

1967

## Joe S. Valdez v. State of Utah : Brief of Respondent

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# In The Supreme Court of the State of Utah

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STATE OF UTAH,

Plaintiff-  
Respondent,

-v-

JOE S. VALDEZ,

Defendant-  
Appellant.

} Case No.  
10843

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE NATURE OF THE CASE

The appellant, Joe S. Valdez, was convicted in the district court of Weber County, State of Utah of the crime of assault with a deadly weapon and found to be an habitual criminal.

### DISPOSITION IN THE LOWER COURT

A complaint was filed against Joe S. Valdez on the 22nd day of November, 1966, charging him with the crime of assault with a deadly weapon by use of a knife on the person of Jose Don Valerio. At the same time a complaint was filed charging defendant

with being an habitual criminal. Trial was held in the district court of Weber County, on the 29th day of December, 1966. After a jury trial, a verdict of guilty was returned on the charge of assault with a deadly weapon. The charge of being an habitual criminal was subsequently tried by the court and the defendant was found to be an habitual criminal. On January 5, 1967, appellant was sentenced to the Utah State Prison in accordance with Utah Code Ann. § 76-1-18 (1953).

## RELIEF SOUGHT ON APPEAL

The respondent, State of Utah, submits that the conviction of the defendant should be affirmed.

## STATEMENT OF FACTS

At approximately 7:30 a.m. on the morning of November 19, 1966, defendant, Joe S. Valdez, accompanied by Miss Shirley Wilkerson, entered Galt Tavern which is located on the north side of 25th Street, midway between the streets of Wall and Lincoln in Ogden, Utah. On entering the tavern they went to the bar, the chairs in front all being occupied (T-68-86). A large Indian, a fellow employee of the defendant, stood near the defendant and Miss Wilkerson.

Subsequently, sometime between 7:30 a.m. and 8:00 a.m., Jose Valerio entered the bar and ordered beer. Valerio testified that at the time he entered he saw no one that he recognized (T-33) and was standing drinking his beer when Valdez walked in.

appellant grabbed him about the top of the shirt and said, "I'm going to kill you," whereupon appellant stabbed him in the stomach with a knife (T-24). Valerio further testified that at the time of the stabbing he noticed no one close to him except appellant (T-24).

Rose Hewitt testified that Valerio was standing some five feet from where she was sitting and that immediately prior to the stabbing appellant was "wandering around" in the tavern. She further stated that appellant came up to Valerio on the side opposite Valerio from which she was seated. This would place appellant facing Miss Hewitt with Valerio between, with his back to Miss Hewitt, at the time of the stabbing incident testified to by Valerio. Miss Hewitt testified that immediately after coming up to Valerio, she saw appellant make a poking or punching motion toward Valerio's stomach. She stated that there was a lot of talking among the customers; that the juke box was playing, and that she was unable to overhear any conversation between appellant and Valerio. After seeing Valdez make the punching motion toward Valerio's stomach, Miss Hewitt hurriedly left the tavern, fearing that a fight was about to break out (T-39-44).

A somewhat different account of the stabbing was given by the appellant and his girl friend, Shirley Wilkerson. They testified that they were standing in the tavern when Valerio came up to appellant and asked him to buy a beer. Appellant bought the beer for Valerio and they stood talking awhile. Appellant complained that Valerio kept



putting his hands on the shoulders and arms of appellant (T-63). He warned Valerio to leave him alone several times, and finally struck Valerio in the face (T-64, 86). Valerio fell to the floor at which time the Indian either grabbed or pushed Valerio (T-65 and 87).

No one in the tavern saw the alleged fight or the actual stabbing (T-46). Valerio testified that after he had been stabbed by appellant he immediately left the bar and went to the home of his sister, who took him to the hospital (T-25).

Later the same morning at approximately 8:30 a.m., the police received an anonymous tip that a knifing had occurred at the tavern. Officer Thomas of the Ogden City Police arrived and was told by Ogden City Police Officer Flink that he could find no evidence of any stabbing (T-45). Officer Thomas checked further with the same result. Thomas questioned and searched appellant but found nothing. Thomas questioned the Indian but was unable to get any intelligible answers. All patrons in the bar were interviewed, but all denied having seen the fight, including the barmaid on duty (T-47-50).

