2001

State of Utah v. Jesus Israel Rosillo : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20010268-CA
v.	:	
JESUS ISRAEL ROSILLO,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION FOR AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE TIMOTHY R. HANSON, PRESIDING

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JURISDICTION AND NATURE OF PROCEEDING

This is an appeal from a conviction for aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, presiding. This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2001).

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

Whether the court correctly denied defendant's request for a lesser included offense instruction on robbery?

"We review a trial court's refusal to give a jury instruction for correctness." *State v. Pearson*, 943 P.2d 1347, 1350 (Utah 1997).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following determinative constitutional provisions, statutes and rules are

attached at Addendum A:

Utah Code Ann. § 76-2-202 (1999);
Utah Code Ann. § 76-2-402 (1999);
Utah Code Ann. § 76-6-301 (1999);
Utah Code Ann. § 76-6-302 (1999).

STATEMENT OF THE CASE

Defendant, Jesus Israel Rosillo, was charged with aggravated robbery, a first degree felony (R. 4-5). A jury convicted him of the offense (R. 116). The trial court sentenced defendant to a statutory five-to-life term, enhanced with a consecutive one-year term for use of a firearm (R. 121-22). Defendant filed a timely notice of appeal (R. 124). The Utah Supreme Court transferred the case to this Court (R. 140-42).

STATEMENT OF THE FACTS[1]

Evidence at trial of defendant's involvement in the aggravated robbery

Just before 2:00 a.m., on August 18, 2000, Steve Lund, a bellman at Embassy Suites Hotel, drove to the Ute Car Wash, located at the corner of 300 South and 300 East in Salt Lake City, to wash a company shuttle van (R. 144:12-14). He was alone and no other persons were at the car wash (R. 144:14-15). As he was vacuuming the inside of the van, two men approached him from behind (R. 144:14-15). The two men stood next to each other, about five feet from Lund (R. 144:15, 31). One of the men pointed a 9 mm handgun at him from waist level (R. 144:16). The other man, defendant, said to Lund, "Give me your

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[1] The facts are recited in a light most favorable to the jury's verdict. *See State v. Wright*, 893 P.2d 1113, 1115 (Utah App. 1995).

money" (R. 144:17). Lund reached into his back pocket and pulled out a "wad" of cash he had earned as tips and handed it to defendant (R. 144:17). Defendant pocketed the money (R. 144:17). Defendant then demanded Lund's wallet (R. 144:17-18). Believing his life was being threatened, Lund complied and handed his wallet to defendant (R. 144:18). Defendant opened the wallet and put it in his pocket (R. 18-19). Throughout the incident, defendant's companion, Andrew Mallory, remained silent, and Lund did not see either of his assailants communicate with each other (R. 144:17-19, 51). As soon as defendant had taken the wallet, he and Mallory walked northward, along 300 East (R. 144:19-20). Defendant and his cohort accomplished the robbery in no more than a minute (R. 144:20).

Lund continued to vacuum the van for a few moments to dispel any thought that his assailants might have he was following them (R. 144:20). He then got into the van and drove back to the hotel, where the police were called (R. 144:21). Within five minutes of his assailants' departure, Lund gave the dispatcher a description of defendant and Mallory (R. 144:21).

Jeffrey Carter, a Salt Lake City Police Officer, was in his patrol car in the rear parking lot of the police station when he heard the dispatch concerning the robbery (R. 144:43-45). The police station is only one block north of the scene of the robbery, and he responded immediately (R. 144:45). He did not find anyone at the scene of the robbery. However, he did receive information that a taxi cab had just picked up two men answering the description of Lund's assailants from an apartment building located between the police station and the

