal Code, Justice Stewart stated that he concurred with the lead opinion's result because:

Despite these departures from the Model Penal Code, it is clear from Russell, 106 Utah 116, 145 P.2d 1003, and the MPC Commentary that all mental states in §76-5-203(1)(a), (b), (c) are essentially forms of common law malice aforethought. Each is at least "an intention or design previously formed to do an act or admit to an act, knowing that the reasonable and natural consequences thereof would be likely to cause death or great bodily injury." Russell, 106 Utah at 126, 145 P.2d at 1007.

Not only is each mental state in the Utah statute a form of common law malice aforethought but each one also amounts to a varied form of depraved indifference murder. Certainly, intentionally causing death demonstrates depraved indifference for the value of the life taken. . . . Therefore, a juror who finds that a defendant who intentionally or knowingly committed a homicide must necessarily find depraved indifference because the defendant who intends to kill is aware that his conduct creates a grave risk of death.

A person who intends to cause serious bodily injury while doing an act "clearly dangerous" to human life, also acts with a depraved indifference to the value of human life. Serious bodily injury is defined as "bodily injury that creates and causes serious prominent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death." Section 76-1-601(9). A person whose "conscious objective or desire" is to cause that type of injury while committing an act clearly dangerous to human life, §76-2-103(1), also demonstrates depraved indifference. The objective depraved indifference judgment is made out when the nature of injuries the defendant intends to cause is "serious," as opposed to "slight." . . .

It follows that regardless of which mental state individual jurors relied upon in reaching this verdict, all agree that the

defendant knowingly engaged in conduct that created a grave risk of death of the victim and that he acted under circumstances that evidenced a depraved indifference to human life.

733 P.2d at 173-74.

Justice Stewart's opinion in Russell formed the basis for the decision in Standiford and is reflected in the lengthy discussion of depraved indifference contained in Standiford. According to the Standiford analysis, the depraved indifference variation of second degree murder is necessarily included in variations (a) and (b) of second degree murder. 769 P.2d at 259. Even if variations (a) and (b) are absent, the depraved indifference variation may still be present. This is so because the three variations form a continuum of mental states. Depraved indifference is more than the recklessness required for manslaughter but less than the intentional killing defined in variation (a) of the second degree murder statute. Standiford, 769 P.2d at 261-64. Depraved indifference is the least common denominator for the first three variants of second degree murder. However, any time either of the first two variations is present, the depraved indifference variation will also be present, because all three variations evidence at least depraved indifference. Therefore, the Russell Court was able to hold that a jury does not have to be unanimous in deciding which of the first three possible mental states is present in convicting of second degree murder because the three mental states are so closely related as

to be a variant of the same culpable mental state. 733 P.2d at 167.

However, the fourth variant of second degree murder, often referred to as the "felony murder rule," does not share the commonalty of mens rea with the first three variants. In fact, the Court has stated that the fourth variant of second degree murder requires no mens rea. State v. McCovey, 803 P.2d 1234, 1239 (Utah 1990); State v. Bell, 785 P.2d 390, 393 (Utah 1989). Rather, the Court has held that variant (d) makes an unintentional killing committed during the course of an enumerated felony a second degree murder. Id. In McCovey the Court stated the rationale for not requiring an intent to kill under the felony-murder rule:

The traditional common law purpose of the felony murder doctrine has been to allow the State to obtain a second degree murder conviction without proving any form of *mens rea*, or mental state. The felony murder statute automatically enhances the degree of the offense and punishment without the necessity of considering a *mens rea* or mental state, i.e. whether the felon intended to commit murder. In essence, it is a strict liability offense that enhances an otherwise unintentional killing to second degree murder.

A further purpose of the felony murder statute is to deter the use of force or weapons in the commission of a felony. If a felon knows that a homicide committed during the commission of a felony, whether accidental or unintentional, will be treated as a first degree felony in addition to the underlying felony being committed, he or she will be less apt to use deadly force or dangerous weapons.

803 P.2d at 1238-39. See also Standiford, 769 P.2d at 259.

In State v. Tillman, 750 P.2d 546, 577-80, 585-88 (Utah 1988), a majority of this Court held that the Utah Constitution required that the jury be unanimous as to every element of a crime and that the term "element" includes both conduct and the culpable mental state. See also Standiford, 769 P.2d at 250. The due process clause of the Fourteenth Amendment of the United States Constitution requires the same. In Re Winship, 397 U.S. 358 (1970).

