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IN THE SUPREME COURT OF THE STATE OF UTAH

JOE S. VALDEZ,

Appellant,

vs.

STATE OF UTAH,

Respondent.

Case No.

19842
UNIVERSITY OF UTAH

AUG 31 1967

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BRIEF OF APPELLANT

Appeal from the Judgment of the Second Judicial District Court
of Weber County, Honorable John F. Wahlquist, Judge

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOE S. VALDEZ,

Appellant,

vs.

STATE OF UTAH,

Respondent,

Case No.
10843

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, Joe S. Valdez, was convicted of the crime of assault with a deadly weapon and with being an habitual criminal in the District Court of Weber County, State of Utah.

DISPOSITION IN THE LOWER COURT

A complaint was filed against Joe S. Valdez on the 19th day of November, 1966, alleging that he did commit an assault with a deadly weapon by use of a knife on Jose Don Valerio. In addition, a complaint was filed charging that the appellant was an habitual criminal. Trial was held in the District Court of Weber County on the 29th day of December, 1966. After a jury trial the jury returned the verdict of guilty on the charge of assault with a deadly weapon. The status of being an habitual criminal was subsequently tried to the court and the appellant was convicted of being an habitual criminal and sentenced to the Utah State Prison in accordance with Section 76-1-18, Utah Code Annotated, 1953.

RELIEF SOUGHT ON APPEAL

The appellant submits that in view of the prejudicial error committed at the time of his trial on the charge of assault with a deadly weapon that his conviction on that charge be reversed as well as his status as being an habitual criminal and a new trial granted.

STATEMENT OF FACTS

At approximately 7:30 a.m. on the morning of November 19, 1966, Miss Shirley Wilkerson drove the defendant, Joe Valdez, to his dental appointment in downtown Ogden, Utah. Upon arriving early, the two

decided to go into Gus's Tavern located in the middle of the block between Wall and Lincoln on the north side of 25th Street. They entered and went all the way to the rear of the bar since all the chairs in front were occupied (T. 68-86). Since there were no chairs in back the defendant stood up to the bar while Miss Wilkerson stood close by. Next to Valdez near the end of the bar stood a large Indian (T. 86).

On the same morning the victim, Jose Valerio, was also in Gus's Tavern drinking beer. Valerio later testified that he went to Gus's that morning because he had been doing a lot of drinking the night before and felt bad (T. 30). According to Valerio, Valdez walked up to where he, Valerio, was standing at the bar, grabbed him saying, "I am going to kill you," and stabbed him in the stomach with a knife (T. 31). When the stabbing occurred Valerio stated that there was no one close to him except Valdez (T. 33). However, at trial Rose Hewitt testified that she was sitting not more than four or five feet away (T. 42). Miss Hewitt testified that from this small distance she didn't hear the defendant say "I am going to kill you." She saw the defendant hit him or punch him in the stomach and then she left (T. 42). She did not see a knife.

A much different account of the fight was given by both the defendant and Shirley Wilkerson. According to them Valerio came up to Valdez and asked for a beer. Valdez obliged. A few minutes later Valdez complained to Valerio about keeping his hands and

arms off of him. Valerio kept on bothering him (T. 63). Then Valdez pushed Valerio back against a pay telephone. Valerio came right back and Valdez then hit him on the jaw knocking him down (T. 64, 86). As Valerio fell he bumped against the Indian, who either grabbed him or pushed him (T. 65). Miss Wilkerson later testified at trial as follows (T. 86, 87):

“ . . . Joe told him to leave him alone, but he still kept bothering him. So he hit him and knocked him down.

“Q. Did you see him at the time that Joe hit him?

“A. Yes, he fell and then this Indian jumped in, I don't know what he did to him. I seen him get up and go out the back door.

“Q. Now, you say you saw Joe hit Mr. Valerio?

“A. Yes.

“Q. Would you tell us how Joe hit him and where he hit him and what happened?

“A. Well, he swung around and hit him with his right.

“Q. Where did he hit him?

“A. On the jaw.

“Q. This knocked Mr. Valerio down, is that correct?

“A. Yes, and then the Indian jumped him.

“Q. Did the Indian hit him?

“A. I don't know if he did or not. I know the guy got up and left.”

Although no one in the crowded bar saw the stabbing except the victim himself it was later discovered that Valerio had been knifed sometime during the scuffle. About five minutes after the incident in question Valerio got up and left the crowded bar without saying a word to anyone. He went home to his sister's, who took him to the hospital.

At about 8:45 a.m. on the same morning an Officer Thomas, who was assigned to the patrol division, received a call from an unknown source who stated that there had been a stabbing in Gus's Tavern. Officer Thomas arrived almost five minutes after another policeman, Officer Flink, had finished searching the bar. Flink said he could find no evidence of any stabbing (T. 45). Thomas then went inside to further check on possible clues as to what may have occurred. While inside he searched and questioned Valdez but discovered nothing. Thomas stated that he saw a large Indian standing close to Valdez. Thomas also testified that the bar was full and practically every stool was filled. He stated that everyone interviewed about the alleged stabbing denied seeing any fight, including the bar maid (T. 47, 50). The Officer also checked the floor for blood but found no traces (T. 46).

On November 21, 1966, a signed statement from Valerio identifying Valdez as the assailant was obtained. The following day, on November 22, a complaint was signed and a warrant issued for the arrest of Joe Valdez charging him for assault with a deadly weapon.

The next day, November 23, shortly after 8 a.m., Mr. Richards, attorney for Valdez, called Officer Brooks and asked if a warrant for Valdez had been issued. Upon finding out there was one, Mr. Richards made arrangements for Valdez to turn himself in (T. 50, 56).

The trial began on December 29, 1966, before the Honorable John F. Wahlquist, and eight jurors. The defendant was convicted for assault with a deadly weapon and for being an habitual criminal. On January 5, 1967, he was sentenced to be confined in the Utah State Prison for not less than 15 years (R. 14). It is from that verdict and sentence that the defendant prosecutes this appeal.

During the course of the trial numerous errors were committed, three of which were prejudicial and are relied on by appellant for reversal.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN NOT LIMITING THE JURY'S CONSIDERATION OF OTHER CRIMINAL INVOLVEMENT ADMITTED TO SHOW MOTIVE ONLY, SINCE WITHOUT SUCH A CURATIVE INSTRUCTION THE JURY COULD INFER THAT THE EVI-

DENCE COULD BE CONSIDERED TO SHOW
THE GENERAL CRIMINAL PROPENSITY
OF THE APPELLANT.