car wash and that the cab was headed toward 700 North and Redwood Road (R. 144:45-46). Within ten or fifteen minutes of the initial dispatch, Officer Carter located the cab at State Street and North Temple and stopped it (R. 144:47). At this point, other officers, including Officer Michael Hamideh joined the stop (R. 144:47, 60-62). Inside the cab, the two officers found defendant and Mallory (R. 144:48, 64). Officer Carter had defendant exit the cab, patted him down in search for a weapon, and found in defendant's back pocket a folded wad of money (R. 144:49-50). Officer Hamideh performed the same procedure on Mallory and discovered a wallet containing Lund's driver's license and credit cards (R. 144:64-68) He also found a "wad of cash" in the amount of $169.00, approximately the same amount that Officer Carter found on defendant (R. 144:67-68). About $330.00 was taken from Lund (R. 145:39). Lund was driven to the scene of the stop, where he identified defendant and Mallory as the two individuals who had robbed him and the credit cards as his own (R. 144:21-22, 68, 73-74).

Approximately fifteen minutes after the police dispatch was broadcast, Sergeant Zane Swim went to defendant's apartment, at 228 South 300 East, about half a block from the Ute Car Wash (R. 144:75-78). At the apartment, Sergeant Swim and officers accompanying him found defendant's wife (R. 144:78-79). Sergeant Swim informed defendant's wife that defendant had been involved in a robbery and received permission to search the apartment for evidence (R. 144:79). On the floor of a small water heater closet, Sergeant Swim found a handgun with a wallet sitting on top of it (R. 144:79-80). Lund testified that the gun was

like that the one Mallory held on him and that the wallet was like his own (R. 144:27, 81-82; State's Exhibits 4, 5, 7 and 8).

Defendant's Denial of Involvement in the Robbery

Defendant testified that Mallory and his family were living with him and his wife until Mallory could get his own apartment (R. 145:3-8). On the night of the robbery, he and Mallory were walking near the car wash. As they approached it, Mallory suggested that they rob someone and as they neared the victim from behind, Mallory pulled "something" out of his pants (R. 145:9-12). According to defendant, he initially thought Mallory was going to ask the victim something, but he eventually recognized that Mallory had pulled a gun and was pointing it at close range at the victim's chest (R. 145:11-14). Defendant claimed Mallory demanded money from the victim and, although defendant did not say anything at that point, the victim handed defendant his wallet and a "wad" of money (R. 145:14). Defendant took it because he was concerned that Mallory might shoot the victim and he did not know what else to do - - "it seemed to me I didn't have any choice, . . . so I just decided to go along with it" (R. 145:15). Defendant then "turned around and walked away as soon as possible and . . . walked back to the apartment" (R. 145:15).

Defendant testified that when Mallory caught up with defendant moments later, he said to defendant, "Give me the wallet and the money," which defendant did (R. 145:15, 33). When they arrived at defendant's apartment, defendant told Mallory that he (Mallory) could no longer stay there (R. 145:16). Mallory retorted that he had no place to go (R. 145:16).

Mallory then awakened his wife and talked with her. According to defendant, Mallory's wife approached him, explained that she had no place to go, and handed him $150.00 with the understanding that she would remain, but that Mallory would leave (R. 145:16). Defendant, however, refused the arrangement, insisting that they both had to leave by the following day. He also explained that he was going to try to spend the night at his uncle's house (R. 145:16-17). Defendant then called a taxi cab to take him to his uncle's house (R. 145:17).

When the taxi arrived, defendant allowed Mallory to join him, with the unstated intention of dropping Mallory off somewhere (R. 145: 17-18). En route to his uncle's house, defendant and Mallory were stopped by police officers (R. 145:18). After receiving his *Miranda* rights, defendant agreed to speak with the officers and told them everything that happened at the car wash (R. 145:18, 43-44).[2]

On cross-examination, defendant continued to emphatically deny all involvement in the robbery: (1) he only intended to go out to a nearby 7-11 store to get some food for his wife and children at about 2:00 a.m., just before the incident (R. 145:24-26); (2) he paid no attention to Mallory's suggestion that they rob someone (R. 145:28); (3) he never saw the gun until Mallory pulled it out (R. 145:22); (4) he moved away from Mallory when he saw Mallory pull out the gun (R. 145:27-28); (5) at the point Mallory drew the gun it was too late to say anything (R. 145:28); (6) he never asked the victim for money (R. 145:29-30); (7) only Mallory asked the victim for money (R. 145:29); (8) he could not understand why Lund

