1984

State of Utah v. Timothy and Mildred Lairby : Response To Appellants' Supplemental Memorandum Of Points And Authorities

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18998
TIMOTHY AND MILDRED LAIRBY,	:	
Defendants-Appellants.	:	

RESPONSE TO APPELLANTS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

APPEAL FROM THE JUDGMENTS RENDERED IN THE THIRD JUDICIAL DISTRICT COURT, THE HONORABLE PETER F. LEARY, JUDGE, PRESIDING.

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SUPPLEMENTAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT IMPROPERLY RESTRICT APPELLANTS' CROSS-EXAMINATION OF CERTAIN WITNESSES AND THUS DENY THEM THEIR CONSTITUTIONAL RIGHT OF CONFRONTATION.

"The right to cross-examination is an invaluable right embodied in Article I, Section 12 of the Utah Constitution and in the Sixth Amendment of the United States Constitution which assures the right to confrontation." State v. Maestas, Utah, 564 P.2d 1386, 1387 (1977). However, the extent of cross-examination rests largely in the discretion of the trial judge, who is allowed considerable latitude in imposing reasonable limits on cross-examination. State v. Starks, Utah, 581 P.2d 1015, 1017 (1978); State v. Curtis, Utah, 542 P.2d 744, 746 (1975). And unless the trial judge clearly abused his discretion, his or her rulings will not be reversed. Ibid.

Appellants argue that there were several instances during their trial when the judge improperly restricted

cross-examination and thus denied them their constitutional right of confrontation. They first cite a portion of defense counsel's cross-examination of Wanda Lairby, Virginia ("Lisa") Lairby's natural mother, which they allege is an example of improper restriction of cross-examination as to bias, interest, and motive to fabricate. However, appellants fail to quote the entire exchange between the judge and their counsel. The following appears in the trial transcript immediately after the last statement quoted in Appellants' Supplemental Brief at page 3:

> MR. LIONEL FARR: Well, if there is a question of custody and if she's biased for these children to stay with her and not go with him, to indicate somewhat her attitude towards these children being with him or even the least irritation at all. I would like to know whether she's biased and check it out.
>
> THE COURT: Well, I suppose if you want to go into the subject of why the visitation was stopped, I suppose that would be appropriate, but I don't know that your approach at the moment is relative or relevant.

(R. 141-142).

The judge's comments indicate that he did not intend to prohibit cross-examination of the witness for possible bias. He was, however, legitimately concerned that the cross-examination be orderly and relevant. As is well settled law, the constitutionally protected right of cross-examination does not entitle a defendant "to embark on fishing expeditions." See State v. Clayton, Utah, 658 P.2d 621, 623

(1983). A foundation must first be established upon which to base the relevancy of questions during cross-examination. Ibid.

Appellants seem to be arguing that the judge completely foreclosed the possibility of questioning Wanda Lairby about a pending custody hearing. Given his comments after he sustained the State's objection to defense counsel's question about that matter, it appears the judge simply was seeking further foundation to support the relevancy of the inquiry. His suggestion that counsel explore "why visitation was stopped" supports this conclusion. Moreover, even if it was error to sustain an objection to counsel's question, the issue of a pending custody hearing was fully explored in later cross-examination of Wanda Lairby (see R. 403-406). Thus, any error was not prejudicial. See State v. Curtis, 542 P.2d at 746.

Appellants' references to portions of defense counsel's attempted cross-examination of Lisa Lairby, Dr. William Palmer, and Violet Jones as examples of improper restriction of cross-examination are similarly without merit. Certain questions put to those witnesses were not allowed on the ground that they went beyond the scope of direct or redirect examination. This is in accord with the long-standing general rule in Utah that the scope of cross-examination is limited to the subject matter of the direct examination. See State v. Bleazard, 103 Utah 113, 133 P.2d 1000, 1002 (1943); Rule 43(b), Utah Rules of Civil

Procedure (which is applicable to criminal proceedings under Rule 81(e), Utah Rules of Civil Procedure); Rule 611, Utah Rules of Evidence (1983). Significantly, appellants made no argument to the trial court that the questions were permissible as exceptions to this general rule--e.g., inquiry into matters affecting the credibility of the witness. See State v. Curtis, 542 P.2d at 746.