At trial the prosecution in order to establish a motive referred several times to a meeting between the defendant and Valerio two years prior to the stabbing. Both Valdez and Valerio had been drinking together when Valdez was arrested for drunk driving. In order to link this incident to the stabbing the state questioned Valerio on direct (T. 22):

Q. Did the officer arrest him?

A. Yes, he arrested him.

Q. Did you have any argument with him at all?

A. No.

Q. Did you later have an argument?

A. We . . . , he called me on the phone about two or three times and wanted me to take the blame, you know.

Q. The blame for what?

A. For driving the car.

Q. Why did he want you to take the blame?

A. He said, "I don't want to go to the pen and if you want to take the blame," you see.

The state also questioned Valerio's wife concerning the possible motive and she testified (T. 35):

Q. Do you know of any arguments that he and your husband have had?

A. No, not that I can recall, no. He had a call from him and another word from him, because I answered the phone about a year ago. He wanted to talk to Jose and him had been together that year before. When they caught him upon that drunk driving, I was right by my husband when they were talking. My husband had already told me about this, so I didn't want to be nosey, I was listening to them when they were talking on the phone, and he said he wanted Jose to take the blame for the drunk driving, because he said, "I can't afford to go back in, because of any more trouble."

When the state cross-examined Valdez the following questions concerning the same incident were asked (T. 75, 76) :

Q. This is a man that testified against you in the Court of the drunk driving case.

Q. This is your friend?

Q. You got real mad at him, didn't you?

Q. Because you wanted him to take the blame for it?

Q. Do you remember calling him on the phone. you heard the testimony of his wife here, calling him and asking him to take the blame for you?

In summation before the jury the prosecutor re-

enforced and emphasized the importance of the motive testimony (T. 103):

" . . . The motive, if there was a motive here, appeared to be the fact that he felt that this former friend of his should have taken the blame so he wouldn't get his parole revoked, because of the drunk driving provision, he would be back to prison. He would have to serve more time. This is something he was concerned about. It made him unhappy.

* * *

This man has a record of having been in the prison. The court has told you that doesn't discredit his testimony, but certainly you can consider it in believing him or not.

Isn't it interesting that everyone else is at fault except Joe? The other man causes all of these troubles. He is sitting up in the back seat of the car but he forgets to remember that here he is in a place violating his parole, right at the time, even if he hadn't done this he would have been violating his parole.

Now he wants you to believe that he isn't the man that caused this trouble. No evidently (sic) there must have been some ill feeling about this man when he grabbed him here and said "I'm going to kill you." This isn't something that men do just every day."

In an effort to keep the trial judge from unconsciously conveying misleading information the defense objected to the following instruction:

"Proof of a motive for an alleged crime is permissible and often is valuable, but never is es-

sential. 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 above instruction was not uttered in a vacuum. It must be read in the context of the whole trial. The testimony as to motive was found in the same portions of the record in which references to defendant's credibility and criminal record appeared. The fundamental error in the instruction is *the absence of language limiting the permissible use of the drunk driving evidence to show motive and nothing else*. Without such curative language it is reasonable to conclude that the jury could and did also use the evidence to show the appellant's propensity to commit the crime and, therefore, as a basis for an inference that he committed the crime for which he was on trial. The jury might also have improperly but reasonably believed such evidence would be used to show that the defendant was not to be believed even though under oath. It is undeniable

that the instruction without any restrictive language when coupled with the repetitious references to the incident, at trial caused undue emphasis in the minds of the jurors.

The requirement of limiting the purpose of evidence of other crimes was articulated in *State v. Wellard*, 3 Utah 2d 129, 279 P.2d 914 (1955). In that case the defendant was prosecuted for issuing a fictitious check. The state in an effort to show defendant's intent to defraud in cashing the check introduced evidence of another check which defendant cashed but which the bank had refused to pay. In receiving the evidence the trial court properly instructed the jury that it could only be used by them for the purpose of showing intent. On appeal the Supreme Court in affirming the conviction used the following language which is apropos here:

“ . . . It is settled in this court that the state may not prove that the defendant committed other offenses merely to show his propensity for the commission of crime, because such evidence is apt to be given undue weight. However, evidence of other crimes is admissible if it tends to prove that he had the necessary intention for the crime charged. For evidence admissible for one purpose is not inadmissible because it fails to meet the requirements for another purpose, *but the jury should be instructed not to use it for the inadmissible purpose.* This the court did in this case and contrary to defendant's argument such instruction was clear and understandable by the jury.”

It is important to point out the distinction between evidence which is admitted because relevant to the main issues in dispute and evidence admitted for a limited purpose. In the present case it was admitted for the latter, to show motive. It had very little relevancy to show intent and no relevancy towards supplying a link in the chain of events which constituted or indicated the commission of the crime charged. Nor is it relevant to show that this particular defendant is not telling the truth.⁽¹⁾ It is inescapable that the only real relevancy although tenuous, goes to show a possible factor inducing the commission of the crime, nothing else. The policy against allowing such weak probative evidence was clearly stated in *State v. Dickson*, *infra*, where the court stated:

“ . . . the very purpose of excluding such evidence is to prevent the prosecution from smearing an accused by showing a bad reputation and relying on that for conviction rather than being required to produce adequate proof of the crime in question. It is the sound and salutary policy of the law to indulge everyone, including convicted felons, with the presumption of innocence, and to require the state to obtain and present sufficient credible evidence to convince the jury of the defendant's guilt of the crime charged beyond a reasonable doubt. If this were not so, serious and perhaps insuperable obstacles to reformation and rehabilitation would exist for a man who had once acquired a bad reputation.”

(1) Drunk driving is not an offense that may be used to impeach the credibility of a witness. *State v. Fournier*, 193 A. 2d 924 (Vt. 1963).