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[2] *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966).

handed the cash and wallet to him when only Mallory had made the demands (R. 145:30-31); (9) he "was put in the situation," and was only "trying to keep things calm" (R. 145:31); (10) he was not sure that the money that Mallory's wife gave him actually belonged to Lund, although he admitted that it might have been Lund's money (R. 145:34); (11) he denied telling Officer Carter that Mallory, as opposed to Mallory's wife, gave him the money the police found on him (R. 145: 35-36, 39). In further confirmation of his denial of complicity, defendant told Officer Carter that he did not participate at all in the robbery (R. 145:44).

At trial, defendant excepted to the trial court's refusal to give a lesser included offense instruction on robbery (R. 145:53). The trial court denied the request because there was no evidence that defendant was not aware that a firearm was being used at the time the robbery took place (R. 145:53).

SUMMARY OF ARGUMENT

The trial court correctly denied defendant's request for a lesser offense instruction on robbery under the test set out in *State v. Baker*, 671 P.2d 152, 158-59 (Utah 1983). The State recognizes that robbery is a lesser included offense of aggravated robbery and that there was a rational basis in the evidence to acquit defendant of the charged offense, based on defendant's testimony. However, because defendant denied any culpability for the robbery, there was no rational basis for also convicting him of the lesser offense, as required by *Baker*. Even if there was error, it was harmless because there was compelling testimonial and physical evidence of defendant's complicity in the aggravated robbery.

ARGUMENT

THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S REQUEST FOR A LESSER INCLUDED OFFENSE INSTRUCTION BECAUSE THERE WAS NO RATIONAL BASIS FOR CONVICTING DEFENDANT OF SIMPLE ROBBERY; ANY ERROR WAS HARMLESS BECAUSE EVIDENCE OF DEFENDANT'S GUILT FOR COMMITTING AGGRAVATED ROBBERY WAS COMPELLING

Defendant claims the trial court improperly refused to give the jury a lesser included offense instruction on simple robbery, thereby leaving the jury with a choice only to convict or acquit him of the greater offense of aggravated robbery. Aplt. Br. at 8-9, 17. Defendant argues that the lesser included offense instruction should have been given because there was a rational basis in the evidence to conclude that defendant was not a party to Mallory's use of a gun in committing an aggravated robbery. Aplt. Br. at 13-19. He also argues that there was a rational basis for the jury to find that he had committed only simple robbery. Aplt. Br. at 19-20. Finally, defendant argues that the trial court's error was prejudicial because evidence of the aggravated robbery was not nearly so great as in other cases that found a trial court's failure to provide a requested lesser included offense instruction harmless. Defendant's argument fails because there is no rational basis in the evidence to convict him of simple robbery under either the State's or his rendition of the events. Even if there were error, it was harmless because evidence of his committing aggravated assault is compelling.

A. A defendant's request for a lesser included offense instruction is warranted only when there is both a rational basis in the evidence to acquit on the greater offense and to convict on the lesser offense.

Under *State v. Baker*, 671 P.2d 152, 158-59 (Utah 1983), a defendant is entitled to a

requested lesser offense instruction only if (1) the statutory elements of the greater and lesser crimes overlap and the evidence of the greater offense includes proof of some or all of the overlapping elements, and (2) the evidence at trial provides a "rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *See also* Utah Code Ann. § 76-1-402(3)(a), -(4); *State v. Pearson*, 943 P.2d 1347, 1350 (Utah 1997); *State v. Standiford*, 769 P.2d 254, 266-67 (Utah 1988); *State v. Shabata*, 678 P.2d 785, 790 (Utah 1984).