Later that morning the police were called to Dee Hospital in Ogden to interview the victim of the stabbing. The victim was Valerio who subsequently named appellant as his assailant (T-17-48).

Valerio testified concerning an incident that he had taken place on January 17, 1965, as a possible motive for the stabbing. On that occasion appellant and Valerio, in the company of two friends, had been

April 1966. Appellant was on parole from the Ogden City Prison at the time and Valerio had had his driver's license suspended. Conflicting testimony was given by Valerio and appellant as to who was driving the car that evening, but the car was stopped by the Ogden City Police and appellant was arrested and later convicted on a charge of drunk driving (T-21-22, 65-68). Appellant felt that Valerio should take the blame for the incident, because his conviction could mean the revocation of his parole. Valerio refused and appellant was very angry over the incident (T-67-68). Appellant was immediately returned to prison for violation of parole and was not again released on parole until May 1966 (T-69).

## ARGUMENT

### POINT I

THE TRIAL COURT COMMITTED NO PREJUDICIAL ERROR IN ALLOWING EVIDENCE CONCERNING THE CONVICTION OF APPELLANT FOR DRUNK DRIVING SINCE:

A. NO REQUEST WAS MADE BY APPELLANT FOR A LIMITING INSTRUCTION.

B. A LIMITING INSTRUCTION WAS NOT NECESSARY; AND

C. THERE WAS NO PREJUDICE TO APPELLANT.

Appellant contends that the admission of evidence concerning the drunk driving incident, in

which both the victim and appellant were involved, was prejudicial without a curative instruction limiting the jury's consideration of the incident to show motive only.

It is submitted that the issue has not been preserved on appeal. The record is devoid of any objection made by counsel for the defendant to any of the questions propounded by the attorney for the state in which mention was made of the driving incident.

It is well settled that failure to raise an objection where the opportunity is afforded prohibits the claim of error on appeal. Thus, in Abbott, **Criminal Trial Practice**, sec. 348, it is stated:

"It is a general rule that, in order to take advantage of the admission of evidence by the trial court as error and to secure a reversal of its judgment upon appeal, the evidence must be objected to in the trial court."

See also **State v. Nelson**, 12 Utah 2d 177, 364 P.2d 409 (1961).

It is clear that appellant has no valid objection to the admission of the evidence concerning the driving incident. Appellant however, realizing that he cannot take advantage of evidence to which he did not object, goes one step further and claims that it was prejudicial error for the trial court not to give an instruction limiting the scope of the evidence.

A search of the record does not yield any statement that defendant's counsel requested any instruction

of the evidence of the driving incident to show only one thing, that the defendant was drunk only. It is a longstanding rule that the court on appeal will not take notice of mere failure to give an instruction which might have been given, but which was not requested or called to the attention of the trial court and no exception was taken for failure to give it. **State v. Peterson**, 121 Utah 531, 240 P.2d 504 (1952); **State v. Cooper**, 114 Utah 531, 201 P.2d 784 (1949); **State v. DuBois**, 98 Utah 234, 98 P.2d 64 (1940).

**State v. Peterson, supra**, is especially applicable to the instant case. In that case defendant was convicted of grand larceny. On cross-examination defendant testified that he had previously been convicted of other offenses and it was held that the court's failure to instruct that such testimony bore only on defendant's credibility as a witness, in view of the fact that counsel for defendant had made no objection to instructions as given by the trial court, did not constitute reversible error.

Appellant relies upon **State v. Wellard, infra**, and **State v. Dickson, infra**, for his assertion that a limiting instruction is necessary to prevent prejudice in the minds of the jury. Neither case is in point on the problem posed by the instant case.

In the **Wellard** case, defendant requested and was given an instruction limiting the use of otherwise inadmissible evidence. The **dictum** of the court must be read in that light and, respondent submits, that said **dictum** stands for the proposition that when evidence is admitted for a limited purpose and a

limiting instruction is requested that evidence be so limited, it is prejudicial error for the trial court to refuse such an instruction. **State v. Wellard**, 12 Utah 2d 129, 279 P.2d 914 (1955). Since appellant requested no such instruction, it was not error for the trial court to refrain from giving such an instruction.