In *State v. Dickson*, 12 Utah 2d 8, 361 P. 2d 412 (1961). The defendant was charged for robbery of a grocery store. He appealed from a conviction alleging two errors. The first error related to questioning about previous felony convictions. The Supreme Court said that the defendant could properly be questioned about previous felony convictions for the purpose of impeaching his credibility as a witness. However, in that case the prosecutor pressed beyond such purpose, when after the defendant had admitted to two robbery convictions, he further asked whether both of them happened to be food markets. The prosecutor based his right to go into the details of those felonies upon the theory that he was trying to show a "modus operandi," to show that the accused was following some plan or scheme of which other crimes were a part, or where the crime was committed in some particular way, so as to lead one to think the same crimes were committed by the same person. Although the case was not resolved on this issue the court stated that it did not approve the admission of evidence of the modus operandi since no logical inference could be drawn that the person who committed the one committed the other. The second error upon which the defendant appealed concerned improper questioning of the defendant as to being involved in an offense where his brother was involved in a felony. That questioning concerned an incident in Texas, subsequent to the alleged robbery in Salt Lake City. The defendant stated that he had been charged but not tried for robbery in Texas. This Court in reversing

held that such cross examination of defendant was not justified for impeachment purposes or on the *modus operandi* theory. Although that case is factually distinguishable from our case the same policy exists here. In our case as in *Dickson*, no requirement of similarity peculiar to the two crimes has been satisfied. The phone calls to Valerio do not compel any logical inference that Valdez stabbed Valerio. Without any limiting instruction prohibiting the jury from using the driving incident as evidence of general criminality it is possible that an intelligent lay person listening to it at the close of trial could be misled into using such for resolving a doubt on the criminal involvement rather than requiring the state to produce adequate proof of the crime. Certainly the error here can't be considered harmless in light of the language used in *State v. Dickson, supra*:

“Inasmuch as we cannot say with any degree of assurance that there would not have been a different result in the absence of the error in cross examining the defendant about the incident in Texas, it must be regarded as prejudicial and the case remanded for a new trial.”

Erroneous instructions were held to be reversible error in *Montgomery v. United States*, 203 F. 2d 887 (5th Cir. 1953). In that case the defendant was convicted for willfully and knowingly attempting to defeat and evade income taxes. The Circuit Court reversed and held that although the district judge could exercise broad discretion in admitting evidence to show defend-

ant's motive in not reporting his illegal gains or to establish the possible source of the funds used for the expenditures, he should have cautioned the jury that such evidence was admitted only for the light it might throw on those specific purposes and no inference of guilt could be drawn merely from the commission of other offenses different in character.

The same policy was the basis for a reversal in *People v. Bentley*, 131 Cal. App. 2d 687, 281 P. 2d 1 (1955). In that case the defendant was convicted of lewd conduct in violation of the state statute. On appeal the District Court of Appeals for California reversed primarily for failure of the trial court to give cautionary instructions as to the limited purposes on the inquiry of cross examination.

Recently the United States Court of Appeals for the District of Columbia on another but closely related question, used language which is apropos here. In *Awkard v. United States*, 352 F. 2d 641 (D.C. Cir. 1965), the court held even cautionary instructions might not protect the interests of the defendant. In that case the defendant was convicted of simple assault and assault with intent to kill. The prosecuting attorney cross-examined defendant's character witness concerning defendant's prior arrests. Both witnesses were asked whether they had heard of defendant's two prior arrests for assault with a dangerous weapon or her conviction for disorderly conduct. Since both arrests grew out of domestic quarrels, upon complaint of defendant's hus-

band and since the conviction also arose from a domestic quarrel, the court was not at all impressed with its relevancy. Judge Washington in reversing the conviction stated:

“The use of such evidence must be closely supervised by the trial judge, not only to assay the prosecuting attorney’s good faith but to consider whether the probative value of the information which might be elicited outweighs the prejudice to the defendant.

“ . . . Cautionary instructions, copiously provided by the trial judge in this case, do not give the accused adequate protection. They cannot prevent the jury from considering prior actions in deciding whether appellant has committed the crime charged. The courts need not rest on the assumption that juries can compartmentalize their minds and hear things for one purpose and not for another. The Supreme Court took the lead in *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), by going behind the historic assumptions of the law of evidence and considering the psychological reality of the jury’s functioning, in that case as it related to its consideration of the voluntariness of confessions.”

In light of the above principles, the trial judge in the instant case was clearly in error for not giving the jury an instruction allowing them to compartmentalize the evidence. Although it may be extremely difficult to frame a limiting instruction so as to give full protection to the rights of the accused this particular instruction falls far short of giving the accused the benefits

to which he is entitled. In the absence of any similarity in the driving incident and the crime charged here, such evidence has no probative value and its only effect would be to cast aspersions upon the defendant and imply that because he was involved in driving trouble he is a person likely to commit a crime or testify falsely. A limiting instruction certainly was required and the failure to give such an instruction was prejudicial error.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING DEFENDANT'S REQUEST THAT THE JURY BE INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF ASSAULT AND BATTERY SINCE THERE WAS EVIDENCE IN THE RECORD TO SUPPORT SUCH AN INSTRUCTION.

After the jury had retired the court asked the defense attorney if he would like to make any matters of record. Mr. Richards raised the following objection to the instructions when he stated (T. 127):

"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."

Although the request was made, no instruction was given. The court submitted to the jury only two alternative verdicts. The jury could find the defendant guilty or not guilty of assault with a deadly weapon.

It is common knowledge that jury instructions must be responsive to the issues presented. The issues in criminal cases are determined by the evidence. The fact that evidence may not impress the judge does not authorize him to refuse an instruction raised by the evidence. However incredible the testimony of the defendant may be, he is entitled to an instruction based upon the hypothesis that it is entirely true.

We don't deny that if the only evidence presented in this case was that of the state that an instruction on the lesser offense of assault and battery would be improper since instructions must be grounded upon the evidence. But this case is different since both sides presented different versions of the stabbing. The error in the present case is that the court in its limited instructions imposed upon the jury only the prosecution's theory of the case. Under that instruction Valdez was either guilty or not guilty of assault with a deadly weapon. The jury should have been given the other alternative verdict. If the jury believed Valdez's version, it would have been required to bring in a verdict of simple assault and battery and not assault with a deadly weapon.