As a general rule, this Court has liberally construed the *Baker* requirements to allow a lesser offense instruction when requested by a defendant. *State v. Hansen*, 734 P.2d 421, 424 (Utah 1986) (plurality opinion); *see also State v. Piansiaksone*, 954 P.2d 861, 871 (Utah 1998). This "serves the fundamental policy of permitting the jury to find a defendant guilty of any offense that fits the facts, rather than forcing it to elect between the charges the prosecutor chooses to file and an acquittal." *Hansen*, 734 P.2d at 424. Also, a lesser offense instruction in some cases may be necessary to allow a defendant to place his theory of the case before the jury. *See Piansiaksone*, 954 P.2d at 870; *Standiford*, 769 P.2d at 266-67.

Nevertheless, a defendant's right to a lesser offense instruction is neither absolute nor unqualified. *Baker*, 671 P.2d at 157; *Standiford*, 769 P.2d at 266-67; *State v. Crick*, 675 P.2d 527, 531-32 (Utah 1983). The right to such an instruction is not based on "some supposed notion of the jury's compassion or leniency," and the "'jury's power to dispense mercy, by favoring the defendant despite the evidence, should not be allowed to so dominate the trial

proceedings as to impede or interfere with the jury's primary fact-finding function.'" *Baker*, 671 P.2d at 157 (quoting *People v. Mussenden*, 127 N.E.2d 551, 554 (N.Y. 1955)).

The State does not dispute that, for the purposes of this case, robbery is a lesser included offense of aggravated robbery, as defendant contends. Aplt. Br. at 9-12. A lesser offense is included when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" Utah Code Ann. § 76-1-402(3) (a) (1999); *Baker*, 671 P.2d at 158 (citing section 76-1-402(3)(a)). "A person commits aggravated robbery if ***in the course of committing robbery***, he . . . uses or threatens to use a dangerous weapon as defined in Section 76-1-601[.]" Utah Code Ann. § 76-6-302 (1)(a) (1999) (emphasis added). *See Hansen*, 734 P.2d at 424 ("[T]he [*Baker*] test is whether the elements overlap at all.").

Further, the State does not contest that under the *Baker* standard, there was a rational basis in the evidence for acquitting defendant of the charged offense, aggravated robbery. Aplt. Br. at 13-19. It was undisputed that only Mallory used a dangerous weapon (R. 144:16; 145:11-14). Defendant was charged as a party to aggravated robbery, all of the State's evidence and closing argument was directed to proving defendant guilty as an accomplice, and the jury was instructed accordingly (R. 4-5, 91, 105, 108; 144:12-82; 145:61-66).[3]

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[3] Utah Code Ann. § 76-2-202 (1999), provides for party liability:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

However, defendant's entire testimony was that he never intended to take anything from Lund, but rather acted only to calm the situation and prevent Mallory from acting rashly (R. 145:3-39). Since the rational basis test "does not require the court to weigh the credibility of the evidence," *see Baker*, 671 P.2d at 159, the State is constrained to recognize that, notwithstanding defendant's patently doubtful credibility, that defendant established a rational basis in the evidence upon which the jury could have acquitted him of aggravated robbery.[4]

However, it is not enough to find that the evidence would support an acquittal on the charged offense. Rather, if "the evidence is ambiguous and susceptible to alternative explanations, the trial court must give the lesser included offense instruction if any one of the alternative interpretations provides ***both*** a rational basis for a verdict acquitting the defendant of the offense charged ***and*** convicting him of the included offense." *State v. Velarde*, 734 P.2d 449, 451 (Utah 1986) (citations omitted) (emphasis added). Utah appellate courts have regularly found that a request for a lesser included offense instruction was properly refused where, although there was a sufficient quantum of evidence to acquit on the greater offense,

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[4] *But see See Standiford*, 769 P.2d at 267 (holding no rational basis for negligent homicide where, in spite of the defendant's claims that the victim threatened him with a gun, 107 stab wounds in the victim's body bespoke at least a knowledge of a risk of death); *State v. Clayton*, 658 P.2d 624, 626 (Utah 1983) (no rational basis for belief that circumstances provided legal justification for homicide where, in spite of the defendant's claims that he shot the victim to prevent himself from a knife attack, two eyewitnesses testified that victim never threatened the defendant in any way); *State v. Lopez*, 626 P.2d 483, 484-86 (Utah 1981). These cases suggest that there is a point at which a defendant's self-serving statements are so incredible that standing alone they do not present a rational basis for acquittal of the charged offense.