Finally, the questioning of Richard Long about a visitation rights agreement and his living with another person was not permitted on the ground that it was not relevant or material (see R. 539). Appellants failed to show satisfactorily how those questions were relevant to either the witness's credibility or the issues of the case (R. 428-431). The relevancy of those questions was far from obvious. Thus, appellants, having not laid sufficient foundation for relevancy, were not improperly restricted in their cross-examination of Long. See State v. Clayton, 658 P.2d at 623.

POINT II

THE TRIAL COURT'S REFUSAL TO SECURE THE ATTENDANCE OF AN OUT-OF-STATE WITNESS WAS NOT REVERSIBLE ERROR.

Appellants claim the trial court erred in refusing to secure for them the attendance of an out-of-state witness, Tracy Long (who apparently was in Arizona), pursuant to Utah Code Ann. § 77-21-3 (1982) (Arizona has also adopted the

Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. See Ariz. Rev. Stat. Ann. § 13-4092 (1956), as amended).

As the State noted in it's initial brief, the duty to present a defense devolves upon the defendant, who is responsible for the production of witnesses in his behalf. See Respondent's Brief at page 15. Because issues raised for the first time on appeal will not be considered by this Court, appellants' failure to bring to the attention of the trial judge the procedures provided for in § 77-21-3, of which he apparently was unaware (see R. 236), should preclude consideration of the argument they now present on appeal. See State v. Steggell, Utah, 660 P.2d 252 (1983). Furthermore, appellants made no showing at trial, nor do they make any here, that Tracy Long was a material witness (a requirement of § 77-21-3). They simply state that her anticipated testimony would have been material and relevant (see R. 235; Appellants' Supplemental Brief at p. 11). Under these circumstances, appellants' suggestion that the trial court's failure to secure the attendance of Tracy Long pursuant to § 77-21-3 should result in a reversal of their convictions is without merit.

POINT III

THE TRIAL COURT DID NOT DENY APPELLANTS THEIR RIGHT TO PRESENT CHARACTER EVIDENCE, NOR DID IT ERR IN REFUSING TO GIVE AN INSTRUCTION ON CHARACTER WITNESS EVIDENCE.

Appellants refer to several pages of the trial transcript to support their claim that the trial court unduly restricted their presentation of character evidence. It is somewhat difficult to respond to this claim because appellants do not demonstrate with any specificity how the trial court may have erred in this regard. However, a review of those references to the transcript reveals that objections to defense counsel's attempts to elicit character testimony were sustained on the legitimate grounds that insufficient foundation had been laid to qualify the witness and that the questions were not relevant to the reputation of the accused. As noted in State v. Goodliffe, Utah, 578 P.2d 1288 (1978):

> [T]he accepted procedure in eliciting testimony of one's reputation as it pertains to his character or a trait of his character that is in issue is to first qualify the witness by determining if he is acquainted with the reputation of the person in question, and if so, then to have him relate what that reputation is. However appropriate it may be to prove a character trait in issue by testimony in the form of an opinion, it is not appropriate to elicit from the witness his individual opinion as to what the person's reputation is in regard thereto.

578 P.2d at 1291. See also State v. Lopez, Utah, 626 P.2d 483 (1981).

In short, appellants' failure to lay proper foundation for character testimony and to ask questions that were relevant to appellants' character restricted the introduction of character evidence. The court did not impermissibly restrict appellants' right to present character evidence. Cf. State v. Ervin, 22 Utah 2d 216, 451 P.2d 372 (1969).

Appellants' further argument concerning the failure to give an instruction on character witness evidence is, as noted in the State's initial brief (see Respondent's Brief at p. 19), without merit. The following additional comments are intended to supplement the arguments made in that initial brief.

It is generally agreed that unless the defendant has presented competent character evidence sufficient to support a character evidence instruction, he or she is not entitled to such an instruction. See, e.g., Conner v. State, Ga., 303 S.E.2d 266 (1983); State v. Williams, 299 N.C. 652, 263 S.E.2d 774 (1980); cf. State v. Stone, Utah 629 P.2d 442, (1981) (which held that a defendant is entitled to an instruction on his theory of the case if there is evidence to support the requested instruction). Because appellants did not satisfy this basic requirement, the trial court did not err in refusing to give a character evidence instruction.

