

2016

**State of Utah, Plaintiff/ Appellee, vs. Tracy Scott, Defendant /
Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee,

vs.

TRACY SCOTT,

Defendant / Appellant.

Case No: 20140995-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF
UTAH, FROM A CONVICTION OF MURDER, A FIRST DEGREE FELONY,
BEFORE THE HONORABLE JUDGE DAVID MORTENSEN

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Oral Argument Requested

Appellant is incarcerated on this case

FILED
UTAH APPELLATE COURTS

JUN 23 2016

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ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT SUBMITTED THE VERDICT-URGING INSTRUCTION TO THE JURY

A. Colloquies with the Jury

The State contends that when the trial court ignored the jury's question about the definition of "substantially caused" it was an "even-handed approach" which "communicated that all of the juror's views were worth consideration." Appellee's Replacement Brief at 21-22. According to the State, because all of the jurors were "concerned about with what 'substantially caused' meant and how this factor applied to the case" the trial court's refusal to address the concern would have applied equally to them all. Appellee's Replacement Brief at 22. This is an unrealistic of human nature in view of the record.

When the jury told the court it was at an absolute impasse, 6-2, it made it very clear that the only reason they had not reached a verdict was that “two feel that ‘substantially caused needs to be ‘the majority of the time.’” R.182. Logically, six jurors did not feel “substantially caused” needed to be the majority of the time. They were saying that this issue, the meaning of the term “substantially caused” was the only thing standing between them and a verdict.

But the trial court did not resolve or even address the question of the jury’s confusion of the term “substantially caused”. R.280:94-95. The court read the supplemental instruction and sent the jury back to deliberate again. It made no mention of the fact that the impasse was caused by a question about the meaning of “substantially caused”, it did not comment upon whether that concern was worthy of an impasse, it made no mention of the possibility of a mistrial if the impasse could not be resolved, and it made no attempt to instruct them on how to persist in deadlock if it they were committed to do so. Instead it ignored the problem and told them how important this trial was, and that the trial had been done well, implying that the jury should be able to reach a verdict, even without knowing what “substantially caused” meant.

The State asserts that because the “jury’s note indicated here that its impasse went to a definition, not to the verdict, the trial court’s request for the jury to continue deliberating was sound.” Appellee’s Brief at 25. Appellate counsel cannot make sense of this distinction. It is as if the State is admitting that an impasse as to the verdict would have been more significant (and thus more

necessary to honor with a mistrial) than an impasse as to the meaning of special mitigation. But this distinction is meaningless, especially in this case.

There was no question in the evidence that Scott shot his wife. There was no question about whether or not he was guilty of murder. The only question for the jury to decide was whether or not special mitigation applied. And according to the jury, that question came down to the meaning of the term “substantially caused” and the degree to which Scott’s own conduct contributed to his emotional distress. This impasse not only “went to a definition”, it went to Scott’s qualification for special mitigation, it went to the verdict. In the juror’s minds, if the minority of jurors was right, and “substantially caused” required the State to prove Scott caused his own emotional distress the majority of the time, according to the jurors, Scott could have qualified for special mitigation. If the majority was right, and “substantially caused” did not require the State to prove Scott caused this own distress the majority of the time, according to the jurors, Scott may not have qualified for special mitigation.

But the trial court’s response to the jury’s note led the jurors to believe that their concerns about the meaning of “substantially caused”, and in turn the merits of special mitigation, were not serious enough to prevent a verdict. See Appellant’s Replacement Brief at 34-35. Even though they had told the judge this issue had caused an “absolute impasse”, they were told because trials are difficult and expensive, they need to continue to deliberate. They were told to get over this impasse. This told the two jurors that their belief about the meaning of

“substantially caused” was insignificant in comparison to the value of the trial, and the need for a verdict. In reality, the jurors in the minority were told they needed to stop worrying about the meaning of “substantially caused”. The supplemental instruction, by not addressing the concern raised by the jury, instructed the jury to ignore the concern. This was coercive.