the same evidence necessarily led to an acquittal on the lesser offense. *See State v. Shabata*, 678 P.2d 785, 790 (Utah 1984) (manslaughter instruction unwarranted in murder conviction where there was no evidence that the defendant ever heard a tape recording that could conceivably have given rise to killing "in heat of passion," and all of the evidence presented by the defendant was that he did not argue with, injure, or kill the victim); *Crick*, 675 P.2d at 533-34 (manslaughter instruction properly refused in murder conviction where defendants' attempted to show that they had not caused the victim's death); *Baker*, 671 P.2d at 160 (criminal trespass instruction unwarranted in burglary conviction where defense of intoxication was to negate any specific intent); *State v. Cox*, 826 P.2d 656, 662-63 (Utah App. 1992) (instruction on criminal trespass properly denied in burglary conviction where defendant testified he never entered the premises); *State v. Sherard*, 818 P.2d 554, 560 (Utah App. 1991) (instruction on negligent homicide unwarranted in murder conviction where witness testified the defendant acknowledged stabbing the victim).

Contrary to defendant's assertion, there is no rational basis in the evidence for convicting defendant for mere robbery. Defendant asserts that the jury could have convicted him of simple robbery "based on Rosillo's testimony that he participated in the matter, in that he unlawfully took the money from Lund." Aplt. Br. at 19. However, as set out in detail at pages five through seven, above, defendant at trial consistently denied any intention whatsoever to rob Lund, with or without a gun. Defendant testified that as he and Mallory approached Lund, Mallory suggested that they rob him and almost immediately pulled out

a gun, pointed it at Lund, and demanded money (R. 145:9-14). In these circumstances, defendant did not think he had any choice other than to go along with Mallory, in an effort to keep the situation calm and from escalating (R. 145:15, 28, 31). Defendant claimed that he paid no attention to Mallory's suggestion that they rob Lund, that he never asked Lund for money, and that he was nonplused by Lund's handing him, rather than Mallory, the money and the wallet (R. 145:28-31). Suggesting that he intended and wanted no part of the incident, defendant also claimed that he immediately left the scene, handed the money and wallet over to Mallory as soon as he asked for it, told Mallory that he could no longer stay at his house, and planned to leave Mallory off somewhere en route to his uncle's house (R. 145:15-18, 33). In further support of this theory, defendant indicated that the was not even sure that the money Mallory's wife allegedly gave him for her rent were the ill-gotten gains of robbing Lund (R. 145:34). Finally, defendant told Officer Carter that he did not participate in the robbery (R. 145:44). In other words, defendant's testimony amounts to nothing more than a claim that defendant was a mere bystander to all of Mallory's criminal acts, not merely his use of a dangerous weapon, and that he did nothing to solicit, encourage, or aid Mallory in the robbery.

Defendant also suggests that Lund's testimony supports the giving of a lesser offense instruction on robbery. Aplt. Br. at 20. However, all of the referenced testimony goes only to show, albeit not very persuasively, that Lund might have been mistaken in identifying defendant as the man who demanded his money. Such evidence, however, would only tend

to refute defendant's complicity in any type of robbery and thus fail to satisfy the *Baker* requirement that there be a rational basis for a conviction on the lesser offense.

Defendant compares this case to *Hansen*, wherein the supreme court found the trial court improperly refused a request for a lesser offense instruction. *Hansen*, 734 P.2d at 424, 427-28. *Hansen*, however, is distinguishable from this case. In *Hansen*, the defendant, Hansen, and an accomplice went to the victim's house, hog-tied the victim, and stole items of personal property. *Id.* at 422. The house was then set on fire, which killed the victim. *Id.* Hansen and his accomplice then immediately drove to another house where they did essentially the same things as at the first house; however this second victim escaped. *Id.*