In **State v. Dickson**, 12 Utah 2d 8, 361 P.2d 411 (1961), the defendant was cross-examined concerning two robbery convictions and over defense objections the state elicited testimony concerning the nature of the places robbed. Also, evidence was admitted concerning incidents in which defendant had been involved with his brother, but for which he had not been convicted. Again, this evidence was admitted over defense objections.

In **State v. Hines**, 6 Utah 2d 126, 307 P.2d 89 (1957), the defendant was without counsel. The Supreme Court held that if instructions were erroneous to such an extent that they would prevent a fair determination of the issues, the court may notice the error without the necessity of exception being taken.

Respondent submits that the record reflects no objection by appellant to instruction number 7 regarding motive. That instruction states:

**"Proof of a motive for an alleged crime is permissible and often is valuable, but never is essential. If, after consideration and comparison of all the evidence, you feel an abiding conviction to a moral certainty that the defendant committed the crime of which he**

is accused, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt and completing proof which otherwise might be unsatisfactory. Motive may be shown by positive evidence or by facts surrounding the act if they support a reasonable inference. When thus proved, motive becomes a circumstance, but nothing more than a circumstance, to be considered by you. The absence of motive is equally a circumstance to be reckoned with, but on the side of innocence, tending to support the presumption of innocence, and to be given such weight as you deem proper."

The record reflects that trial counsel for appellant made the following statement:

"I think there has been (in)sufficient evidence to show any kind of motive that (sic) this would tend to place undue emphasis on the mind of the jury on the driving incident a couple of years ago." (T-98).

Respondent submits that the above language does not constitute an objection, as appellant contends but rather a request for an instruction that the jury could not use the driving incident as evidence of motive. The trial court was correct in refusing such an instruction since it was for the jury to decide upon the evidence presented whether or not motive had been shown.

The evidence at the trial showed that the driving incident contributed to or was the direct cause of appellant's return to prison for parole violation. This constitutes sufficient evidence of motive to warrant the giving of an instruction concerning motive

and knowing the triers of fact to decide whether motive was present or not.

Respondent submits that there was no error in allowing evidence of motive and the failure to give a limiting instruction thereon. Trial counsel made no request for such a limiting instruction and the evidence of motive was sufficient for the jury to decide whether motive was present or not. Therefore, there was no prejudice to appellant.

## POINT II

THE TRIAL COURT COMMITTED NO PREJUDICIAL ERROR IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF ASSAULT AND BATTERY SINCE:

A. NO REQUEST WAS MADE BY APPELLANT FOR AN INSTRUCTION ON A LESSER INCLUDED OFFENSE.

B. APPELLANT WAIVED HIS RIGHT TO AN INSTRUCTION ON A LESSER INCLUDED OFFENSE BY REQUESTING A CLARIFYING INSTRUCTION THAT IF ALL ELEMENTS OF ASSAULT WITH A DEADLY WEAPON WERE NOT PROVED AN ACQUITTAL WOULD BE NECESSARY EVEN THOUGH THE EVIDENCE SHOWED A SIMPLE ASSAULT.

Appellant relies upon a statement made by trial counsel after the jury had retired for his contention that an instruction was requested on the lesser included offense of assault and battery. Mr. Richards stated:

"The only thing, your Honor, for the sake of the record, I would like to let the record show that I

requested the additional instruction to the jury as a result of Mr. Anderson's argument relative to the assault necessarily connected with a deadly weapon and not from an assault standpoint separately. I think they might be confused upon that point." (T-127)

The record does not show where the requested instruction was made but it was apparently made during a bench conference requested by Mr. Richter at the close of Mr. Anderson's argument (T-126-127). A reading of the argument to which Mr. Richter referred shows that Mr. Anderson made the following remarks:

"She (Miss Hewitt) said he pushed him in the stomach. She said she saw him when he pushed him in the stomach and she knew there was going to be a fight and she ran out of the tavern. Now isn't that exactly what Mr. Valerio said." (T-122)