B. ABA Guidelines

The State claims in its brief that the trial court followed the ABA guidelines by giving an instruction prior to deliberations, and then, when it appeared the jury was unable to agree, it gave a supplemental instruction. Appellee’s Brief at 23. This is technically accurate as far as it goes. What the State does not acknowledge is that the supplemental instruction was not consistent with the ABA guidelines. These inconsistencies, combined with the context in which the instruction was provided, made the supplemental instruction coercive under the circumstances.

Instruction 26 is a proper instruction, nearly identical to the instruction recommended by the ABA. It discloses that the jury has a duty to deliberate (note it says nothing of any obligation to reach a verdict), it directs the jurors to decide the case for themselves, to change their opinion if convinced it is erroneous, and it directs jurors to not surrender their honest convictions for the “mere purpose of returning a verdict”. R.185. This is a proper, non-coercive instruction, and if the trial court had merely repeated it, Scott would not be raising this claim on appeal. But instead of following the ABA recommendations, to “give or repeat an

instruction as provided” in the ABA standard, the trial court crafted its own supplemental instruction, one which contained considerations not provided in the ABA standards. See R.180.¹

The jury had properly been instructed in Instruction 26, and after knowing that they should not “surrender [their] honest convictions” they told the judge they “are at an absolute impasse” because they disagreed about the meaning of the term “substantially caused”. R.182. As explained by trial counsel, this note told the judge “they have discussed it with each other and they cannot come to an agreement that they are differing opinions which they cannot come to an agreement, and that continuing to deliberate will make it so that somebody has to give up their honestly held convictions.” R.280:82-83. After the jury made the nature of their absolute impasse known, rather than merely repeating the uncoercive ABA instruction as recommended by the ABA, the trial court responds with its own instruction describing the “significant expenditure of time and effort” involved in the trial, telling the jury that the trial had been tried the best it could be and they should not expect that another trial would be easier to resolve. R.180.

Just like the coercive instruction in *State v. Harry*, 2008 UT App 224, the

¹ The State’s citation to the ABA recommendation is incomplete. The State asserts that the guideline directs that a “court may require the jury to continue their deliberations and may give or repeat an instruction.” Appellee’s Brief at 23. But the guideline actually directs that the court “may give or repeat an instruction *as provided in section (a)*.” ABA §5.4(b) (emphasis added). This error in the State’s citation is important in light of the fact that the State is supporting a supplemental instruction that contains factors not provided in section (a).

supplemental instruction here came after the jury had expressed its inability to reach a verdict and directed the jury to consider the “significant expenditure of time and effort” of a trial. This consideration, when considered in context, placed on the jury and undue burden of having to consider how much trouble it would be to try the case again. Taking all these factors into account, this Court should have substantial doubts about the integrity of the jury’s deliberation process.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE WHEN IT FAILED ADMIT THE THREAT TESTIMONY SUPPORTING SPECIAL MITIGATION

A. Deficient Performance

The State has characterized the second issue incorrectly. It claims Scott is challenging trial counsel’s effectiveness by trying to prove he was “ineffective for not *seeking* admission of the specific wording of the victim’s alleged threat”. Appellee’s Replacement Brief at 2 (emphasis added). This is misdirection. There can be no doubt, trial counsel *sought* admission of the threat evidence. The record is clear, the defense wanted to admit the content of the threat and the trial court stopped it based on an incorrect hearsay objection. The State is now trying to rewrite the record by inventing some tactical purpose utterly rebutted by the record. The State believes that if it can persuade the Court that trial counsel consciously decided not to admit the threat testimony, then it can show this was a reasonable tactical decision. But in order to persuade the Court that the evidence was not admitted because counsel did not want to admit it, the State must

persuade the Court not to look at the record. Scott hopes the Court will not be persuaded.

According to the State, trial counsel may have believed that having the jury hear the words Teresa used to threaten Scott was not as helpful to the defense as only having the jury learn that some unspecific threat was made. Therefore, according to the State, trial counsel did “not seek to admit the specific words of Teresa’s alleged threat.” Appellee’s Replacement Brief at 32. In some hypothetical world, in some make believe trial, this could have been the story we tell. But in the real world, in this case, where we have a recording of what happened, this explanation is manifestly inaccurate.

