2003

Salt Lake City v. Roy Benjamin Hoskins : Brief of Appellee

Utah Court of Appeals

Scott Fisher; Senior Assistant City Prosecutor; Attorney for Appellee.
W. Andrew McCullough; J. Robert Latham; McCullough and Associates, LLC; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, Plaintiff / Appellee, vs. **ROY BENJAMIN HOSKINS,** Defendant / Appellant.	BRIEF OF THE APPELLEE Court of Appeals Case No. 20031008-CA

BRIEF OF THE APPELLEE

APPEAL FROM A MOTION IN LIMINE DETERMINATION AND JUDGEMENT AND CONVICTION OF THE CHARGE OF ASSAULT, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE SECTION 76-5-102 (1953 AS AMENDED), IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT, STATE OF UTAH, THE HONORABLE WILLIAM W. BARRETT, JUDGE, PRESIDING.

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SALT LAKE CITY,	)	BRIEF OF THE APPELLEE
Plaintiff / Appellee,	)	
vs.	)	Court of Appeals Case No. 20031008-CA
ROY BENJAMIN HOSKINS,	)	
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I. STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1953 as amended).

II. STATEMENT OF THE ISSUE(S) PRESENTED FOR REVIEW & STANDARD OF APPELLATE REVIEW

Issue(s) for Review. (1) Is the trial court's determination that prior felony convictions of a government witness were inadmissible incorrect as a matter of law? (2) If the determination was in error, given the available evidence, was there a reasonable likelihood of a more favorable result for the defendant?

Standard of Review. "Although the admission or exclusion of evidence is a question of law, [the appellate court] review[s] a trial court's decision to admit or exclude specific evidence for an abuse of discretion." State v. Cruz-Meza, 76 P.3d 1165, 1167 (Utah 2003). If evidence has been improperly admitted or excluded, the appellate court "will not reverse a conviction unless the error is substantial and prejudicial in the sense

that there is a reasonable likelihood that in [the error's] absence there would have been a more favorable result for the defendant." State v. Johnson, 784 P.2d 1135, 1140 (Utah 1989).

Preservation of the Argument. The Defendant filed his second Motion in Limine on/about November 11-12, 2003. R.36-37. The evidentiary hearing was held 12-3-2003 before the Honorable William W. Barrett. R.164 p.1. The trial court issued its ruling on that same date. R.164 p.24-25.

III. RELEVANT STATUTES

A. Sixth Amendment, United States Constitution:

(set forth in Defendant's Brief at page 2).

B. Article I, section 12, Utah State Constitution:

(set forth in Defendant's Brief at page 2).

C. Utah Code Ann. § 76-1-601 ("Definitions") (3) & (11):

Unless otherwise provided, the following terms apply to this title:

* * * *

(3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.

* * * *

(11) "Substantial bodily injury" means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.

D. Utah Code Ann. § 76-5-102 ("Assault"):

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to

another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

(a) the person causes substantial bodily injury to another; * * * *.

E. Utah Rule of Evidence (URE) 609:

(set forth in Defendant's Brief at page 2).

IV. STATEMENT OF RELEVANT FACTS

The City submits the following statement of facts.

1. This matter came before the Court on December 3, 2003 for motions and jury trial. R.164 p.1.

2. Plaintiff was represented by Scott A. Fisher, Senior Assistant City Prosecutor. R.164.

3. Defendant was represented by W. Andrew McCullough, Attorney for defendant. R.164.

MOTIONS

4. The trial court granted the first defense motion to limit reference to a prior altercation as a "prior disagreement" during this trial. R.164 p.2.

5. The trial court granted the second defense motion in part. This allowed the defense to inquire into the methamphetamine addiction of the city's victim witness, but

did not allow the defense to venture into testimony about different aspects of meth addiction more appropriate for expert testimony. R.164 p.4.

6. Counsel for the City did indicate to the court that consideration of prior felonies was subject to Rule 403 of the Utah Rules of Evidence. R.164 p.6.

7. The City's victim witness Lee Charles Wanlass was sworn and questioned by Mr. McCullough. R.164 p.11.

8. Mr. Wanlass testified that he had been charged with felony theft in 1999, and that charge was reduced to a class A misdemeanor. R.164 p.11.

9. Mr. Wanlass testified the 1999 theft involved theft from a building of a camera worth $700, that he did not actually steal the camera(s), that he was the one caught with the camera(s) in his possession, and that he knew they were stolen. R.164 p.12.