However, even if this Court were to find that it was error not to give the requested instruction, appellants were not prejudiced since even without the error there was no "reasonable likelihood of a more favorable result for the defendant[s]." State v. Fontana, Utah, ___P.2d___, No. 17796, slip op. at p. 9 (decided March 2, 1984), quoting State v. Hutchison, Utah, 655 P.2d 635, 637 (1982). See also State v. McCumber, Utah, 622 P.2d 353, 359 (1980).

POINT IV

THE TRIAL COURT'S RULINGS CONCERNING THE ADMISSIBILITY OF EXPERT OPINION TESTIMONY WERE PROPER.

A. DR. WILLIAM PALMER'S OPINION TESTIMONY WAS PROPERLY ALLOWED.

Dr. William Palmer, a physician employed at Primary Children's Hospital and the University of Utah School of Medicine and who was also a member of the Child Protection Team of the University of Utah and Primary Children's Medical Center (R. 320), testified that, in his opinion, Lisa Lairby had been sexually abused (R. 335). That opinion was based in large part on what Lisa Lairby told him during his examination of her, which included a physical examination of the vagina (R. 329, 334, 337). Appellants contend that Dr. Palmer should not have been allowed to give his opinion because insufficient foundation had been laid as to whether the statements Lisa Lairby made to him are typically relied upon by experts in

determining whether sexual abuse has occurred.

Information normally relied upon by a physician in the course of his professional duties may provide the basis for expert opinion testimony in the courtroom. In Edwards v. Diderickson, Utah, 597 P.2d 1328 (1979), this Court said:

> We recognize that expert evidence is sometimes justifiably based in part on evidence obtained outside the courtroom--even evidence of the adjudicatory facts in dispute. But such evidence is usually the type that an expert relies upon as a matter of course in forming opinions and is sufficiently reliable to warrant an opinion based thereon. See, e.g., Jenkins v. United States, 113 U.S. App. D.C. 300, 307 F.2d 637 (1962); United States v. Aluminum Co. of American, 35 F.Supp. 820 (S.D.N.Y. 1940).

597 P.2d at 1332 n.2. The following excerpt from Dr. Palmer's testimony indicates that statements from a child who is being examined for sexual abuse are normally relied upon by experts in the field in determining whether abuse has actually occurred:

> Q. Did you say that your opinion, then, was influenced by what the child said to you?
>
> A. Yes, my opinion was influenced by what the child said to me, yes.
>
> Q. Was your opinion based

entirely upon what the child said to you?

A. My opinion was based upon what the child said to me in terms of my experience with other children who are sexually abused.

Q. Okay. But was it based--I see. Then it was based also on what other children have said to you?

A. It's based upon the fact that if I excluded physical evidence and only made an assessment as to sexual abuse having occurred in children who are not experienced sexually and since most sexual abuse does not involve penetration, then I would be excluding 80 percent of children who are sexually abused.

Q. So, what you are saying as far as this--

A. I'm saying my experience, my experience after seeing children who have been sexually abused is that children whose behavior, and that includes vocabulary and way of expressing things in terms of their genital area, when the behavior is beyond that which would be

> acceptable as normal, if you will, in a sexual sense in a given age group, then that has--yes, that has to influence a concern. It is one of the indicators of sexual abuse.

(R. 338-339). See also testimony of Christine Swanson (R. 303-311).

The trial judge could justifiably have found that the interpretation of statements made by possible victims of child abuse to an examining physician, and the conclusions to be drawn therefrom, are "within the scope of the special knowledge, skill, experience or training possessed by the [physician] witness." Rule 56(2)(b), Utah Rules of Evidence (1971). The trial judge's ruling with respect to Dr. Palmer's testimony is in accord with the principle that the determination of the suitability of expert testimony in a case and the qualificiation of the proposed expert are within the sound discretion of the trial court. See State v. Clayton, Utah, 646 P.2d 723, 726 (1982). As noted in Clayton:

> In State v. Ward, 10 Utah 2d 34, 347 P.2d 865 (1959), this Court held that where it appeared to the trial court that there was a reasonable foundation for the opinion of the expert witness, it was within the discretion of the court to admit the opinion and allow any frailties therein to be exposed on cross-examination. "The faults in it . . . go to its weight rather than to its competency." 10 Utah 2d at 38, 347 P.2d at 868.