The record contains substantial evidence to support the instruction on assault and battery. Both on direct

and on cross-examination, Valdez stated that he hit Valerio on the jaw but did not stab him. Shirley Wilkerson on direct examination stated that Valdez "swung around and hit him with his right." She testified that she was standing close by but saw no knife nor had any reason to believe that Valdez knifed Valerio (T. 87). Rose Hewitt, who was standing not more than five feet from the incident, stated that she saw Valdez hit or punch Valerio but saw no knife (T. 42). Contrary to Valerio's version, she did not hear Valdez say "I am going to kill you" nor did she see Valdez grab Valerio by the coat or shirt as the complainant had previously testified (T. 42). There was evidence in the record which pointed to the Indian at the end of the bar as the possible perpetrator of the stabbing. Valdez testified on direct that when he hit Valerio the Indian, who was standing at the end of the bar " . . . grabbed him, or either grabbed him or pushed him when he fell back against him . . ." Shirley Wilkerson testified that when Valerio fell the "Indian jumped him (T. 87). "When asked whether the Indian hit Valerio she stated: "I don't know if he did or not. I know the guy got up and left."

The above version of the incident did not go uncontradicted but that is not the measuring rod as to whether a lesser included offense has been placed in issue. The United States Supreme Court in *Stevenson v. United States*, 162 U.S. 313, (1896), stated at p. 314:

" . . . It is difficult to think of a case of killing by shooting, where both men were armed, and both in readiness to shoot, and where both did shoot, in which the question would not arise, for the jury to answer, whether the killing was murder or manslaughter, or a pure act of self-defense. The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter, or an act performed in self-defense and yet, so long as there was some evidence relevant to the issue of manslaughter, and credibility and force of such evidence must be for the jury and cannot be matter of law for the decision of the court."

The same reason is equally applicable to the facts of the present case. Only in the event that Valdez was either guilty of assault with a deadly weapon or innocent of that offense could the instruction given by the trial court be deemed correct. Such an instruction would be correct only if the prosecution's evidence tended to prove that assault with a deadly weapon had been committed, and that the defendant had denied any connection with the alleged offense. But in the instant case, the fact of simple assault and battery was conceded and the stabbing denied. In such a situation the court cannot ignore the jury's right to believe that portion of defendant's testimony which negates the commission of assault with a deadly weapon, and concedes assault and battery. The issue of simple assault and battery was squarely posed, and it was prejudicial error not to instruct thereon.

The cases which have considered the court's duty

to instruct as to lesser offenses fall basically into three groups: (1) The first group involves the extreme where there is evidence which, if accepted by the trier of fact, would absolve defendant from guilt of the greater offense, although it would also support a finding that he was guilty of a crime of lesser degree. In this situation some courts hold that an instruction on the lesser offense must be given even though not requested, and no matter how unlikely it may appear that any verdict other than one of guilty of the higher offense would be returned. *People v. Morrison*, 228 Cal. App. 2d 707, 39 Cal. Rptr. 874 (1964); *Smith v. State*, 83 Okl. Ctd. 209, 175 P. 2d 348 (1946); *State v. Littlejohn*, 356 Mo. 1052, 204 S.W. 2d 750 (1947); *State v. Fouts*, 169 Kan. 686, 221 P. 2d 841 (1950); *State v. Kicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954); *People v. Carmon*, 36 Cal. 2d 768, 228 P. 2d 281 (1951); *People v. Jeter*, 60 Cal. 2d 671, 388 P. 2d 355 (1964); (2) In the second group of cases the extreme opposite is found where the evidence, even though construed most favorably to defendant would not support a finding of guilt of the lesser offense or degree, although the evidence would, if construed by the trier of fact in favor of the prosecution, support a finding of guilt of the higher offense. This situation is generally found in cases where the defendant denied any complicity in the crime charged, and thus lays no foundation for any verdict intermediate between "not guilty" and "guilty". This situation is also found where the defendant requests no instruction and there is no evidence

in the record to raise the issue as to the lesser charge. *State v. Mitchell, supra; State v. Poulson, supra; State v. Dodge, supra.* (3) The third situation involves this case and is intermediate between the two just discussed. Here the evidence is sufficient to support a finding of guilty of the greater offense based upon the state's version, and it is also sufficient to support a finding of guilty of the lesser offense based on appellant's version, since appellant admitted the assault and battery but denied the stabbing. Thus, since there was both a request for an instruction as to the lesser offense and evidence in the record to support the request, it was error for the trial court not to give an instruction on the lesser offense.

State v. Barkas, 91 Utah 574, 65 P. 2d 1130, (1937), is almost identical to the present case and should be deemed controlling here. In that case the defendant, a sheep rancher, was charged and convicted of assault with a deadly weapon for shooting a former employee in the leg. Defendant claimed he shot the complainant in the leg to keep him from stealing sheep. The state's evidence was that the defendant shot the complainant in the leg during an argument over a debt defendant owed complainant. Defendant requested the instruction as to the lesser offense, but the trial court denied the request and took the position that since the defendant admitted shooting the complainant intentionally to prevent him from stealing he could not ask the jury to disbelieve his own testimony by allowing him an instruction inconsistent with his own theory of

the case but must rely on the defense that he was justified in shooting him. The court on appeal reversed and held the jury could pass upon complainant's story as well as defendant's and believe either, neither, or parts of both. The court at p. 579 loc. cit. addressed itself to the question whether the trial court should have instructed the jury as to lesser or included offenses since such instruction was requested. The court stated it was error for the trial court to submit the cause to the jury on only two possible verdicts, guilty or not guilty of assault with a deadly weapon. The court in criticizing the theory on which the trial court refused to instruct, stated as follows:

" . . . This theory, however, clashes with two fundamental rules, in trial of criminal cases: It has the effect of the court weighing the evidence and, in effect, limiting the jury to a consideration of only part of the evidence (the defendant's); and it, in effect, bases upon the defendant the burden of proving his innocence or justification. We recognize the rule that where defendant admits the facts substantially as contended by the State, and justifies his act, he has the burden of showing the facts to establish his justification. *But in the instant case, defendant did not admit the State's account of what had happened at the shooting; but denied it in toto, and told an entirely different story of what had occurred and how it happened. He put directly in issue all the evidence of the State and the duty of weighing one story against the other, belonged to the jury and not the court. And if the jury believed Cordovo's story of how the shooting occurred, they might well find a verdict on a lesser charge.*

" * * * the courts, we think, without exception, have held that, where the accused is charged with a greater offense, he is nevertheless entitled to an instruction that the jury may convict him of a lesser offense if included within the greater; that is, he may be found guilty of simple assault, or assault and battery, unless the evidence is of such character as will necessarily require a finding that the greater offense was committed by him. * * * It is, however, always a delicate matter for a trial court to withhold from the jury the right to find the accused guilty of a lesser or included offense and determine the question of the state of the evidence as a matter of law. That should be done only in very clear cases."