10. Mr. Wanlass testified that he entered pleas to four third-degree burglaries in September 2000. Those pleas were for burglaries that occurred at the same time in July 2000 at "Diamond Storage". R.164 p.13.

11. Mr. Wanlass testified that he entered four separate storage units using bolt cutters to take locks off, one of which was his own, that tools and "other off-the-wall things like that" were taken out of those storage units. R.164 p.14.

12. Mr. Wanlass testified that he had not tried to get rid of any of the stolen items at the time he was caught (one day to two weeks later). R.164 p.15.

13. Mr. Wanlass testified that his purpose in taking the items was "to get money to

help the pay bills and do some drugs." R.164 p.15.

14. On this basis, the trial court referred to the burglaries as an act of dishonesty. R.164 p.24.

15. At the same time, the trial court engaged in a prejudicial/probative balancing analysis: "Is it going to be prejudicial to [Mr. Wanlass]? I think the fact that he's coming out in chains and a – I think I'm not going to allow any of that. I'll let you ask him about the joyride, the details about that. I think otherwise there's enough prejudice when he walks out in a jumpsuit with handcuffs on that I don't want to take it any further than that." The trial court later reiterated: "But, you know, I've got to kind of weigh the prejudice here, and, you know, I think the prejudice is high when he walks out with handcuffs on in a jumpsuit, and I don't want to exacerbate that any more than is necessary, although I will allow you to get into the '01 case where he knew it was a stolen vehicle." R.164 p.24-25 (emphasis added).

16. At the time Mr. Wanlass was testifying, he was in jail on probation violation. R.164 p.15.

17. Mr. Wanlass was in jail on a probation violation to his 2001 guilty plea to felony "receiving or transferring a stolen vehicle". He testified his sole connection to the stolen vehicle had been his day planner which was found in it by police. He testified that he pled guilty because he "had no choice", and that he was going to be found guilty "no matter what". R.164 p.16-17.

18. Mr. Wanlass was also in jail on a probation violation to a car theft conviction from the previous year. He testified that he had been stopped by police driving a car he'd gotten from his brother-in-law, did not know it was stolen, that he had been at a funeral and his brother-in-law had been too drunk to drive. R.164 p.17.

19. Mr. Wanlass indicated that he'd pled guilty to that charge because the only thing he was being charged with was being in possession of a stolen vehicle. R.164 p.18.

20. Mr. Wanlass testified that he had also pled guilty in 2002 to a 2001 joyriding case. He was driving a truck while moving, he had gotten the truck from a friend, and he did know it was stolen when he got it from his friend. R.164 p.18. The trial court indicated that this was "the only one that I can really pinpoint as something that would involve dishonesty . . . where he said he knew that the vehicle was stolen and he kept it anyway." R.164 p.24.

21. The trial court also allowed the defense to ask Mr. Wanlass about the two violations for which he was then incarcerated. R.164 p.25.

22. The city's witness Jess Lee Garcia II was also sworn and testified. R.164 p.21.

23. Mr. Garcia testified that he was in jail custody for two stolen vehicles, joyriding, concealing a dangerous weapon, and possession of paraphernalia. He indicated that he had not been convicted of the stolen-vehicle offenses, which were still pending. He indicated that he had been convicted of the theft crime of joyriding about eight months before. R.164 p.22. He also indicated that the possession of paraphernalia charge and

concealing a dangerous weapon charge were not convictions and were still pending as well. R.164 p.23.

24. Mr. Garcia indicated that a friend of his girlfriend had stolen her mom's car, and let him borrow it. He initially thought it was not stolen, and then found out at a party that it was stolen. He went to return it, "popped" a tire while doing so, and encountered police at that time. He plead guilty to a class A reduction from a second-degree felony because he "didn't want no felony". R.164 p.22-23.

25. The trial court did not allow the defense to use any of Mr. Garcia's criminal history. R.164 p.24.

26. The trial court also granted the defense request to prohibit any reference to the nature of the defendant's business (an escort agency) during trial. R.164 p.26-27.

TRIAL

27. At trial, Mr. Wanlass indicated that there was one other male associated with Mr. Hoskins during this incident, and described this other male as "a pretty good sized guy". R.149 p.4.

28. Mr. Wanlass testified that Mr. Hoskins hit him when the two of them were standing face-to-face. R.149 p.6.

29. Mr. Wanlass testified that he was sure that it was Mr. Hoskins that hit him, with Hoskins's right hand to Wanlass's left side of his face in his mouth. Mr. Wanlass was unable to recall whether the other male did anything. R.149 p.7.