In Russell and Standiford, the Court determined that because the first three variants of second degree homicide encompass virtually the same mental state, a jury can be unanimous even though individual jurors may decide that a different variant of the statute are involved. All jurors agree that a mental element is involved. However, when the fourth variant of second degree murder is added to the set of variants which the jury may consider, some of the jurors may find that no mental element is involved while others may find that the homicide was committed under some mental element. In effect, instructing on all four variants of second degree murder allows a jury to be nonunanimous with respect to the mental element involved in the crime. Some jurors will find a mental element while others need not find such an element to return a verdict of guilt. Such a variation clearly violates Tillman.

In State v. Moritzsky, 771 P.2d 688 (Utah Ct. App. 1989), the court of appeals held that counsel's failure to request a proper instruction on defense of habitation was deficient

performance. The court speculated that counsel's failure "to check the 'pocket-part' of the Utah Code" resulted in the deficient performance. 771 P.2d at 692. The court could conceive of no tactical basis for counsel's omission.

In this case all the cases previously cited had been issued by this Court prior to the trial in this case except McCovey.³ Therefore, counsel and the trial court should have been aware of the case law and of the problems of a nonunanimous jury verdict and of the potential for a nonunanimous jury verdict because of the jury instruction which included all four alternatives of second degree murder without requiring the jury to be unanimous on either the first three variants or the fourth variant. Nothing was to be gained by allowing the jury to be nonunanimous therefore, the decision could not have been a tactical decision of counsel. Rather, counsel's actions can only be viewed as deficient performance.

The prejudice inherent in a nonunanimous jury verdict was discussed by Justice Stewart in his concurring opinion Tillman. Justice Stewart stated:

The importance of preserving the principle of jury unanimity as to all "elements of an offense" can hardly be overstated. To dilute that principle by allowing jurors to disagree among themselves as to separate, alternative elements of the crime, even though they agree on the general conclusion that the crime . . . has been committed, is to lose the value of the synergistic affect of jurors acting as a group

³The proposition for which this brief cites McCovey was well-known from other cases at the time of trial. See e.g., Standiford, 769 P.2d at 259.

and reconstructing facts and applying the law. Nonunanimity permits a jury to refrain from coming to grips with determining precisely what the defendant did and then deciding whether that met the legal standards for defining the legal elements of the crime.

Nonunanimity as to alternative elements of a crime can also deprive the defendant of a defense to the charge. . . .

. . . Finally, if the principal of jury unanimity is relaxed, all the vaunted projections of proof beyond a reasonable doubt will be threatened. Requiring juror unanimity as to the crime itself only, rather than each element of the crime, would permit a jury to render inconsistent and potentially irrational verdicts because they may be based on conflicting and even inconsistent determinations of the facts. That is no small erosion of a fundamental principal of our criminal justice system.

750 P.2d at 578. As related by Justice Stewart, the prejudice inherent in counsel's deficient performance in failing to require a unanimous verdict as to the variant of second degree homicide deprived Mr. Germonto of the fair trial guaranteed him by the Utah and U. S. Constitutions.

Counsel's deficient performance prejudiced Mr. Germonto and this Court should reverse his conviction.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE CHARGES TO BE JOINED BECAUSE THE CHARGES DID NOT ARISE OUT OF A SINGLE CRIMINAL EPISODE.

In its opening brief, LDA noted that over the objection of defense counsel, the trial court allowed the prosecution to join in a single information the original forgery charge and the subsequent homicide and robbery/burglary charges. (LDA Br. at

14-18) In response, the State argues that the joinder was proper because the charges were part of a single criminal episode and the evidence of the forgery was otherwise admissible under Rule 404(b), Utah Rules of Evidence, in that "it supported defendant's identification in the homicide case." (State Br. at 26-31) Neither of the State's arguments is a valid reason for the joinder.

Conduct is part of a "single criminal episode" if the conduct "is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective." Utah Code Ann. §76-1-401 (1990). The statute requires both temporal proximity and commonality of purpose for two or more crimes to form a single criminal episode.