Hansen was charged with first degree murder for having knowingly killed the first victim during the commission of an aggravated arson. *Id.* At trial, the State presented evidence tending to prove that Hansen committed robbery and burglary, as well as arson. *Id.* at 422-23. However, Hansen testified that he held a gun on the victim and then tied him up only to accomplish the robbery/burglary, and that he was completely unaware that his accomplice in those offenses had set fire to the house, from which he fled. *Id.*

The trial court instructed the jury on the offense of first degree murder as charged. *Id.* at 423. Consistent with his testimony about his participation in the robbery/burglary, Hansen requested a lesser offense instruction on felony-murder, based on this theory that the victim's death was unintentional and occurred during a robbery or burglary, to which he admitted. *Id.* The trial court denied the request, although it did give felony-murder and

manslaughter instructions, premised on Hansen's participation in the arson. *Id.* Hansen was convicted of first degree murder, as charged. *Id.*

The Utah Supreme Court found that the requested instruction should have been given:

> The second element of the Baker test also was satisfied: the evidence provided a rational basis for the jury to acquit on the first degree murder charge and convict on the requested second degree murder, charge. On the facts before it, ***if the jury believed Hansen's testimony***, it could rationally have found (i) that he was not guilty of arson and did not have the mental state required for first degree murder, but (ii) that Hansen did commit robbery or burglary, that Stewart was killed during the course of that crime, and that Hansen did not intend or know that Stewart's death would result. This would warrant a verdict of guilty on Hansen's requested felony-murder instruction. [Emphasis added.]

Id. at 424, 427-28. Elaborating on its holding that the trial court's error was prejudicial, the court observed that by refusing the requested instruction the trial court never gave the jury the opportunity to consider whether Hansen might have been guilty of some offense related to his admitted participation in the robbery/burglary, as opposed to the arson. *Id.* at 428.

In contrast, as set out above, defendant's testimony went only to his innocence on both the charged offense of aggravated robbery and simple robbery. In sum, because defendant's entire testimony and any evidence adduced on appeal was that defendant played no part in any robbery, there was no rational basis in the evidence for the requested lesser offense instruction. Thus, if the jury believed defendant's testimony it was bound to acquit him, not to convict him of a lesser offense he denied committing. *See State v. Shabata*, 678 P.2d 785, 790 (Utah 1984); *Crick*, 675 P.2d at 533-34; *Baker*, 671 P.2d at 160; *State v. Cox*, 826 P.2d 656, 662-63 (Utah App. 1992); *State v. Sherard*, 818 P.2d 554, 560 (Utah App. 1991). In

any event, any error in the court's refusing to give defendant's requested lesser offense instruction on robbery was harmless.

B. Any error in refusing the requested instruction on robbery was harmless in light of the compelling evidence of defendant's guilt for aggravated robbery.

"'An erroneous decision by a trial court cannot result in reversible error unless the error is harmful.'" *Piansiaksone*, 954 P.2d at 870 (finding instructional error harmless where there was no evidence to support manslaughter conviction) (quoting *State v. Robertson*, 932 P.2d 1219, 1227 (Utah 1997)). "'Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings. Put differently, an error is harmful only if the likelihood of a different outcome is sufficiently high that it undermines our confidence 'in the verdict.'" *Id.* (quoting *Robertson*, at 1227). In this case, defendant was not entitled to an instruction on simple robbery because "the evidence in support thereof was so slight that all reasonable people would have to conclude against the defendant on that point." *Piansiaksone*, 954 P.2d at 871 (no basis in evidence that the defendant killed the victim as a result of extreme emotional disturbance) (citing *State v. Harding*, 635 P.2d 33, 34 (Utah 1981)).

In an effort to persuade this Court that any error in refusing his requested lesser offense instruction was prejudicial, defendant argues that the evidence of the charged offense in this case was not so compelling as in other cases in which an erroneous refusal to give a lesser offense instruction was found harmless. Aplt. Br. at 24–29. In support, defendant

cites *Baker* and *State v. Kruger*, 2000 UT 60, 6 P.2d 1116. Neither of these cases, however, turned on a harmless error analysis, but rather on a failure to present a rational basis for either acquittal on the charged offense or conviction on the lesser offense.