As mentioned, the present case is unlike *State v. Mitchell*, 3 Utah 2d 70, 278 P. 2d 618 (1955). In that case the defendant was convicted of second degree murder. The evidence at trial showed that the defendant had possession of a .25 calibre pistol and was seen to be holding the pistol at the head of the hotel staircase just after the murder. When the defendant was apprehended two days later human blood was found on his hands and five matching .25 calibre cartridges were found in his suitcase. Defendant appealed to this court alleging that it was error for the court not to instruct as to the lesser included offenses. The court refused to reverse the conviction primarily for two reasons. First, it was not persuaded that there was any evidence from which reasonable persons could conclude the victim had died from a simple battery, or otherwise than with malice aforethought or as a result of a murderous intent. Second.

and most important the court felt that since the defendant failed to request the instruction, "it would seem palpably unreasonable" to allow him to sit by with positive assurance of another trial if his client was convicted. It is important to note that the court limited its holding as follows:

"We confine our holding to the particular situation where instructions are *not requested* and not given."

The present case is quite different since defendant did request the instruction and there certainly is evidence in the record to reduce the offense to a lesser degree. Appellant put the lesser offense in issue when he denied the stabbing and presented his own version of what happened.

State v. Poulson, 14 Utah 2d 213, 381 P. 2d 93 (1963), is also different than the present case. In that case the defendant was tried upon a charge of murder committed in perpetuation of rape or burglary. In *Poulson*, the defendant did not deny murdering the girl. His sole defense was that of not guilty by reason of insanity. On appeal defendant alleged error contending the jury was not properly instructed on the lesser included offenses. Defendant contended that his mental condition was such that he could not entertain the specific intent to commit the crime charged. The Supreme Court refused to reverse and held that defendant's position could not be maintained since he did not request any instructions on lesser included

offenses, and since it was apparent from the record that he chose to submit the case to the jury on an "all or nothing basis." Our case is easily distinguishable. Here the defendant not only requested the instruction, but he also denied committing the crime and presented his own version of what happened. That is entirely different than the *Poulson* case.

The present case is also unlike *State v. Dodge*, Utah 2d, P. 2d (1967), where the defendant was convicted of perjury in the first degree. Defendant appealed on the ground that the trial judge gave the instruction as to the lesser included offense of second degree perjury. The court refused to reverse for the reason that the defendant did not request any such instruction. The court went even further and stated that if a request had been made an instruction would have been improper since the evidence was such that defendant was guilty of first degree perjury, or he was not guilty of any crime. The court cited and relied on the following excerpt from *State v. Ferguson*, 74 Utah 263, 279 P. 55 (1929), where this court stated at 266:

"It is a well settled rule that instruction as to lower grades of the offense charged should be given when warranted by the evidence. It is equally well settled that in a criminal prosecution error cannot be predicated on the omission of the trial court to instruct as to lesser grades of the offenses charged where there is no evidence to reduce the offense to a lesser grade." *State v. Angle*, et al., 61 Utah 432, 215 P. 531.

In *Young v. United States*, 309 F. 2d 662 (D.C. Cir. 1962), the court had before it an assignment that the trial court erred in failing to give a requested charge on the lesser included offense of simple assault where the defendant was charged with assault with intent to commit robbery. In reversing, the court used the following language which is also applicable to the present case:

“ . . . However, implausible, unreliable or incredible only the jury has the right to make the evaluation of West's testimony. The evidence of a simple assault cannot be regarded as strong or convincing and perhaps the source could well be regarded as of dubious reliability, but the question of its weight and credibility was for the jury. On West's testimony it was possible, even if not necessarily plausible, that West was searching the pockets for weapons not money or other valuables. The evidence was sufficient to warrant a jury to infer that West's intent was to rob and this intent could be to appellant as an aider and abettor; but it was also sufficient to allow for another permissible verdict, i.e., that appellant was simply assaulting Collins while West searched for weapons. Even when instructed on the lesser included offense of simple assault it would be permissible for the jury to totally disbelieve West or to believe that part which tended to exculpate appellant from an intent to rob. The jury might reasonably conclude that West, by giving his testimony, was trying to do a favor for his friend Young and therefore, might reject his explanation as to the object of the search of Collins. But without the critical instruction they would not be afford-

ed the choice which was exclusively a jury choice. The ruling denying the lesser included offense instruction necessarily involved an appraisal of that evidence and West's credibility by the District Judge but the trier cannot withdraw that appraisal from the jury." *Kinard v. United States*, 68 App. D.C. 250, 96 F. 2d 522 (1938). See also *Stevenson v. United States*, 162 U.S. 313, 323, 16 S. Ct. 839, 40 L. Ed 980 (1896).

In *Kinard v. United States*, *supra*, and *Stevenson v. United States*, *supra*, cited by the court in *Young v. United States*, *supra*, it is interesting to note that both cases were reversed for failure to instruct on the lesser included offense of manslaughter in a trial for murder. A reading of those cases will emphasize the necessity of submitting the issue for the determination of the triers of fact. See also *United States v. Moore*, 16 USCMA 375, 36 CMR 531 (1966).

In *Broughman v. United States*, 361 Fed. 2d 71 (D.C. Cir. 1966), the defendant was convicted of robbery in the lower court. He appealed seeking reversal of his robbery conviction on the ground that the trial judge erred in refusing to instruct the jury on the lesser included offense of simple assault. In that case the Government's evidence consisted of the complaining witness testifying as to being robbed and struck in the face by appellant while appellant's co-defendant was holding him. The co-defendant denied the charge and testified that the appellant was merely trying to separate the plaintiff from a screaming woman and that appellant never struck the plaintiff, but merely pulled

at him. The indictment alleged a taking by force and violence. The court held that an instruction on the lesser included offense of simple assault should be required since there was evidence of the lesser crime. The government argued that the co-defendant's testimony showed a justifiable assault and that plaintiff's testimony showed a robbery. Therefore, the government contended the jury would have to believe *all* or *nothing* of either the co-defendant's or the plaintiff's testimony. The court disagreed and reversed, relying primarily on *Young v. United States, supra*. The court made the following statement which is certainly apropos in the present case:

"The fact that Blake's testimony raised an issue whether appellant was guilty of any crime at all is not inconsistent with appellant's claim that this same testimony raised an issue whether a lesser included offense had been committed. Here the jury could have believed Blake's testimony that he and appellant did not rob Weedon while at the same time finding, in light of the injuries sustained by Weedon and the fact that appellant was found with bloody clothes and skinned knuckles, that they had assaulted him. Whether the assault was justified was a question for the jury."