In this case, the forgery was accomplished fairly close in time to the homicide and robbery. However, the forgery was not a part of a single criminal objective. The State characterizes the single criminal objective as the objective of the defendant "to obtain 'things of value' from the victim." (State Br. at 28) However, the State presents no evidence which indicates that the defendant assaulted Mr. Lisonbee in order to obtain his check book or to commit a forgery. Rather, the only evidence presented at trial indicated that the defendant's killing of Mr. Lisonbee was in response to the latter's production of a dangerous weapon. (Supp. Br. at 6-15) The theft of items from Mr. Lisonbee's home occurred only as an afterthought after the victim had been rendered unconscious and probably dead. (T. 4 at 146-50) No

evidence, not even any circumstantial evidence, indicated that Mr. Germonto went to Mr. Lisonbee's house with the object of taking "things of value" from him. The State's assertions to the contrary are simply pure conjecture. The only inference supported by the evidence is that the forgery was a separate and distinct crime from any previous crimes committed by the defendant.

The State also argues that evidence of forgery would have been admissible at Mr. Germonto's homicide trial because Mr. Germonto's "possession of the forged check only minutes after Mr. Lisonbee's death supported defendant's identification as the murderer, as well as his motive and intent in committing the homicide." (State Br. at 29) However, the State overlooks the fact that identification was not an issue in this case. Mr. Germonto admitted that he hit Mr. Lisonbee. (T. 4 at 144-45) The primary issue with respect to the homicide was whether it was committed in self-defense.

Additionally, the State argues that joinder was proper because the forgery provided proof of motive. However, proof of motive is not required to maintain a criminal conviction. Therefore, contrary to the State's assertion, the evidence would not have been admissible under Rule 404(b).

The forgery was used to stigmatize the defendant and influence the jury's fair and dispassionate consideration of the evidence. "The effect of joinder was to permit the consideration of prejudicial evidence pertaining to charges on which the

evidence would have been inadmissible in a separate trial." State v. Tarafa, 720 P.2d 1368, 1370 (Utah 1986). As such, the trial court abused its discretion when it permitted the information to be joined.

POINT III

THE DEFENSE OF HABITATION INSTRUCTION WAS COMPLETELY INAPPLICABLE TO THIS CASE AND DEPRIVED MR. GERMONTO OF A FAIR TRIAL.

In its opening brief, LDA asserted that the defense of habitation instruction was erroneously given by the trial court. The instruction was inapplicable in this case and was prejudicial because the prosecutor misused it in seeking to meet the State's burden of proof. The effect was to lessen the burden of proof required by the State.

In response, the State claims that the evidence supported the trial court's giving of the defense habitation instruction and that the defendant could not object to the instruction on the ground that it diminished the prosecution's burden of proof. In support of its claim that the evidence supports the instruction, the State makes several erroneous assertions. For example, the State claims that the defendant "never feared fatal harm from Mr. Lisonbee." (State Br. at 33) However, the State ignores Mr. Germonto's testimony that he feared for his life when he saw Mr. Lisonbee with a knife in his hand. (T. 4 at 194) The State also claims that the evidence supports "a reasonable inference that while Mr. Lisonbee may have opened the door, defendant gained entry into the home by

assaulting Mr. Lisonbee." (State Br. 34) However, the State can point to no evidence which supports this "inference." For example, there is no evidence that Mr. Germonto entered the house carrying any type of implement that could have been used as a weapon, for example, a wrench.

Lost in its own maze of twisted inferences, the State fails to address the real issue, i.e. that the defense of habitation instruction given by the trial court pertains only to a statutory defense. The statute which gave rise to the instruction is found in a part of the Utah Code which is entitled "Justification Excluding Criminal Responsibility." Utah Code Ann. Title 76 Chapter 2 Part 4 (1990). The part concerns "conduct which is justified [as] a defense to prosecution" Utah Code Ann. §76-2-401 (1990). (Addendum A) The defense of habitation instruction was a non sequitur in this case. By giving the instruction, the trial court turned the entire concept of the statute on its head.

Additionally, even if the instruction was somehow appropriate, certain prerequisites must be met before such an instruction may be given. In In re R.J.Z., 736 P.2d 235, 236-37 (Utah 1987), this Court enumerated the requirements to be met before the defense of habitation statute may be invoked:

In order to avail himself of the justification provided by Section 76-2-405(1), the defendant must have had a reasonable belief that the force was necessary. We interpret the term "reasonable" to mean objectively reasonable. In order to be justified in using deadly force, certain other requirements must be

met. If the entry is a violent or surreptitious one, the defendant must have had a reasonable belief that the entry was made for the purpose of committing a violent act. Further, the defendant must reasonably believe that the force used was necessary to prevent the violence. The defendant would also be justified in using deadly force if he had a reasonable belief that the entry was for the purpose of committing a felony and that the force used was necessary to prevent the felony from being committed.

