

1967

## State Of Utah v. Dennis A. Hunter : Brief of Appellant

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### Recommended Citation

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	Case No.
	)	10893
v.	)	
	)	
DENNIS A. HUNTER,	)	
	)	
Defendant-Appellant.	)	

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BRIEF OF APPELLANT

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Appeal from the judgment of the  
Third Judicial District Court in and for  
Salt Lake County, State of Utah

Honorable A. H. Ellett, Judge.

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the appellant, Mr. Hunter, was found guilty of assault with a deadly weapon. On the 30th day of December, 1966, the appellant was sentenced to an indeterminate term of imprisonment not to exceed five years in accordance with § 76-7-6, Utah Code Anno. (1953).

### RELIEF SOUGHT ON APPEAL

The appellant, Dennis A. Hunter, respectfully submits that his criminal conviction of assault with a deadly weapon should be reversed and that a new trial of the charges against him be ordered.

### STATEMENT OF FACTS

On April 23, 1966, the appellant, Dennis A. Hunter, and one Steve Clark, were involved in a high-speed automobile chase with pursuing Utah Highway Patrolmen. As the chase progressed up Echo Canyon, the two automobiles closed to within one or two car lengths of one another. At this point, one of the patrolmen leaned out of his car window and made as if to fire his pistol at the appellant and his companion (T. 38, 55 and 56). As the appellant and his companion dropped lower in their seats to avoid being struck by the presumed pistol fire, the automobiles separated to a distance greater than a hundred feet (T. 56). At this point, the appellant leaned out of his window and fired shots in the general direction of the pursuing patrol car (T. 39 and 56).

At the appellant's trial, no evidence was produced to show that any of appellant's pistol shots struck anywhere near the automobile in which the pursuing patrolmen were riding. In fact, the chief witness for the State

testified that he did not notice any results of the appellant firing (T. 48).

The State further failed to produce any direct proof of the intentment with which the appellant acted while firing his pistol, save the fact that the gun was pointed in a general direction toward the patrolmen. All of this occurring while both automobiles were engaged in extensive evasive maneuvers and while both automobiles were some distance from one another.

At the conclusion of the presentation of evidence, counsel for the appellant requested an instruction on the includability of the lesser offense of wimple assault within the charge of assault with a deadly weapon (R. 17 and 21). The lower Court rejected this requested instruction stating that it felt that the issue at hand was either assault with a deadly weapon or nothing (T. 67).

Further statements by the Court indicate that there might have been some confusion as to the nature of a criminal assault. The Court apparently took the position that an assault would be criminal only if the assaulting party clearly intended to kill or physically injure a party (T. 67 and 68). According to the Court, any other form of assault would not be criminal in nature, but would merely be a civil matter (T. 68). To this, counsel for the appellant took due exception (T. 67, 68 and 75).

Following an interrupted deliberation by the jury, (T. 76) a verdict of guilty of the charge of assault with a deadly weapon was returned against the appellant. It is from this conviction the appellant now takes this appeal.

## ARGUMENT

THE TRIAL COURT COMMITTED GRIEVOUS AND REVERSIBLE ERROR IN REFUSING TO GRANT APPELLANT'S REQUESTED INSTRUCTION ON THE INCLUDABILITY OF THE LESSER OFFENSE OF SIMPLE ASSAULT WITHIN THE CHARGE OF ASSAULT WITH A DEADLY WEAPON.

There are three defined elements of the offense of assault with a deadly weapon with which the appellant in this case is charged. The Utah Supreme Court in the case of State v. Barkas, 91 Utah 574, 580, 65 P.2d 1130 (1937) has defined these elements as being: "(1) An assault; (2) use of a deadly weapon; (3) an intent to do bodily harm."

Implicit within the description of assault with a deadly weapon is the rule of law that so-called simple assault is a necessary and included lesser offense within the greater offense. In the Barkas case, the Utah Supreme Court fully accepted this rule of law and stated that:

There can be no doubt that a charge of assault with intent to do bodily harm, includes also simple assault, because that assault must be proved as a necessary element of the greater offense. (Emphasis added.)

See also the case of People v. Bruce, 40 Cal. Rptr. 877 891 (D.C. Cal. App., 1964); "[S]imple assault . . . is a necessarily included offense within the charge of force likely to produce great bodily harm."

By elevating simple assault to the stature of a "necessary element" of the offense of assault with a deadly weapon, the Utah Court has likewise imposed the requirement that an instruction on this included offense must be given to the jury. The result of this rule of law therefore being that a trial court's failure to present the jury with such an instruction, with such an alternative verdict, is generally considered to be reversible error. The Court in the case of State v. Hymas, 64 Utah 285, 286, 230 Pac. 349 (1924), pointed out 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 . . . ." And, in the Barkas case, the Court at page 580 states that:

Since "simple assault" is a necessary element of the offense charged or any offense included therein, . . . it was error on the part of the trial court to refuse to submit that possible verdict to the jury.

By refusing or failing to give such instruction, such an alternative, the trial judge effectively usurps the fact-finding duties of the jury. This Court has long recognized the danger inherent in such usurpation by a trial judge and has indicated its reluctance to uphold such actions. This marked reluctance was clearly indicated in the opinion in the Hymas case at page 287 where the Court states that:

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 evidence as a matter of law.