The same analysis should apply here since the jury "could have believed" Valdez's testimony that he did not stab Valerio while at the same time finding, in light of the story told by Shirley Wilkerson, that Valdez assaulted Valerio without any knife.

Appellant is not unmindful of the decisions which hold that in certain cases where the evidence is all one sided and shows a willful, malignant, and malicious killing, an instruction on the lesser included offense may not be justified. The same may be true where the defendant fails to request an instruction and chooses the "all or none" approach. The case law, however is almost unanimous in recognizing the necessity for instructing the jury as to an included crime of lesser degree when there is evidence from which the jury could find that such lesser crime was committed. The presence of such evidence is the determinative factor. In looking at the record there is ample evidence in this case. Valdez was not silent as to what occurred in Gus's Tavern. No knife was found. Appellant's testimony alone or even Shirley Wilkerson's alone is enough to require an instruction on simple assault and battery. Appellant did not admit the state's account of what happened, but denied it in the most important aspect and gave his own account of what occurred. It was reversible error not to let the jury pass upon that version as well as the state's and believe either, neither or parts of both.

POINT III

AFTER EVIDENCE OF THE DEFENDANT'S PRIOR CONVICTIONS HAD BEEN ADMITTED FOR THE PURPOSE OF IMPEACHMENT, IT WAS PREJUDICIAL

ERROR FOR THE TRIAL COURT TO GIVE INSTRUCTION NUMBER 10 WITHOUT AN INSTRUCTION LIMITING THE PURPOSE FOR WHICH THE EVIDENCE HAD BEEN ADMITTED.

The trial court erred in denying the defendant's request for a more limiting instruction and sending to the jury instruction number 10 which 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 a 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."

Because of the prejudicial and repetitious questioning of Valdez by the prosecutor, Mr. Roland Anderson, Mr. Richards took exceptions to the above instruction contending it would place undue emphasis on the fact that the defendant had been convicted of prior crimes (R. 98). The exception did not cause the court to change its instructions to the jury.

The prejudicial effect of letting the jury know of these prior convictions is acknowledged by many. Its admissibility is based primarily on the belief the jury has the ability to segregate the evidence according to its permissible uses. However, when the court admits

evidence of other convictions for credibility purposes, it should also instruct the jury to limit the consideration of the evidence to the issue of credibility. The trial court failed to limit the instruction in this case. In *State v. Winget*, 6 Utah 2d 243, 310 P. 2d 738 (1957), Judge Wade observed the possibility of prejudice in admitting evidence not relevant to the issue of guilt. He stated as follows:

"... Except where otherwise provided by Rules of Evidence all relevant evidence is admissible. Relevant evidence means evidence having a tendency in reason to prove or disprove any material facts in issue. However, evidence that a person committed a crime on one occasion is inadmissible to prove his disposition, bad character, or propensity to commit crime as the basis for an inference that he committed the crime for which he is on trial, but such evidence when relevant is admissible to prove some material facts including the absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity. The reason for excluding such evidence is that the danger of prejudice outweighs the probative value of such evidence."

It is not denied that the defendant's attorney on opening arguments first brought out the fact that the defendant had been convicted on prior occasions. In doing so, Mr. Richards knew he was not opening any door that wouldn't be opened anyway since the defendant Valdez would eventually have to take the stand to defend himself. But just because Mr. Valdez took the stand to protect himself, that doesn't mean he should

he denied those limitations on evidence referred to by Justice Wade. The defendant had no real choice in the matter. He had to testify to defend himself. It should be pointed out, however, that the prosecutor, before the defendant took the stand, illicit evidence pertaining to the defendant's prior convictions. Mr. Anderson obtained information from Valerio on direct examination concerning the possibility that Valdez would be back in the "pen" if Valerio wouldn't take the blame for the drunk driving charge (R. 22). Valerio's wife when questioned on direct examination also mentioned that Valdez called Valerio and stated that she heard the defendant say, "I can't afford to go back in because of any more trouble."

In an effort to impeach the defendant, the prosecutor asked Valdez on cross-examination the following repetitious and prejudicial questions concerning prior crimes including his parole violations:

Q. Why did you go to the tavern (R. 73)?

Q. Do you know that is a violation of your parole?

Q. You didn't care about that, did you?

Q. You knew you could go back to prison for that, didn't you?

Q. That didn't stop you from going there?

Q. You knew it was a violation didn't you?

Q. You also knew if you didn't get caught you wouldn't go back to the penitentiary, didn't you?

Q. Now, you state that you have been in prison, is that right?

Q. More than once?

Q. What were you in prison for?

Q. Wasn't it, in fact, you were charged with robbery (R. 74)?

Q. In fact, it was assault and robbery, too, wasn't it?

Q. I am talking about this time of release, was it in May? What was the charge for which you received sentence?

Q. The original offense was assault and robbery, isn't that the truth?

Q. You had been in prison before that too?

Q. You had been in prison on another offense?

Q. You had been in prison on other offenses before this?

Q. Now, of course, you know that assaulting somebody is a violation of your parole too, isn't it (R. 80)?

Q. And also carrying a knife would be a violation too, wouldn't it?

Q. And, also going into the tavern is a violation too, isn't it?

Q. And drinking is a violation too, isn't it?

Q. And, keeping company with people that are not just right is also a violation, too, isn't it?

Q. There is a lot of things that is a violation, isn't that right?

Q. You pay attention to those that you want to pay attention to, isn't that right?

Q. You pay attention to those that are violations that you want to, and those that you don't want to, you don't pay any attention to?

Q. Let me make it clear to you.

Q. You don't mind going to the tavern enough though you know that is a violation, you don't mind that, do you (R. 81)?

Q. You have been in the tavern many times during the time you have been on parole, haven't you, Joe?

Q. You have been in fights too, while you have been on parole, too haven't you, Joe?

The prosecutor again mentioned the defendant's prior convictions in his closing argument to the jury. He stated (R. 104):

"Joe isn't what you would say is an inexperienced man. Joe has had experience with the law before. Joe is a smart man, by the way. His testimony from the witness stand indicates that this man is a thinker. If he were to—here is a man that obviously has already violated his parole regulations. He is going to places he should not, he is drinking, he is possibly associating with

people he shouldn't be associating with under a parole arrangement."