In *Baker*, the defendant, charged with burglary, acknowledged breaking into a gas station and forcibly opening a locked desk. *Baker*, 671 P.2d at 159. His defense at trial was that he was too intoxicated to have formed the necessary intent for the offense. *Id.* The only evidence of intoxication was the testimony of a friend who testified that he observed symptoms of intoxication in the defendant's behavior earlier in the day. However, the witness also testified that when the defendant was later stopped while driving, the police smelled the defendant's breath, but did not give him a field sobriety test or prevent him from driving away. *Id.* The Utah Supreme Court found that there was not a sufficient quantum of evidence regarding defendant's capacity to form an intent, and therefore the defendant was not entitled to a lesser included offense instruction on criminal trespass. *Id.* at 160. Alternatively, the court found that even if the evidence were sufficient on the question of intent, it would also have defeated his claim of intent to commit criminal mischief. *Id.*

Similarly, the court in *Kruger* found no error in the trial court's refusal to give a lesser offense instruction. *Kruger*, 2000 UT 60, ¶16. In *Kruger*, the defendant was charged with felony murder for killing an automobile driver while trying to rob him. *Id.* at ¶10. At trial, Kruger requested a lesser included offense instruction on manslaughter, contending that the shooting was the result of extreme emotional disturbance, or in the alternative, recklessness.

Id. In support of his request, Kruger offered the testimony of his sister, who testified that although Kruger told her that he had shot someone while attempting to commit a robbery, she did not initially believe him because he often fantasized or exaggerated. *Id.* at ¶17. The court found that this speculative testimony "[did] not constitute a sufficient quantum of evidence to provide a rational basis to acquit Kruger of attempting to rob [the victim] and thus acquit him of felony murder." *Id.* at ¶19.[5]

Defendant also argues that the evidence in support of harmless error in *State v. Evans*, 2001 UT 22, 20 P.3d 888, far outstrips the inculpatory evidence in this case. Aplt. Br. at 24-27. In that case, the defendant was charged with attempted aggravated murder of a police officer during a traffic stop. *Id.* at ¶¶1-2. At trial, defendant requested a lesser included offense instruction on manslaughter, which the trial court refused. *Id.* at ¶18. The *Evans* court found that Evans was entitled to the instruction based only on his testimony that he did not know the victim was a police officer. *Id.* at ¶19. However, the court found the error harmless because two occupants in Evans' car testified that they and Evans knew they were being "pulled over," and because several witnesses on the street, the three police officers involved in the stop, and the occupants of Evans' car, testified that the victim/officer's patrol car clearly displayed flashing emergency lights. *Id.* at ¶¶20-21.

As noted above, the ultimate test of harmlessness is whether the alleged error creates

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[5] The court then arguably gave what might be considered a harmless error opinion, noting that no reasonable jury could have disregarded the testimony of four witnesses to whom Kruger had confessed the offense. *Kruger*, 2000 UT 60, ¶19.

a sufficient likelihood of a different outcome so as to undermine the reviewing court's confidence in the verdict. As discussed below, evidence of defendant's guilt in committing aggravated robbery readily satisfies the harmless error standard. Moreover, even if this Court regarded *Baker* and *Kruger,* along with *Evans*, as measuring sticks for the application of harmless error analysis, the compelling evidence of defendant's guilt would compare favorably.

Lund testified that defendant and Mallory both approached him from behind while he was alone at the car wash at 2:00 o'clock in the morning (R. 144:12-15). When Lund turned around, he saw defendant and Mallory standing next to each other, only five feet from him (R. 144:15-16). Mallory pointed a 9 mm handgun at him (R. 144:16). Defendant said to Lund, "Give me your money" (R. 144:17). Lund handed defendant a "wad" of cash, which defendant pocketed (R. 144:17). Defendant then demanded Lund's wallet, which Lund also relinquished to defendant, feeling his life was being threatened (R. 144: 17-18). Defendant opened the wallet, looked into it, and then closed it and put it into his pocket (R. 144:18-19). In all, Lund had approximately $330.00 taken from him by defendant (R. 145:39). Lund never saw his assailants communicate with each other. The entire incident lasted no more than a minute, after which defendant and Mallory immediately left (R. 144:17-20).