Look to the record. It is perfectly clear, the defense **sought** to admit the threat evidence. R.278:113, R.291:113.² Scott was on the stand testifying about all the circumstances which led to his emotional distress before the shooting. He talked about the history of fighting between he and his wife. He talked about the fighting in the days and hours immediately before the fight. He talked about the guns kept in the safe under the dresser, and about how the safe had been opened and one of those guns, the silver one that belonged to Teresa, had been removed from the safe. All of this testimony led to the point at which Scott was going to tell

² After Scott had testified that he began about the threat on Wednesday after seeing the gun missing from the safe, trial counsel asked “When you say a threat was made, are you saying – who threatened who?” R.278:113. Scott was not allowed to answer. Defense counsel then tried to have Scott disclose what he was thinking, but because Scott “was thinking [about] the threat [he] had received the day before” the court again stopped the testimony. R.278:113.

the jury that Teresa had threatened to shoot him with the exact gun that was now missing from the safe.³

After trial counsel had elicited all this evidence, after he had laid the groundwork for the threat evidence that would have tied the gun to Scott's distress, when Scott tried to disclose the details of the threat the State immediately objected as hearsay. Defense counsel then failed to respond that the evidence was non-hearsay, and the trial court sustained the State's objection. This failure is difficult to explain, perhaps in the heat of trial counsel's mind went blank, perhaps he is not as familiar with the rules of evidence as he should be. Whatever the reason, the failure to respond was an error. And the State's attempt to turn that error into strategy is a fantasy, easily rebutted by the record.

Never again did the defense refer to the non-specific threat. Counsel did not argue in closing that the threat caused Scott to fear for his life, or that this non-specific threat was the source of Scott's distress. Defense counsel did not encourage the jury to "imagine what the words were", or even remind them that a threat had been made. Appellee's Replacement Brief at 34. The trial court had ruled, there was no way to "dance around and get a threat" admitted. R.291:113. As far as the trial court was concerned, the threat evidence had not been admitted, so it was no longer part of the defense's argument in support of special mitigation. The State now attempts to rewrite history and create an imaginary

³ This is further supported by both Scott's and Gale's affidavits attached to Scott's 23B Motion for Remand. They both make it patently clear, the defense intended to introduce the specific details of Teresa's threat.

world where defense counsel takes advantage of the trial court's erroneous hearsay ruling in order to improve the mitigation defense, wherein the jury's imagination runs wild considering all the horrible and distressing things someone⁴ may have said to Scott. This is unreasonable.

According to the State, "once the trial court ruled the statement inadmissible hearsay, counsel may well have reconsidered and concluded that he would actually be better off without the specifics." Appellee's Replacement Brief at 34. This is a strange argument. According to the State, after the court excluded the evidence defense counsel then decided it didn't want to admit it. As if he had any choice at that point. Counsel had failed to properly argue the rules of evidence and the court had ruled against him. This imagined after-the-fact change in tactic cannot qualify as a conceivable tactical basis justifying counsel's initial error. It cannot be a reasonable tactical strategy to incorrectly argue the rules of evidence in the first place and then decide you are better off having been wrong.

And even if the State's argument made sense in theory, it finds no support in the record, and in fact ignores the portions of the record where the State argued the exact opposite point. The record clearly shows it was not, and could not have been, trial counsel's intent to use the lack of specific evidence to his

⁴ Although the State presumes the jury would have known it was Teresa who made the unspecified threat, based on the testimony, and the Court preventing Scott from answering "who threatened who?", it is not clear the jury would have even known who's threat to imagine. R.278:113.

advantage.

First of all, nothing in trial counsel's conduct after the court ruled the threat was inadmissible shows he was able to magnify the effect of Scott's limited testimony about the threat. Although the term 'threat' is used many times after the judge's hearsay ruling, the majority of those instances were when the State was trying to prove Scott had threatened Teresa at earlier times, or when the State argued Teresa was not threatening Scott when he shot her.⁵ Not once did defense counsel argue, or even imply, that the unspecified threat from Teresa to Scott played a role in special mitigation.⁶ Not once did defense counsel even bring out the fact that Teresa had made an unspecified but serious threat to Scott, and not once did counsel direct the jury to infer "that the threat was greater than what it actually was." Appellee's Replacement Brief at 19. Defense counsel did not and could not tactically expect the jury would magnify the vague notion of the threat