646 P.2d at 726.

Finally, appellants characterize Dr. Palmer's testimony as opinion on whether Lisa Lairby was telling the truth. The record simply does not support that conclusion. Dr. Palmer's gave his opinion on whether the child had been sexually abused, nothing more.

B. THE TRIAL COURT PROPERLY QUASHED APPELLANTS' SUBPOENA OF DR. BARBARA LIEBRODER.

Dr. Barbara Liebroder, who had conducted a psychological examination of Wanda Lairby but not of Lisa Lairby (see R. 574, 580), was subpoenaed to testify by appellants. After a lengthy discussion between the court and counsel about the content and purpose of the proposed testimony from Dr. Liebroder, the court granted the witness's motion to quash the subpoena (R. 571-583). It becomes obvious after reviewing that discussion that appellants' sole purpose for calling Dr. Liebroder was to elicit from her an opinion on Wanda Lairby's credibility. The court clearly quashed the subpoena on the grounds that it was improper to have a psychologist tell the jury whether a witness was telling the truth (R. 582-583).

It is the exclusive function of the trier of fact to determine the credibility of the witnesses. State v. Howell, Utah, 649 P.2d 91, 97 (1982). Therefore, it was entirely proper for the trial court not to allow Dr. Liebroder to

testify. As noted in State v. Filson, Idaho, 613 P.2d 938 (1980):

> A psychiatrist's testimony on the credibility of a witness may involve many dangers: the psychiatrist's testimony may not be relevant; the techniques used and theories advanced may not be generally accepted; the psychiatrist may not be in any better position to evaluate credibility than the juror; difficulties may arise in communication between the psychiatrist and the jury; too much reliance may be placed upon the testimony of the psychiatrist; partisan psychiatrists may cloud rather than clarify issues; the testimony may be distracting, time-consuming and costly.

613 P.2d at 942 n.3. Furthermore, appellants' reliance on State v. Miller, Utah, 677 P.2d 1129 (1984), as support for their claim that a psychologist should be allowed to testify on a witness's credibility is misplaced. The Miller decision dealt with psychiatric testimony concerning the defendant's ability to form the intent required to commit the charged offense. It did not address the issue of psychiatric testimony on the credibility of a witness.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR A PSYCHIATRIC EXAMINATION OF WANDA AND LISA LAIRBY.

There are essentially three views on the matter of ordering a psychiatric examination of the complaining witness

in a sex crime case: (1) the court has no inherent power to compel a psychiatric examination; (2) the defendant has an absolute right to an order compelling a psychiatric examination of the complaining witness; and (3) the trial judge has the discretion to order a psychiatric examination when a compelling reason is shown. See State v. Gregg, 226 Kan. 481, 602 P.2d 85, 89 (1979). The latter, and better, view, which is fully discussed in Ballard v. Superior Court, 64 Cal.2d 159, 49 Cal. Rptr. 302, 410 P.2d 838 (1966), has been adopted in the vast majority of jurisdictions. Gregg, 602 P.2d at 89. Under that view, whether an examination is ordered "is within the sound discretion of the trial court" and a motion requesting the examination "should be granted only upon a substantial showing of need and justification, which is not a light burden." State v. Wounded Head, S.D., 305 N.W.2d 677, 679 (1981). "The principle established by the majority of the cases is that the judge has the discretion to order such an examination, although the failure to do so has rarely been held an abuse of discretion." Ballard v. Superior Court, 64 Cal.2d at 177, 49 Cal. Rptr. at 313, 410 P.2d at 849, quoting State v. Klueber, 81 S.D. 223, 229, 132 N.W.2d 847, 850 (1965). Finally, the purpose of the psychiatric examination "is to detect any mental or moral delusions or tendencies causing distortion of the imagination that would affect the probable credibility of the complaining witness." State v. Wounded Head, 305 N.W.2d at 679.