Later in his argument Mr. Anderson stated: (T-125)

"I would like to just go over briefly these elements that are set out in number six. There can be no question about the fact according to the testimony of Mr. Valerio, Rose Hewitt (Sic) that there was an assault upon this man. There can be no question about the fact that this man suffered a wound and the infliction was such that it could have caused death. Also that it was a knife wound, and that it took place in Ogden, Weber County, Utah on the 19th day of November, and in order to take and say this man is innocent you must say this to yourselves: Mr. Valerio either lied or was mistaken, that Rose Hewitt either lied or was mistaken, and that Officer Thomas in giving his testimony didn't report it correctly."



It is obvious that appellant's true concern was concerned that the jury might take Miss Hewitt's testimony as evidence of assault with a deadly weapon when she had testified that she had seen a weapon in the hands of appellant (T-24). Her testimony showed only a simple assault and battery. The instruction requested by Mr. Richards was to the effect that only if the jury believed both the testimony of Mr. Valerio combined with that of Miss Hewitt could the jury find present all the necessary elements for conviction of assault with a deadly weapon; that if they believed only the testimony of Miss Hewitt, they could find only a simple assault and would have to return a verdict of not guilty. In other words, the requested instruction had the exact opposite meaning as that which appellant now attaches to it. Mr. Richards was not requesting an instruction that the jury could return a verdict on a lesser included offense, but wanted it made clear that if the jury could find only the elements of simple assault, they must return a verdict of not guilty.

This meaning is further clarified by the fact that Mr. Richards requested the additional instruction regarding the elements necessary to bring back conviction on assault with a deadly weapon, as a result of Mr. Anderson's argument (T-127). The request was not made because the evidence showed that an instruction on a lesser included offense was warranted, but because he felt that Mr. Anderson's argument might have confused the jury. The in-

...of his statement regarding the instruction that:

"...I think they (the jury) might be confused upon that point."

Respondent submits there was no room for confusion regarding the verdict the jury was to bring. It was either guilty or not guilty of assault with a deadly weapon. It is, therefore, abundantly clear neither in his statement quoted above nor anywhere else did Mr. Richards request an instruction on a verdict on an included lesser offense. The defendant was relying on an "all or nothing proposition." The words of Mr. Justice Callister in **State v. Poulson**, 14 Utah2d 213, 215, 381 P.2d 93, 94 (1962) are bearing on the instant case. Mr. Justice Callister stated:

"The trouble with this position is that defendant did not request any instruction on lesser included offenses, and it is apparent from the record that he did not desire them—choosing rather to submit the case to the jury on an all or nothing basis."

Mr. Justice Henroid further clarified the position of the court when he stated in **State v. Mitchell**, 30 Utah2d 170, 75 278 P.2d 618, 621 (1955):

"The great weight of authority is to the effect that if no request is made for instructions on lesser offenses, and none is given, such failure to instruct is not reviewable as a matter of right on appeal. We subscribe to such view. It is no difficult task, at the close of a criminal case, for counsel to make a simple request for instructions as to included offenses, if he

wants them given, or to remain silent, depending on his studied decision as to which course better may serve his client."

See also **State v. Sullivan**, 73 Utah 582, 276 Pac. 12 (1929); **State v. DuBois**, 98 Utah 234, 98 P.2d 354 (1940).

Respondent submits that the requested instruction demonstrates the defendant relied on acquittal of the greater charge and refrained from requesting an instruction on the lesser included offense.

Although the requested instruction of Mr. Richards was rightfully denied, the fact of its request demonstrates that appellant chose not to request it in fact was opposed to an instruction on an included lesser offense.

Since appellant failed to request an instruction on a lesser included offense it would, in the words of Mr. Justice Henroid in **State v. Sullivan, supra**:

"Seem palpably unreasonable to allow one to sit by and deliberately refuse to request instructions as to lesser offenses, with positive assurance of another trial if his client be convicted of the charge against him."