⁵ See R.278:150 (on cross-examination Scott is asked whether he threatened Teresa during their fights); R.278:151-52 (on cross-examination Scott is asked about profanity and threats throughout their marriage); R.278:168 (on re-direct Scott clarified that the profanity and threats throughout the marriage were also used by Teresa against Scott); R.279:82 (Thayne Scott testified he didn't think Teresa ever threatened Scott); R.279:86-87 (Thayne Scott testified Scott threatened to kill Teresa "multiple times", "10 or 12" times); R.279:89 (Thayne Scott testified he could not think of any threats during a specific fight involving the garage door); R.280:36 (in closing the State argued Scott's children heard him threaten to kill her); R.280:40 (in closing the State argued Teresa "was no threat" to Scott while she was sitting on the bed). None of these references to a threat involved the defense using Scott's limited testimony about the unspecified threat.

⁶ Defense counsel does use the term 'threatened' in closing one time but it is in context of describing the difference between self-defense and special mitigation. R.280:43. He makes no reference to the threat Scott was prevented from describing to the jury.

from the limited testimony Scott was allowed to give. Instead, the record shows counsel was forced to abandon the threat evidence, and its role in special mitigation, altogether when the court ruled the threat was inadmissible.

Secondly, by the State's own argument at trial, there was "no basis" in the evidence, without the specific language of the threat, to support Scott's fear that Teresa had "it out for him and she's going to shoot him." R.279:14. The State argued, to prevent Scott from having the jury instructed on the defense of special mitigation, that Scott "created this scenario [in his mind] where she was trying to kill him or had some harmful intent toward him and there is no basis for that in the facts that he was seeing." R.279:17. The State noted "according to [Scott's] testimony" Teresa was in the room and the gun was missing from the safe but "she doesn't make any threatening gestures to him, she doesn't brandish the gun, she doesn't point the gun at him...[,] [m]aybe she was cleaning it, maybe she was changing it from defensive ammunition to target ammunition... but there is no basis, there is nothing in the evidence to suggest that... her having the gun out of the safe, merely having it out was any threat to him or that he had any reason to take it that way." R.279:13. The State emphasized the lack of testimony about the gun, "I think that idea is also really bolstered by the fact that he made it very clear that a gun has never been introduced into any of their disputes." R.279:13-14.

But the State was only able to argue this because trial counsel had failed to properly respond to the erroneous hearsay objection. It certainly would not have been the case that the gun had not been introduced into any of their disputes if

Scott had been allowed to testify about Teresa's threat. At trial, when the State wanted to prevent Scott from having the jury instructed on special mitigation, it argued there was no basis to support it because no evidence about her gun had been introduced. The State now wants to flip 180 degrees and argue that the limited threat testimony presented to the jury, without any mention of her use of the gun or impact of her statements on Scott, was better for Scott's special mitigation than evidence that was excluded. This is a complete reversal of its position at trial and nonsensical in light of the record and the affidavits.

There is no conceivable tactical purpose for trial counsel to have been wrong about whether the threat evidence being hearsay. The State's attempt to turn this into some plan to get non-specific threat evidence admitted is fantastical. The record is clear, the evidence was admissible, defense counsel wanted to admit it, when the evidence was not admitted counsel did not use its exclusion to Scott's advantage. This was deficient performance.

B. Prejudice

The State argues that Scott cannot prove prejudice because "the jury heard Defendant's entire mitigation defense". Appellee's Replacement Brief at 35. This isn't true. The *entire* mitigation defense included evidence of Scott's wife telling him she had been recently shooting her gun, that she had shot well, and that Scott had interpreted her statements as a threat to use the gun against him. This evidence, not presented to the jury, was central to Scott's mitigation defense, and the State's attempt to minimize or ignore it should not be taken seriously.

The standard for prejudice in an ineffective assistance of counsel claim requires the defendant to show there is a "reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). This means the Court should look at what actually happened at trial, and consider, if things had been properly done, is there a reasonable chance Scott could have received a different outcome. But rather than looking at the record in this case and considering what actually happened, the State's arguments on this point avoid the relevant portions of the record as much as possible, because to examine the record is to see that the jury actually considered special mitigation. The State reargues the merits of special mitigation anew, rather than admitting that the jury seriously considered it even without some of the most important evidence.