This Court's discussion in State v. Hubbard, Utah, 601 P.2d 929 (1979), of whether it was error for a trial judge to refuse to order a psychiatric examination to determine competency of a witness indicates that the majority view applies in Utah as well:

> We do not question that if it were made to appear that there is a substantial doubt that a witness is capable of understanding and appreciating the duty to tell the truth, or that he is able to perceive, remember and communicate facts with reasonable accuracy, the trial judge might grant a request for such an examination before permitting him to testify. However, in the very nature of such an inquiry, and the prerogatives which belong in the first instance to the trial judge, and secondly to the jury, of judging the credibility of witnesses, the determination as to whether such an examination should be had must necessarily rest largely within the discretion of the trial judge.

601 P.2d at 930. See also State v. Wilkerson, Utah, 612 P.2d 362, 364 (1980), where the Court said: "The trial court has substantial discretion in examining the ability of the child to perceive and truthfully relate facts."

It does not appear from the record that appellants presented a compelling reason for ordering psychiatric examinations of Wanda and Lisa Lairby (see R. 9, 231-233). They offered nothing more than that, based upon a psychological evaluation they had of Wanda Lairby, they

believed a "folie a deux"[1] might exist between Wanda and Lisa. This simply did not rise to the level of a compelling reason to order examinations. The evidence referred to by appellants is wholly insufficient to conclude that examinations were required to determine whether some psychological abnormality affected the credibility of those witnesses. See State v. Wounded Head, 305 N.W.2d at 677. Appellants' motion was clearly a fishing expedition, which should not be countenanced by the trial courts. See State v. Gregg, 602 P.2d at 92.

Based upon the foregoing, the trial court, with no compelling reason before it, did not abuse its considerable discretion in refusing to order psychiatric examinations of Wanda and Lisa Lairby.

POINT VI

THE TRIAL COURT DID NOT ERR IN ADMITTING ONLY A PORTION OF A LETTER WRITTEN BY APPELLANT TIMOTHY LAIRBY.

It is generally recognized that when a portion of a writing, conversation, or statement is introduced by one party, the other party may request introduction of the whole, subject to two qualifications: "The portions sought to be admitted (1) must be relevant to the issues and (2) only those

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[1] A folie a deux is "the presence of the same or similar delusional ideas in two persons associated with one another." Webster's New Collegiate Dictionary (1981).

parts which qualify or explain the subject matter of the portion offered by the opponent need be admitted." United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981), citing United States v. McCorkle, 511 F.2d 482, 486-487 (7th Cir.), cert. denied, 423 U.S. 826 (1975). See also Rule 106, Utah Rules of Evidence (1983).

At issue here is a letter written by appellant Timothy Lairby. It is not clear from the record which party offered the letter for introduction into evidence (see R. 92 which indicates the State did, and R. 768 which indicates appellants did). It is clear, however, that the trial court received only a portion of the letter, over appellants' objection (see R. 768-769). Appellants apparently never specified to the trial court why the excluded portions of the letter were relevant and how they served to qualify or explain the subject matter of the portion admitted.

On appeal, appellants fail to show that the two qualifications to the general rule expressed in Walker were satisfied in this case. Furthermore, the letter (particularly the excluded portion) was not included in the record on appeal. This Court has repeatedly said that it cannot rule on a question when there is an inadequate record upon which to resolve it. See State v. Jones, Utah, 657 P.2d 1263, 1267 (1982); State v. Wulffenstein, Utah, 657 P.2d 289, 293 (1982); State v. Mitchell, Utah, 671 P.2d 213 (1983). Therefore, this Court should not consider appellants' argument concerning

admission of only a portion of the letter.

Finally, even if this Court were to find that the trial court erred, the error was harmless. In the context of the entire case, it can be safely concluded that exclusion of portions of the letter had little effect on the outcome of the trial. Certainly, the excluded evidence would not have had a substantial influence in bringing about a different verdict, and thus reversal is not in order. Rule 5, Utah Rules of Evidence (1971); Rule 103, Utah Rules of Evidence (1983); State v. Fontana, Utah, ____P.2d____, No. 17796, slip op. at p.9 (decided March 2, 1984).