In 1985, the legislature amended section 76-2-405 to add the language now found in section 76-2-405(2). . . . After considering the language and the legislative history of this amendment, we are persuaded that the legislature intended that a legal presumption of reasonableness would arise whenever an entry is "unlawful" and "made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony."

The trial judge refused to make a finding as to whether the entry in this case was unlawful and forcible. We hold that such a finding is essential to the proper application of section 76-2-405. The first step in deciding whether any defendant is justified under section 76-2-405 is to determine what burden of proof the defendant and the State are respectively required to carry. It is impossible to allocate the burden of proof without first determining whether the defendant is entitled to the statutory presumption.

The instruction given in this case allowed the jury to "infer" that Mr. Lisonbee acted reasonably. (R. 267) this "presumption" of reasonableness is beneficial to the party receiving it inasmuch as it shifts the burden of proof to the other party. Moritzsky, 771 P.2d at 691. When given in its normal context, the effect is to shift the burden to the State. However, in this case the effect was to impermissably shift the

burden to Mr. Germonto. When combined with the prosecutor's argument (LDA Br. at 19-21), the instruction allowed the jury to presume that Mr. Germonto's self-defense claim was legally unavailable and that the burden of proof necessarily shifted to the defendant.

Furthermore, no evidence supported a finding that Mr. Lisonbee had a reasonable belief that force was necessary. No evidence supported a finding that Mr. Germonto's entry into Mr. Lisonbee's house was other than invited. No evidence supported a finding that Mr. Lisonbee's use of force was necessary to prevent violence. No evidence supported a finding that Mr. Germonto's entry was for the purpose of committing a felony. Finally, no finding was made by the trial judge that the entry was unlawful and forcible as required by R.J.Z. In short, even if the giving of the instruction was appropriate, the necessary prerequisites required by R.J.Z. were not met.

The trial court's use of the defense of habitation instruction was not justified by the statute, was not supported by the evidence, did not comport with R.J.Z., and impermissably shifted the burden of proof to the defendant.

POINT IV

**THE ROBBERY CHARGE SHOULD HAVE BEEN DISMISSED
BY THE TRIAL COURT BECAUSE THE PROSECUTION
FAILED TO PRESENT ANY EVIDENCE THAT THE ROBBERY
WAS ACCOMPLISHED BY MEANS OF FORCE OR FEAR.
IN THE ALTERNATIVE, THE ROBBERY CONVICTION WAS
NOT SUPPORTED BY SUFFICIENT EVIDENCE.**

In his supplemental brief, Mr. Germonto asserted that the robbery charge was unsupported by the evidence and, as a

matter of law, should have been dismissed because the prosecution failed to establish all of the required elements that demonstrate that a robbery occurred.

The State responds by claiming that the defendant has not marshaled the evidence to support his contention, that the evidence did support the robbery conviction and that "under the res gestae rule, it is inconsequential that the death of the victim preceded the [robbery]." (State Br. at 36-42)

The State's contention that the evidence has not been marshaled is simply untrue. Pages 8 through 11 of the defendant's supplemental brief clearly details the evidence concerning the robbery.

The "evidence" which the State claims supports the conviction does not include two crucial pieces of evidence. First, the State ignores Mr. Germonto's testimony that before any items were taken, Mr. Lisonbee was at least unconscious and probably dead. Also ignored is the medical examiner's testimony that Mr. Lisonbee could have lived for only a period of one to perhaps as much as fifteen minutes after the blows were inflicted. (T. 3 at 33) The State can point to no evidence other than its own conjecture and speculation that Mr. Germonto formed an intent to take property from Mr. Lisonbee before Mr. Lisonbee died. Indeed, the evidence supports Mr. Germonto's version of events, i.e. that Mr. Lisonbee confronted Mr. Germonto with a knife and pushed Mr. Germonto while cutting his hand. Mr. Germonto, fearing for his life, began to hit Mr. Lisonbee with

the wrench that was in his hand. Regardless of whether Mr. Germonto intended to kill Mr. Lisonbee or acted in self-defense, it is clear that at the time Mr. Lisonbee was bludgeoned, no evidence supports the inference that Mr. Germonto intended to take anything from Mr. Lisonbee. Only after Mr. Lisonbee lay unconscious did Mr. Germonto form the intent to take some of Mr. Lisonbee's property in order to facilitate his escape from Salt Lake City. (T. 4 at 151) No evidence presented by the prosecution contradicts this theory of the case. Indeed, the prosecution argued this theory of the case to the jury in closing arguments when the prosecutor stated that Mr. Germonto should be found guilty of the robbery because "he robbed Mr. Lisonbee after he killed him." (T. 5 at 46)