The danger that arises by such a refusal to give an instruction on lesser included offenses is clearly demonstrated in the situation where the evidence is of a nature that points to some degree of guilt on the defendant's part. If the jury has no choice save that of acquittal or conviction on the greater offense, it is then placed squarely on the horns of a dilemma. For to acquit the defendant is to release a man the jury feels is guilty, yet to convict him of the greater offense is to find him guilty of a charge greater in degree than that the jury feels is warranted by the evidence. The refusal by the Court to give the jury a third alternative of a lesser offense then destroys the jury's right and power to pass judgment on the evidence. But more than this, the refusal to give this instruction weakens dangerously the rightful presumption of innocence given to an accused and reduces the burden of proof placed on the State.

This fact-finding role of the jury becomes critical when it is realized that in order to convict a person accused with assault with a deadly weapon, the jury must, as a matter of law, determine the intent with which the accused acted. See State v. Barkas, supra. Likewise, due to the nature of this offense the intent of the actor generally must be inferred from the circumstances surrounding his actions rather than by direct proof. It becomes clear then, that the jury may determine as a matter of fact that the intention that may be inferred or derived from the evidence is too weak to sustain a charge of assault with a deadly weapon. To remove such determination from the jury by refusing to give an instruction on lesser included offenses is to deprive the fact-finders of their most basic and important obligation and to cast the trial judge in a role for which he is ill-suited under our judicial system.

That the foregoing line of reasoning applies to the instant case is apparent from a review of the evidence presented at the trial. In describing the alleged assault, the State's witnesses testified that the firing of the pistol by the appellant took place under extremely adverse conditions. The appellant fired his shots while in an automobile that was engaged in extensive and evasive maneuvering at high speeds. (T. 38, 39, 56, and 57). The distance between the appellant's automobile and that of the State trooper's was, in the words of the witness Denos, "a hundred feet or better." (T. 56) It is therefore no wonder that the State's witnesses conceded that not only were they and their automobile not struck by any of these shots, but, and more importantly, the appellant's shots were apparently so wide of the mark that the witnesses had no idea of where these shots went. (T. 48) In fact, on cross-examination, trooper London finally admitted that, "All I saw, that the gun was pointed in my direction." (T. 48)

Added to these facts is the additional point that in order for the appellant to aim the pistol at the complaining party, trooper London (R. 2), it was necessary for the appellant, who was in the right-hand side of the fleeing automobile, (T. 39 and 56) to twist his body around and fire with his left hand across his body at an acute angle toward trooper London who was in the left-hand side of the pursuing automobile. (T. 36)

The State completely failed to offer any direct evidence of, or further circumstantial evidence to portray the specific intent with which the appellant acted. This dearth of evidence coupled with the physical conditions as established by the State's witnesses

completely left the questions of intent open for decision by the jury. That this evidentiary condition requires jury determination as to the degree of the offense committed was recognized in the case of Barnishel v. People, 347 P.2d 915, 918 (Colo., 1959):

Where there is no evidence of the specific intent required to determine the defendant guilty of the precise offense charged in the information, or the evidence, as in this case, might be insufficient to remove the reasonable doubt which might be in the minds of the jury as to the intent, under the same evidence the defendant might be found guilty of simple assault.

The jury in the instant case was not given the opportunity to decide the issue of reasonable doubt and its relationship to the question of the intent of the appellant. The trial court rejected the instructions on lesser and included offenses requested by appellant's counsel. (T. 67) (It should also be noted that it is clear that the status of this evidence raised serious doubts and questions in the jurors' minds. At one point during its deliberation, the jury returned with a verdict with which not all of the jurors agreed. The foreman indicated that the jury had reached an impasse in its deliberations. (T. 76) Subsequent to the urgings by the trial court, the jury, after three hours of deliberation, returned a verdict of guilty. (T. 78))

In refusing the requested instruction, the lower Court gave a confusing interpretation to the law of assault with a deadly weapon. At page 67 of the official transcript, the Court states that "the evidence shows that a gun was loaded . . . . It's either with a

deadly weapon or nothing under this evidence." This position is contrary to the law as pointed out in the Barkas case at page 579 of the opinion:

This, [action of assault] if done with the intention of frightening, or intimidating or interfering with Cordova would constitute a technical or simple assault, which is a threat or attempt to interfere with one's sense or feeling of physical security and put one in fear for his safety.

See also the contradictory position taken by the lower Court on lines 16, 17, 18 and 19 at page 48 of the official transcript.

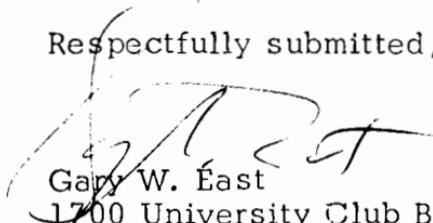
The state of this evidence raised a sufficient question as to the intent with which the appellant acted. This was a matter for the jury and not the Court to decide. It is upon this wrongful refusal by the lower Court to grant the requested instruction on the lesser included offense of simple assault that this appeal is taken.

### CONCLUSION

It is respectfully submitted that the trial court committed grievous and reversible error in refusing to grant appellant's request for an instruction on the inclusion of the offense of simple assault in the charge of assault

with a deadly weapon and that appellant's conviction should, therefore, be reversed and a new trial ordered.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. W. East", is written over the typed name.

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