POINT VII

LISA LARIBY'S TESTIMONY WAS NOT SO INHERENTLY IMPROBABLE AS TO WARRANT UPSETTING THE JURY'S VERDICT.

Appellants' argument in Point VIII of their brief is two-fold. First, the point heading suggests that appellants believe the trial judge should not have allowed Lisa Lairby, a 6-year old child, to testify. However, appellants made no objection to her testifying, either in a pretrial motion or when she took the stand at trial. This Court will not review the admissibility of evidence that was not objected to at trial. State v. Bingham, Utah, ___P.2d___, No. 18774, slip op. at p.6; State v. McCardell, Utah, 652 P.2d 942, 947 (1982). Because "the facts are not such that great and

manifest injustice would be done if this Court does not entertain the issue sua sponte as an exception," State v. Pierce, Utah, 655 P.2d 676, 677 (1982), the first prong of appellants' argument should not be considered.

Second, appellants argue that Lisa Lairby's testimony was so inherently improbable that there must have been a reasonable doubt as to their guilt. This argument ignores the wide latitude that has traditionally been afforded courts in admitting the testimony of children. See State v. Wilkerson, Utah, 612 P.2d 362, 364 (1980); State v. McMillan, Utah, 588 p.2d 162, 163-164 (1978); People v. Ortega, Colo. App., 672 P.2d 215, 218 (1983). As a practical matter, a reviewing court should be particularly tolerant of a child witness's use of terms not normally used by adults when it addresses the question of whether the child's testimony is inherently improbable--especially in sexual abuse cases. A child may perceive and relate facts differently than would an adult, but that does not prevent a child from testifying truthfully, accurately, and in a manner that can be understood by the jury. Nor does it prevent a jury from determining beyond a reasonable doubt that the facts testified to by the child have in fact occurred.

Appellants focus on Lisa Lairby's "child-like" descriptions of what appellant Timothy Lairby had done to her as examples of inherently improbable testimony. However, her use of the word "winky" instead of "penis," or the word "puke"

instead of "ejaculate," does not render her testimony unbelievable and therefore insufficient to support appellants' conviction. Those terms might reasonably be used by a 6-year old child to describe what must have been an extremely traumatic experience. Additionally, the conflicts between her testimony and that of other witnesses were questions for the jury to resolve and were not of sufficient magnitude to warrant upsetting the jury's verdict. See State v. Howell, 649 P.2d at 97. As noted by this Court in State v. Middlestadt, Utah, 579 P.2d 908 (1978):

> In general, the common-law supports the contention that a conviction may be sustained upon the uncorroborated testimony of the victim, and that such evidence is not insubstantial simply because the testimony is conflicting in some respects. As to the quality of the testimony given, it is settled that it must be so improbable that it is completely unbelievable before it is insufficient to uphold a conviction.

579 P.2d at 911. See also State v. McMillan, 588 P.2d at 164.

POINT VIII

UNDER THE STANDARDS FOR REVIEW OF AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, APPELLANTS' CONVICTIONS SHOULD BE AFFIRMED.

The governing legal standards applicable to a claim of ineffective assistance of counsel were recently summarized by this Court in Codianna v. Morris, Utah, 660 P.2d 1101 (1983):

This Court has previously held in a murder case involving appointed counsel that an accused "is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession." State v. McNicol, Utah, 554 P.2d 203, 204 (1976). Accord, State v. Gray, Utah, 601 P.2d 918 (1979); Strong v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969). The McNicol test has a subjective element--"willingness to identify himself with the interests of the accused"--and an objective element--" competent member of the Bar." The objective element is measured both by general ability or experience and by performance in the defense of a particular case. Both elements (willingness to identify with the accused, and competence) are essential to adequate representation. The McNicol test, which we reaffirm, includes all of the requirments the Court of Appeals for the Tenth Circuit identified in its recent redefinition of the constitutional requirements of effective assistance of counsel. After rejecting the "sham and mockery" test that had previously been applied in the Tenth and other circuits, the court held: "The Sixth Amendment demands that defense cousel exercise the skill, judgment and diligence of a reasonably competent defense attorney." Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) (en banc).