The question which the State avoids and which this Court must address is whether the robbery statute which requires an unlawful or intentional taking of personal property in the possession of another "from his person or immediate presence, against his will, accomplished by means of force or fear" can be accomplished when the victim is unconscious or dead and the defendant inflicted the wound which caused the victim's injuries without an intent to take the victim's personal property. The cases cited in the appellant's supplemental brief clearly demonstrate that if a murder is committed with no intent to commit a robbery, no robbery has occurred. "If a theft is conceived of, and executed after a murder, it is a theft but it

is not an armed robbery." State v. Lopez, 762 P.2d 545, 551 (Ariz. 1988).

Furthermore, as argued in the appellant's supplemental brief, if this Court finds, as other courts have, that Mr. Germonto's robbery conviction was not supported by sufficient evidence, because the taking was not executed by means of force or fear, then Mr. Germonto's murder conviction must also fail. (Supp. Br. at 15-16) If some jurors predicated their finding of guilt on the felony murder rule and the underlying felony is not supported by the evidence, then the homicide conviction also lacks evidentiary support.

Under this set of circumstances, Mr. Germonto may have committed a murder and a theft, but not a robbery. However, theft is not one of the enumerated felonies in §76-5-203(d) which will support a conviction for murder in the second degree under the felony-murder rule. Therefore, as argued in Point I above, because some of the jurors could have found that the murder was committed under variant (d) of the second degree murder statute, the murder conviction must fail because of the prospect that the jury was not unanimous on all of the elements which constituted the offense of second degree murder.

POINT V

**THE PROSECUTOR'S CONDUCT VIOLATED MR. GERMONTO'S
CONSTITUTIONAL RIGHTS AND EITHER PLAIN ERROR WAS
COMMITTED OR COUNSEL WAS INEFFECTIVE FOR NOT
CURTAILING THE PROSECUTOR'S CONDUCT.**

In both the LDA opening brief and appellant's supplemental brief, arguments were advanced that the prosecutor engaged in

prejudicial misconduct when he questioned Mr. Germonto concerning when the defendant disclosed the version of events which he related during his testimony. Additional error was committed when the prosecutor argued to the jury that Mr. Germonto should not be believed because he had not disclosed the version which was the subject of his testimony to his own attorney until shortly before trial. Because the prosecutor's questioning and argument were not objected to at trial, the issue was raised in the context of both plain error and ineffective assistance of counsel. (LDA Br. at 22-27; Supp. Br. at 16-25)

The State responds to the argument by claiming that no attorney-client privilege existed which could have been infringed by the prosecutor; that even if the content of the letter were privileged, the defendant waived the privilege by answering the prosecutor's questions on cross-examination; that the prosecutor's comments did not invade the defendant's right to remain silent; and that the defendant was not prejudiced by the prosecutor's conduct.

Communications subject to the attorney-client privilege are those which promote the best possible representation of the client and encourage candor between the attorney and the client. Gold Standard v. American Barrick Resources, 801 P.2d 909, 911 (Utah 1990). Furthermore, each case must be considered individually to determine whether the communication in question can properly be considered confidential under the privilege. Id. The threshold inquiry to determine whether a communication is

confidential is whether the communication was intended by the client to be confidential. Hofmann v. Condor, 712 P.2d 216, 217 (Utah 1985) (Zimmerman, J., dissenting) citing McCormick on Evidence §91, at 217 (E. Cleary 3d ed. 1984).

In this case, Mr. Germonto's letter was initially delivered to the trial judge. However, the trial judge did not read the letter and immediately passed it to defense counsel. (M. 5 at 10) Defense counsel stated that the letter "totally, and completely changes our defense." (R. 313 at 3-4). Mr. Germonto's answer to the prosecutor's question at trial indicates that the letter was indeed directed to his attorney and was only passed to the judge to facilitate delivery to the attorney. (T. 4 at 226) Furthermore, the answer indicates Mr. Germonto's desire to communicate candidly with his attorney. Clearly, the letter was a candid communication from Mr. Germonto and was designed to promote the best possible representation of him by his attorneys. Therefore, the letter was clearly a confidential communication subject to the attorney-client privilege.