During deliberations, a minority of the jury believed Scott's extreme emotional distress was not substantially caused by his own conduct because he was not the source of the distress the majority of the time. These jurors believed that Scott may not be to blame for the extreme emotional distress he was suffering at the time of the shooting. They believed that Teresa's role in their fighting, in the family strife, was potentially significant enough to mitigate Scott's guilt. They believed this even without knowing that Teresa had discussed shooting her gun, and without knowing Scott believed Teresa had threatened to shoot him. The jury believed this even without being able to put together the final pieces of the puzzle.

They jury heard that when Scott entered his room and found Teresa had taken her gun from the safe. But what they didn't hear was that Scott believed Teresa had threatened to shoot Scott with that very gun. The jury was at an absolute impasse on the question of special mitigation without even hearing the evidence that tied the entire defense together. If the truncated, handicapped, special mitigation defense caused an absolute impasse on this issue, that could only be overcome by a dynamite instruction, it is no stretch to find that the complete defense would have improved Scott's case.

Instead of examining what happened in this case, with this jury, the State's brief reexamines some hand-picked evidence and argues that it does not support Scott's special mitigation defense. See Appellee's Replacement Brief at 35-38. It is as if the State wants the Court to find as a matter of law that Scott was not entitled to special mitigation. This is an incorrect argument. The trial court found there was a reasonable basis in the evidence to have the jury instructed on special mitigation. R.279:18. The State has not challenged that ruling. This Court is not called upon to revisit anew the questions about whether Scott's distress was extreme, whether there was a reasonable explanation, or whether Scott substantially caused the distress. That was the jury's job after Scott made the initial showing. The record shows the jury believed there were significant reasons to accept the mitigation defense as it was presented. The record shows the jury took the mitigation defense seriously, even without the threat evidence. The question this Court must ask is whether there is a likelihood of a more favorable

result with the additional evidence supporting the mitigation defense. Instead of reweighing all the evidence, this Court need only consider whether there is a reasonable probability the jury would have felt differently about the meaning of “substantially caused” if it had learned Scott was worrying about the fact that Teresa had threatened to use that silver gun on him.

This Court should not hesitate to find a reasonable likelihood of a more favorable outcome for Scott if the jury had heard the threat evidence. The record clearly demonstrates the jury had real concerns about whether or not Scott was the source of his distress. Evidence which would have strongly suggested that his distress was caused by Teresa’s threat, which he interpreted as a threat to use her gun on him, could easily have pushed the jury over the edge in Scott’s favor. And even if the Court does not think the jury would have unanimously found special mitigation applied, there can be little doubt that the minority jurors who had already settled into an absolute impasse on special mitigation would have been fortified in their resolve not to acquiesce to a verdict. In that case, we should presume the trial court would have eventually agreed to a mistrial. Either way, these likely outcomes sufficiently establish that trial counsel’s deficient performance prejudiced Scott’s defense.

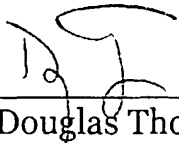
CONCLUSION AND PRECISE RELIEF SOUGHT

Because the trial court provided an *Allen* instruction which was coercive under the circumstances, this Court should reverse Scott’s conviction and remand

for a new trial.

Because trial counsel provided ineffective assistance of counsel by failing to properly respond to the State's incorrect hearsay objection, and thereby failing to admit evidence that Scott had been threatened, Scott asks the Court to reverse his conviction and remand for a new trial.

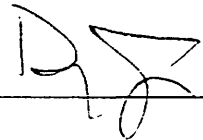
RESPECTFULLY SUBMITTED this 23rd day of June, 2016.



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Appointed Appellate Counsel

CERTIFICATE OF SERVICE

I certify that I mailed two copies of this Reply Brief, along with a PDF version, to the Utah State Attorney General, Appeals Division, P.O. Box 140854, Salt Lake City, UT 84114-0854 on this 23rd day of June, 2016.



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