Relying on Dyer v. Crisp, supra, and other authorities, our recent opinion in State v. Malmrose, Utah, 649 P.2d 56, 58 (1982), identifies the following considerations necessary to determine whether a conviction should be reversed or set aside on the basis of ineffective assistance of counsel: (1) The burden of establishing inadequate representation is on the defendant, "and proof of such must be a demonstrable reality and not a speculative matter." State v. McNicol,

> 554 P.2d at 204. (2) A lawyer's "legitimate exercise of jugdment" in the choice of trial strategy or tactics that did not produce the anticipated result does not constitute ineffective assistance of counsel. State v. McNicol, 554 P.2d at 205. (3) It must appear that any deficiency in the performance of counsel was prejudicial. State v. Forsyth, Utah, 560 P.2d 337, 339 (1977); Jaramillo v. Turner, 24 Utah 2d 19, 22, 465 P.2d 343, 345 (1970). In this context, prejudice means that without counsel's error there was a "reasonable likelihood that there would have been a different result . . ." State v. Gray, 601 P.2d at 920. Similarly, as we noted in State v. Malmrose, 649 P.2d at 58, "the failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance.

660 P.2d at 1109. These standards parallel those set forth by the United States Supreme Court in its recent decision of Strickland v. Washington, ___U.S.___, 35 CrL 3066 (decided May 14, 1984). Under the Sixth Amendment a defendant is entitled to "reasonably effective assistance" of counsel. However, a reviewing court's analysis of an ineffective assistance claim is two-tiered. As stated in Strickland:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

> defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

35 CrL at 3071. Significantly, the second component of demonstrable prejudice was adopted by this Court in Codianna, 660 P.2d at 1109. Thus, appellants' argument, that they should not have to show prejudice is not only inconsistent with the law of this state, but is now also contrary to the latest pronouncement on the issue from this country's highest court.

Several factors stressed in the Strickland opinion are particularly important. An attorney's performance should be evaluated in terms of reasonableness "considering all of the circumstances." 35 CrL at 3071. "Judicial scrutiny of counsel's performance must be highly deferential." Id., at 3072.

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and make all significant decisions in the exercise of reasonable judgment.

Ibid.

With respect to the defendant's burden to show prejudice if he or she is able to show that particular errors of counsel were unreasonable, the Supreme Court stated:

> Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.
>
> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866-867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.
>
> . . .
>
> The defendant must show that there is a easonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 3073.

Appellants specifically identify seven alleged errors committed by trial counsel which, they contend, establish ineffective assitance of counsel and require reversal of their convictions. Each of those alleged errors will be discussed separately.

Appellants cite trial counsel's opening statement to the jury as evidence of ineffective assistance. Admittedly, the statement was far from eloquent, but it clearly did not

prejudice appellants in any significant way. In fact, because not much was said to the jury in that statement, it probably had little effect one way or the other. A less than brilliant opening statement by trial counsel simply did not deny appellants the opportunity to present their case to the jury.

The claim that a reasonably competent defense attorney would have moved to strike the testimony of Craig Duvall, Christine Swanson, Finia Feuiaki, and Kelly Powers is completely unsupported by any law or substantive discussion as to why that testimony should have been stricken, or whether it was even likely the trial court would have granted such a request. Without more, appellants claim is highly speculative.

Appellants argue that trial counsel failed effectively to impeach a State's witness because counsel did not have preliminary hearing transcripts which allegedly contained prior inconsistent statements. However, the record indicates that counsel had some transcript of a prior proceeding in his possession when he cross-examined the witness (see R. 501). Furthermore, there is nothing in the record to show that the preliminary hearing transcripts, if counsel in fact did not have them, contained prior inconsistent statements that would have been helpful for impeachment purposes. It is well settled that this Court cannot rule on matters outside the trial court record. See State v. Bingham, Utah, ___P.2d___, No. 18774, slip op. at p.5

(decided June 13, 1984).