It isn't denied that when the defendant does take the stand the prosecution may as a rule impeach him by introducing his past record. However, the prosecutor's references to the defendant's violation of parole by going in a bar or having a drink have no reasonable relationship to veracity as against the likelihood of prejudicing the jury. The whole line of questioning, allowed under the guise of impeachment was certainly not "relevant evidence having a tendency in reason to prove or disprove any material facts in issue. Although this appeal is not based on the ground that the questions propounded were necessarily reversible error, we do claim that those questions without any clear instructions limiting the *only* purpose for which that testimony could be used might be enough to introduce guilt and convict an innocent man.

The need to limit the purpose for which impeachment evidence is introduced was indicated in *State v. Edwards*, 13 Utah 2d 51, 368 P. 2d 464 (1962). In that case the defendant was convicted of profiting from the earnings of a fallen woman. On cross-examination the defendant was asked prejudicial questions concerning his previously being in jail and his tendency for getting drunk in public. On appeal this court reversed on the ground that the "defendant in a criminal case may not be questioned as to matters wholly remote from the questions of guilt or innocence of the crime charged, so as to amount to a general assault upon his

character". This court also expressly referred to the need for limiting instructions, but since no instruction was requested, the court refused to rule on that ground. The court stated:

"In the instant case, the defendant having placed in issue his wife's character, the fact that she had pleaded guilty to the crime of prostitution tended to impeach the defendant's assertion that his wife was a woman of good character, and thus impeach his veracity. Therefore, the questions propounded relating to the wife's plea of guilty were proper for this limited purpose. *An instruction to the jury restricting its consideration of this evidence to this limited purpose certainly would have been in order. However, no such instruction was requested by the defendant.*"

Even so this court reversed. It is urged that this court compare the line of questioning in *Edwards* with the questioning here. It is almost identical. Although it is not contended that the questioning was necessarily reversible error, it is called to the court's attention to show the greater need for limiting instructions. The questioning here like in *Edwards* is certainly collateral and remote to the issue of his guilt or innocence.

This court in *State v. Wellard*, 3 Utah 2d 129, 279 P 2d 914 (1955), again referred to the need for instructions couched in plain and unambiguous language. The court at p. 133 stated:

" . . . It is settled in this court that the state may not prove that the defendant committed other offenses merely to show his propensity for

the commission of crime, because such evidence is apt to be given undue weight. However, the evidence of other crimes is admissible if it tends to prove that he had the necessary intention for the crime charged. For evidence admissible for one purpose is not inadmissible because it fails to meet the requirements for admissibility for another purpose, but *the jury should be instructed not to use it for the inadmissible purpose. This the court did in this case and contrary to defendant's argument such instruction was clear and understandable by the jury.*"

Facts in the present case are similar to *Kemp v. Government of Canal Zone*, 167 F. 2d 938 (5th Cir. 1948), where the court did give limiting instructions. In the case the defendant was convicted of murder. When defendant took the stand on cross-examination, he was asked if he had been previously convicted of two felonies in the State of Washington and whether they were robbery and murder. *The trial court instructed the jury that those convictions could not be taken as evidence of guilt or innocence upon the trial, but were to be considered only as affecting defendant's credibility as a witness. On appeal the court held this instruction was not in error.* The court agreed that when the defendant took the stand in his own defense he was subject to impeachment like any other witness, but the court also felt that the defendant deserved the proper limiting instructions.

The court in *Matters v. Commonwealth*, 245 S.W. 2d 913 (Ky. 1952), also recognized the need to explain to the jury the proper use of such testimony. In that

case the defendant was charged with and convicted of committing armed robbery. The court on appeal reversed and stated that although the questions asked the defendant on cross-examination concerning his prior conviction were admissible, it was the duty of the trial court to admonish the jury as to the limited purpose for which the evidence was admissible.

The court in *Farley v. State*, 93 Okla. Cr. 192, 226 P.2d 1002 (1951), also recognized the need for limiting instructions. In that case the defendant was convicted of grand larceny. The counsel for defendant on direct examination in interrogating his own witness brought out the fact that he had been convicted of three prior felonies for which he has served time. On cross-examination the county attorney, like in our case, went into the nature of the crime for which the witness had been convicted and without objection by defense counsel. The trial court gave the following complained-of instruction:

“In considering the testimony of a witness who the evidence shows has heretofore been convicted of an offense, you may consider such fact of conviction *only* as it may or may not in your judgment affect the weight or credibility you may give to the testimony of such witness.”

On appeal the court agreed that such cross-examination was proper but added:

“So, where, in the case of a witness for either the defendant or the state, evidence is admitted and limited to the purpose of affecting the credi-

bility of such witness, showing prior conviction or convictions for crime, *the State or the defendant, as the case may be by the same principle involved when such evidence was admitted as a defendant, would be entitled to an instruction by the trial judge, limiting the purpose for which such evidence was admitted, as otherwise such evidence might prejudice the defendant or the State as the case might be beyond the scope in which the testimony was admitted. For this reason, we conclude that the court did not err in giving the instruction complained of.*"

These cases have indicated that the principal problem in the use of prior convictions to impeach is the risk of the improper use of the evidence by the jury, particularly where the defendant is being impeached in his capacity as a witness. Empirical evidence by the University of Chicago Jury project confirms the worst of what has been suspected: "jurors have an 'almost universal inability and or unwillingness either to understand or follow the court's instruction on the use of defendant's prior criminal record for impeachment purposes'." See Note 70 Yale L. J. 763, 777 (1961). In another study, Hans Ziesel and Harry Kalven, Jr., both University of Chicago law professors, have just completed an exhaustive ten-year study of the behavior of juries in felony trials throughout the country. Kalven & Ziesel, *The American Jury* (1966). The authors first selected a national cross section of 357 felony cases, all of which tried before juries between 1954 and 1958. They then obtained detailed written interviews from the judges who presided at each

of these trials. From each of the judges they ascertained (1) the result the judge would have reached had the case been tried before him sitting without a jury, and (2) if there was a difference in result, the judge's explanation from the result reached by the jury. Then from that the authors analyzed the material and drew the conclusions they felt their analysis permitted. Those conclusions which show the definite need for limiting instructions as to the use of prior convictions for impeachment are as follows:

1. The jury is far more likely to acquit a defendant who has no record and takes the stand than will the judge.

2. In 117 of the 3576 cases, the defense counsel chose a jury and the defendant was either convicted or the jury could not reach a verdict. In each of those 117 cases, the judge, had he been sitting alone, would have acquitted. In thirteen percent of these cases, the unfavorable verdict was attributable to some immoral or vulgar behavior on the part of the defendant. The authors find that a number of these jury verdicts were due to the jury's lack of sophistication in making credibility evaluation. In their view, the judge is better able to fence off the less credible components of the case, and to separate the wheat from the chaff. The jury tends to follow the old maxim, *falus in uno, falus in omnibus*. As evidence of the jury's lesser ability the authors point to the fact that in ten percent of these 117 cases, the defendant either failed to testify or had a record. See

also Joshua N. Koplovitz, Book Review, Criminal Law Bulletin, No. 9 (1966).