It is submitted, therefore, that it was appellant's purpose to go for "all or nothing." He not only refrained from requesting an instruction on a lesser offense, but also attempted to get an instruction that would have precluded an instruction on a lesser included offense.

Respondent submits, therefore, that appellant is not entitled to an instruction on a lesser included offense. Not only did appellant fail to make request for such an instruction but also he waived his right thereto by requesting an instruction that would have precluded an instruction on a lesser included offense.

### POINT III

EVIDENCE OF APPELLANT'S PRIOR CONVICTIONS WAS PROPERLY ADMITTED AND THE JURY WAS PROPERLY INSTRUCTED RELATIVE THERE-TO.

Instruction number 10 reads as follows:

"The fact that a witness had been convicted of a felony if such a fact, may be considered by you in judging the credibility of that witness. The fact of such conviction does not necessarily destroy or impair the witness' credibility and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you are to take into consideration in weighing the testimony of such a witness."

Generally evidence of prior convictions may not be admitted to prove the bad character or propensity of a defendant to commit a crime and normally must be excluded, **State v. Winget**, 6 Utah 2d 243 310 P.2d 738 (1957). The evidence of appellant's prior criminal record in the trial of this case was admitted solely for purpose of impeaching appellant's testimony and attacking his credibility as a witness on his behalf.

It is well settled that when the defendant takes the stand the prosecution may impeach him by introducing his past record. When such evidence is admitted an instruction should be given to the jury informing them of the use to which such evidence may be put. It is submitted that the instruction given by the court was adequate for that purpose.

In **People v. Hardwick**, 204 Cal. 582, 589, 29 Pac. 427, 430 (1928), a case charging defendant with assault with a deadly weapon, the trial court refused to give the following instruction requested by defendant:

"A previous conviction of a felony does not necessarily destroy the credibility of any witness, nor does it raise a presumption that the witness has or will testify to that which is false. It is simply a circumstance of more or less weight which you are authorized to take into consideration in determining what credit shall be given to him with respect to his testimony."

The court held that refusal to give the requested instruction was erroneous and in so doing stated:

"It is not debatable that the instruction asked by defendant correctly states the law applicable to the situation."

The similarity between that instruction and the one given in the instant case is easily seen. The two instructions are basically the same. In **People v. Buzzell**, 15 Cal.2d 654, 661, 104 P.2d 503, 506 (1940) a first degree murder case in which evidence of prior robbery conviction was introduced to impeach defendant's testimony the trial court gave an in-

which is practically identical to the one complained of in the instant case. The instruction contained the following wording:

"A previous conviction of a felony does not necessarily destroy the credibility of any witness . . . . It is simply a circumstance of more or less weight which you are authorized to take into consideration in determining what credit shall be given to him with respect to his testimony." **Ibid.**

The court in approving this instruction stated

"In our opinion, the instruction properly confined the evidence of a prior felony conviction to the credibility of the witness." **Ibid.**

In a more recent case an instruction worded in precisely the same words as instruction number 10 was given. In that case the defendant was convicted of grand theft and conspiracy to commit grand theft in violation of the California Penal Code. During cross-examination of the defendant it was brought out that he had previously been convicted of a felony. The trial court refused to give an instruction proposed by defendant and instead gave an instruction of which Instruction Number 10 in the instant case is a verbatim copy. In holding that the instruction given was proper, the court expressed the view that an instruction proposed by defendant that would have told the jury "in no uncertain terms" that a prior felony conviction was "not evidence of guilt or innocence of the crime charged," and could also properly have been given. The court stated that the difference between the two instruc-

tions is largely one of emphasis and that the instruction given was in no way improper or misleading. **People v. Shaw**, 115 Cal.App2d 597, 252 P.2d 670 (1953).

Respondent submits that instruction number 10 was adequate to inform the jurors of the use to which prior felony convictions could be made and a more limiting instruction was unnecessary.

## CONCLUSION

The facts in the instant case are sufficient to show that the appellant was guilty of the offense charged. The record on appeal in the instant case shows a total absence of any prejudicial error or other action which would warrant reversal by this court. Therefore, respondent submits that the conviction should be affirmed.

Respectfully submitted,

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