Of some concern is trial counsel's failure to object to questions about appellant Mildred Lairby's decision to remain silent after being advised of her Miranda rights after arrest. Eliciting evidence of a defendant's decision to exercise his or her constitutional right to remain silent, or prosecutorial comment thereon, may violate a defendant's right against self-incrimination. See Doyle v. Ohio, 426 U.S. 610 (1976); Griffin v. California, 380 U.S. 609 (1965); State v. Hales, Utah, 652 P.2d 1290 (1982); State v. Wiswell, Utah, 639 P.2d 146 (1981). Thus, it was error for appellants' counsel not to object to the questions asked by the prosecutor (see R. 556) and to himself ask questions about the subject (see R. 557-558). The issue then is whether this error was prejudicial to appellants.

In Wiswell, this Court stressed that it was the prosecutor's repeated efforts to elicit testimony about the defendant's post-arrest silence and his comment thereon in final argument that resulted in prejudice to the defendant. See 639 P.2d at 147. However, it was implied in Wiswell and expressed more clearly in State v. Hales, 652 P.2d at 1292, that evidence of or comments on a defendant's silence does not automatically result in prejudicial error. Curative instructions, for instance, are an important consideration for reviewing courts. See Hales, 652 P.2d at 1292. Also, Wiswell implied that if the improper evidence or prosecutorial comment

is not extensive, reversible error may not result. See Wiswell, 639 P.2d at 147-148, including the dissenting opinion of C.J. Hall.

In the present case, the evidence of Mildred Lairby's post-arrest silence was quite limited. There was no comment on it in closing argument. Additionally, the trial judge, having admonished counsel not to mention the subject in final argument (see R. 797-798), specifically instructed the jury "that no presumption or inference adverse to [Mildred Lairby] is to arise from the fact that she exercised her constitutional right to speak to an attorney." See Instruction No. 27 (R. 128). Under these circumstances, the error of counsel and, quite frankly, the possible error of the trial court in not striking the improper evidence on its own motion, did not amount to prejudicial error. The situation here is clearly distinguishable from that in Wiswell.

Appellants' further claims concerning failure to object to the admission of a "highly prejudicial document" without ever having seen or requested to see the document, failure effectively to elicit character evidence, and failure to give an effective closing argument can be disposed of rather summarily. The record indicates that counsel asked to read the letter referred to by appellants and that he initially objected to its admission (see R. 730, 734). Although counsel experienced some difficulty in questioning "character witnesses," he was able to elicit some reputation

evidence that may have been of value to appellants. Furthermore, on appeal appellants make now showing that these character witnesses had anything substantial to offer. Finally, although counsel's closing argument may not be the one appellants' present counsel would have given, it fairly presented to the jury appellants' case. Appellants fail to point to anything in particular to support their conclusion that the argument "fell far below the level of quality expected from a reasonably competent defense attorney." See Appellants' Supplemental Brief at pp. 9-10.

Appellants bear the burden of establishing ineffective assistance of counsel by demonstrable, not speculative, proof; and they must show that "any deficiency in the performance of counsel was prejudicial." Codianna, 660 P.2d at 1109. See also Strickland v. Washington, 35 CrL at 3071. Appellants' proof with respect to counsel's alleged errors being unreasonable is largely speculative. With respect to the prejudice component the lack of merit in appellants' claim is even more evident. They do not even argue that without counsel's alleged errors "there was a 'reasonable likelihood that there would have been a different result.'. . ." Codianna, 660 P.2d at 1109. Nor does a review of the entire record and the substantial evidence presented against appellants suggest a reasonable likelihood of a different result without the alleged errors which, if errors at all, were not "so serious as to deprive [appellants] of a

fair trial, a trial whose result is reliable." Strickland, 35 CrL at 3071.

CONCLUSION

Based upon the foregoing, the judgments and sentences of the trial court should be affirmed.

RESPECTFULLY submitted this 15th day of June, 1984.

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CERTIFICATE OF DELIVERY

I hereby certify that I hand-delivered two true and exact copies of the foregoing Brief to the offices of Roger Taylor Nuttall, Attorney for Appellants, 255 East 400 South, Suite 104, Salt Lake City, Utah 84111 this 15th day of June, 1984.

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