Within a half-hour of the incident, defendant and Mallory were apprehended together in a taxi cab not far from the scene of the crime (R. 144:21, 47). Officers searched both Mallory and defendant. On Mallory they found Lund's driver's license and credit cards and

a "wad of cash" in the amount of $169.00 (R. 144:64-68). On defendant they also found a folded "wad" of money in the approximate amount of $169.00 (R. 144:49-50; 145:67-68). In defendant's apartment, within one-half block of the crime scene, police found a handgun like the one Mallory used and a wallet Lund described as like his own, hidden on the floor of a small water heater closet (R. 144:27, 79-82).

The evidence undisputedly proves that Lund was the victim of an aggravated robbery. The only evidence that defendant was not an accomplice to the entire incident is his own testimony, which amounted to a repeated, consistent denial of any responsibility for any robbery at all (R. 145:9-44). In particular, defendant testified that the robbery was Mallory's idea in which he played no active part except to keep the situation calm by accepting Lund's money after Mallory, not he, demanded it (R. 145:9-15). After the robbery, defendant claimed that he tried to dissociate himself from the event by immediately leaving the scene, handing the money and wallet over to Mallory as soon as he asked for it, telling Mallory that he could no longer stay at his house, and in intending to leave Mallory off somewhere en route to his uncle's house (R. 145:15-18, 33).

However, the facts belie defendant's testimony and, consequently, his credibility. There is nothing in Lund's rendition of the events to indicate that defendant did not play as active a role in the aggravated robbery as Mallory. Additionally, defendant went beyond any appearance of simply placating Mallory when he made a second demand for Lund's money (R. 144:17-18). More importantly, the physical evidence rebuts defendant's denial of

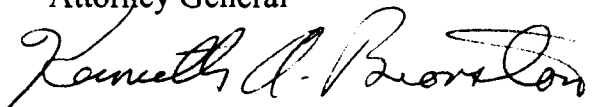
complicity. Both he and Mallory, within one-half hour after the robbery, were each found with almost exactly half of the sum of money stolen from Lund (R. 144:64-68; 145:39). "Defendant asks much of the jury," *see Evans*, 2001 UT 22, ¶23, in suggesting that the money found on him was essentially the $150.00 allegedly given to him by Mallory's wife, since defendant himself testified that Mallory and his wife were staying with him because they "didn't have anything and didn't have any place to go" (R. 144:145:8, 16). Finally, a wallet like Lund's and a handgun like that used in the robbery were found on the floor of the water heater closet in defendant's apartment, from which defendant had assertedly excluded Mallory (R. 144:27, 79-82). All of this evidence not only destroyed defendant's credibility, the only counterpoise to Lund's rendition of the events, but also constituted independent physical evidence in support of defendant's complicity in the aggravated robbery. In sum, any error in the trial court's refusing defendant's requested lesser included offense instruction on simple robbery was harmless.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's conviction be affirmed.

RESPECTFULLY SUBMITTED this 29th day of October, 2001.

MARK L. SHURTLEFF
Attorney General



KENNETH A. BRONSTON
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CERTIFICATE OF HAND DELIVERY

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were hand delivered to Linda M. Jones and Lisa J Remal, Salt Lake Legal Defender Assoc., attorneys for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 29th day of October, 2001.

Kenneth A. Bronston

ADDENDA

ADDENDUM A

76-1-402. Separate offenses arising out of single criminal episode — Included offenses.

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) 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.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

76-2-202. Criminal responsibility for direct commission of offense or for conduct of another.

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

76-6-301. Robbery.

(1) A person commits robbery if:

(a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear; or

(b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft.

(2) An act shall be considered "in the course of committing a theft" if it occurs in an attempt to commit theft, commission of theft, or in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

76-6-302. Aggravated robbery.

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes serious bodily injury upon another; or

(c) takes an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.