The State claims that even if the communication was subject to the attorney-client privilege the confidentiality was waived when the following exchange occurred between the prosecutor and Mr. Germonto during trial:

Q. When did you first tell anybody about this, "he-attacked-me-with-a-knife" part of the story?

A. The first time that I told the truth about what has happened was right after my meditation that the Lord told me that, "the truth is the only way. The truth is the only thing that is going to save you from that. The truth is the

only thing that you can do now." And so, I wrote my attorney, which was directed to the judge, a letter explaining all of the things that I said here today.

(T. 4 at 226)

Rather than volunteer information which would waive the attorney-client privilege, Mr. Germonto's answer was a direct response to the prosecutor's prejudicial question which was gleaned only because the prosecutor possessed knowledge of the existence of the confidential letter. Indeed, if the prosecutor did not have knowledge of the confidential letter, he would have been unable to ask the question. The prosecutor did not know before the existence of the letter what Mr. Germonto's defense would be to the charges, i.e. whether Mr. Germonto would admit to killing Mr. Lisonbee in self-defense or whether he would deny any participation in the crime. The prosecutor took advantage of his knowledge of the existence of the confidential letter to ask Mr. Germonto questions which impinged on Mr. Germonto's attorney-client privilege and his right to remain silent. A properly interposed objection by defense counsel or questioning of the prosecutor's motivation in asking the question by the trial court would have prevented the prosecutor from ascertaining any information from Mr. Germonto.

Counsel's error in not objecting to the question clearly cannot be termed a tactical decision because nothing could have been gained by Mr. Germonto's answer which plainly affected his credibility. Rather, the failure to object was an oversight which was deficient performance. The State claims that Mr.

Germonto could not have been prejudiced by either the error by the trial court or the ineffectiveness of his trial counsel because as the State claims, Mr. Germonto's "credibility was not central to the case" (State Br. at 51) The State's argument incorrectly discounts the reality that Mr. Germonto's credibility was at issue. If the jury believed Mr. Germonto's version of the events, then it would have found that Mr. Germonto acted in self-defense and that he had not committed a murder.

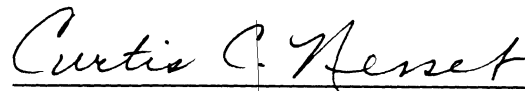
The prosecutor's questions and comments in closing argument infringed on Mr. Germonto's attorney-client privilege and his right to remain silent. The trial court's and defense counsel's inaction prejudiced Mr. Germonto's case.

CONCLUSION

For the reasons set forth above and in the preceding briefs filed on behalf of Appellant, Mr. Germonto's conviction should be reversed and remanded for a new trial or dismissal.

Respectfully submitted this 10th day of March, 1993.

NYGAARD, COKE & VINCENT



CURTIS C. NESSET
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies were delivered to the office of the Attorney General, 236 State Capitol, Salt Lake City, Utah, this _____ day of March, 1993.

ADDENDUM A

PART 4

JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY

76-2-401. Justification as defense — When allowed.

Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed:

- (1) When the actor's conduct is in defense of persons or property under the circumstances described in Sections 76-2-402 through 76-2-406 of this part;
- (2) When the actor's conduct is reasonable and in fulfillment of his duties as a governmental officer or employee;
- (3) When the actor's conduct is reasonable discipline of minors by parents, guardians, teachers, or other persons in loco parentis;
- (4) When the actor's conduct is reasonable discipline of persons in custody under the laws of the state;
- (5) When the actor's conduct is justified for any other reason under the laws of this state.

History: C. 1953, 76-2-401, enacted by L.
1973, ch. 196, § 76-2-401.

76-2-405. Force in defense of habitation.

(1) A person is justified in using force against another when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation; however, he is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:

(a) the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence; or

(b) he reasonably believes that the entry is made or attempted for the purpose of committing a felony in the habitation and that the force is necessary to prevent the commission of the felony.

(2) The person using force or deadly force in defense of habitation is presumed for the purpose of both civil and criminal cases to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry is unlawful and is made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony.

History: C. 1953, 76-2-405, enacted by L.
1973, ch. 196, § 76-2-405; 1985, ch. 252, § 1.

Amendment Notes. — The 1985 amendment designated the first paragraph as Subsection (1); redesignated former Subsections (1) and (2) as Subsections (1)(a) and (1)(b); inserted "surreptitiously, or by stealth" in Sub-

section (1)(a); substituted "in the habitation" for "therein" in Subsection (1)(a); inserted "he reasonably believes" in Subsection (1)(a); substituted "in the habitation" for "therein" in Subsection (1)(b); added Subsection (2); and made minor changes in phraseology.