From that study one can see the need for proper limiting instructions since evidence of prior conviction is properly introduced not as evidence of guilt but for impeachment purposes. It is also important to note that if the jury is given the proper cautionary instruction they do have the ability to understand and follow it. Kalven and Ziesel, in their study of *The American Jury*, stated as follows:

“Upon analysis, however, we read the results as making an important point about the jury’s revolt from the law. It has been a basic thesis of this study that the jury by and large responds to the discipline of the evidence, and where it does not, it conceals from itself its own response to sentiment, sentiment under the guise of resolving issues of evidential doubt . . . Table III reveals that the discipline of the evidence and the discipline of the judge’s comments re-enforce each other with the result that, when both are present, they virtually eliminate disagreement. The moral then is that the momentum of the jury’s revolt is never enough to carry the jury beyond the evidence and the judge.” Kalven & Ziesel, *The American Jury*, p. 427 (1966).

It is also important to note that where there is a indictment for a felony and also a second count charging the alleged felon with being an habitual criminal Utah by statute has adopted the policy of keeping former convictions from the jury until the guilt or innocence of the accused, under the charge of the present

crime, is determined, Utah Code Ann. § 76-1-19 (1953). The vital difference between this method and the common law method is that under this statute, former convictions are kept from the jury until the guilt or innocence is determined, whereas at common law the convictions are allowed in with cautionary instructions given to the jury. Utah's statute was adopted after a similar Connecticut statute. The reason for such preclusion was mentioned in *State v. Ferrone*, 96 Conn, 160, 113 A. 452, 457 (1921), where the court stated:

"It cannot be believed that an accused man would ever have a fair trial resulting in a verdict not affected by prejudice or by consideration by which the jury should not be influenced, if during that trial allegations that he has twice before been convicted of state prison crimes have been read to the jury, and evidence of his former convictions has been placed before them."

The effect of allowing the prosecutor to impeach the defendant here without limiting the application to which prior convictions can be put by the jury operates to completely abrogate the effectiveness of the above statute. An argument that the defendant had a choice not to take the stand is not persuasive since Valdez had no real choice in the matter. He had to take the stand to defend himself and avoid any adverse inferences. Since Utah has seen fit to legislate this policy prohibiting inferences of guilt based on prior convictions, it should then be enforced at least by limiting the use of evidence of prior convictions by advising the jury of its restricted use. This court in *State v.*

Sullivan, 6 Utah 2d 110, 307 P. 2d 212 (1957), articulated this policy in a similar manner:

"The presumption of innocent and the requirement of proof of guilt beyond any reasonable doubt, are indeed of the utmost importance, safeguards against the possibility of convicting the innocent. We scrupulously adhere to them notwithstanding the difficulties encountered by the possibility that some guilty may escape punishment. It is an ancient and honored adage of our law that it is better that ten guilty go free than that one innocent person be punished. *We appreciate the wisdom of the maxim, the importance of according every proper consideration to those accused of crime.*"

The court in *Sumrall v. United States*, 360 F. 311 (10th Cir. 1966), also recognized the necessity of having exacting instructions. In that case the defendants were convicted after a jury trial of armed robbery of a federally insured bank. The only point raised on appeal was that the trial court committed error in refusing to strike an "unresponsive, prejudicial and inflammatory" reference by a police officer-witness to the past "records" of the defendants. The Tenth Circuit Court of Appeals, conceding that the evidence of guilt was overwhelming, nevertheless reversed the conviction. It held, citing numerous cases, that evidence of prior criminal conduct was not admissible to establish guilt. The court stated that whether a reversal and new trial is required depends on "whether the jury was more prone to convict these appellants knowing the

and previous records." The court then made this final observation, which is certainly appropriate here:

"Technical niceties such as these make the law appear ridiculous to the man in the street. But all law is technical if viewed only from concern for punishing crime without heeding the mode by which it is accomplished." See Justice Frankfurter in *Bollenbeck v. U.S.*, 326 U.S. 607, 614, 66 S. Ct. 402, 90 L. Ed. 350. "In circumstances like these the question is not whether the appellants have been proven guilty, but whether guilt has been established according to the procedural safeguards to insure trial before a fair and unprejudiced jury. It is not enough to be able to say that the evidence is entirely sufficient to convict without reference to prior records of appellants and that the jury would have in all probabilities returned a verdict of guilty without such knowledge. The question we must decide is whether the jury was more prone to convict these appellants knowing they had previous records than without such knowledge. In other words, can we say without reasonable certainty that the reference to prior records 'had but very slight effect on the verdict of the jury'?"

One need only read the transcript pertaining to the cross-examination of Valdez to see the need for a cautionary instruction. (See R. 73, 74, 80, 81). The trial court's refusal to give a limiting instruction in light of the need for one, the defendant's request for one, and the case law requiring one was definitely prejudicial and reversible error.

CONCLUSION

The instant action presented facts to the jury where the position of the prosecutor and the defense were substantially at loggerheads. The complaining witness was the only individual whose testimony supported all the elements of the crime with which the appellant was charged. A large portion of the evidence received at trial was directed towards the appellant's previous criminal record and involvement. In the absence of instructions limiting the use of this testimony with the narrow limits which the law recognizes supporting its introduction the appellant was obviously prejudiced. Further the failure of the trial court to instruct on the lesser included offense which was raised by the evidence is blatant prejudicial error. It is obvious justice will be served only by returning this case for a new trial under circumstances which will insure that any conviction will result therefrom would be the result of proof of guilt of the crime charged and not merely of having a bad record in the past.

This court should reverse.

Respectfully submitted,

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