30. Mr. Wanlass recited the injuries received during this event: a scar to his bottom lip, loss of feeling to his bottom lip, and four "busted" teeth broken off at the gum line. R.149 p.7-8.

31. Mr. Wanlass admitted to the two charges that had him in jail at the time of trial and also to the previous felony joyriding conviction while on the stand. R.149 p.22.

32. Angela Montoya was sworn and testified as a city witness. R.149 p.26.

33. Ms. Montoya testified that she "saw a large African American man push a Caucasian man into a car". R.149 p.27.

34. She indicated that she saw two black men fighting a white man, but that she did not see the other black male touch the white male. R.149 p.28.

35. She testified that the victim male had hit a car, his back to the car, that he fell on his rear end, that the guy who had pushed him started kicking him, and at that point she stopped watching and went inside her workplace. R.149 p.29.

36. Testimony indicated that she observed this from a distance of forty-five feet. R.149 p.30.

37. Jesse L. Garcia II was sworn and testified as a city witness. R.149 p.32.

38. Mr. Garcia testified he watched the altercation from his balcony, observing two males arguing with his neighbor. He described them as black males, one a decent size guy and the other a "pretty big man" weighing at least 250. R.149 p.33.

39. Mr. Garcia testifies that he sees "All of a sudden out of the middle of nowhere

the big guy just hits [Mr. Wanlass] in his mouth and then the other dude, they both just start socking him and [Mr. Wanlass] falls to the ground." Mr. Garcia indicates that he watches this from a distance of approximately thirteen (13) feet. He has a front view of Mr. Wanlass and a back view of the other two men. R.149 p.34-35.

40. Mr. Garcia was asked how he could be sure that the defendant Mr. Hoskins was one of the two men he saw assault Mr. Wanlass. He responded: "Because after they was done giving Lee [Wanlass] a real good butt-whipping, the guy turned around and (inaudible) all of us and said, 'You guys testify, take this to court, you will be dealt with.'" R.149 p.37.

41. Mr. Garcia indicated that the other male, not Mr. Hoskins, struck Mr. Wanlass first. Then, Mr. Hoskins struck Mr. Wanlass immediately after, and before he lost his footing. R.149 p.38.

42. Mr. Garcia testified that once Mr. Wanlass went to the ground, both males kicked Mr. Wanlass while he was down. Mr. Garcia stated specifically that Mr. Hoskins had kicked Mr. Wanlass in his chest, in the ribs. R.149 p.39.

43. Mr. Garcia testified that the larger male hit Mr. Wanlass ten to fifteen times, while the smaller male (Mr. Hoskins, by Mr. Garcia's testimony) struck him five to ten times. He testified that each of the assailants kicked Mr. Wanlass three or four times. R.149 p.42.

44. Roy Benjamin Hoskins, the defendant, was sworn and testified on his own

behalf. R.149 p.47.

45. Mr. Hoskins testified: "Actually that made five of us because he [Lee Wanlass] was walking with a young lady. The young lady that I was looking for to do damage to, he was walking with her. That's who he testified that he said he was walking from the store with." Mr. McCullough then asked: "Now hold it. Mr. Hoskins, were you looking for this young lady to do damage to her?" Mr. Hoskins responded: "No, sir." R.149 p.51.

46. Mr. Hoskins testified: "The argument continued on. I was standing on the steps. There was a young lady [previous witness Ms. Montoya] that said that there was a really big gentleman. I may have looked pretty big because I was standing on the top step in between the apartment complex and the parking lot and I was standing up on that step talking to them and he [Lee Wanlass] was down on the very bottom step so I may have looked like the same height as him [Lee Wanlass] or, you know, possibly or whatnot." R.149 p.52.

47. Mr. Hoskins characterized the other male as a "little bit" bigger than himself. R.149 p.53.

48. Mr. Hoskins testified that he was the only African American male in the immediate area until after both he and Lee Wanlass had gone to the ground. R.149 p.55.

49. Mr. Hoskins testified that Lee Wanlass grabbed him, that he stood his ground, and when he stood his ground he slipped off the steps. R.149 p.60.

50. Mr. Hoskins testified that he did not later tell the police detective that he had

elbowed someone into a car. He stated that he told the police detective "the exact same thing I just told you, right now, the exact same thing, word for word." R.149 p.61.

51. Detective Cordon Parks was sworn and testified on rebuttal for the city. R.149 p.62.

52. Detective Cordon Parks indicated that eleven days after this incident, he had interviewed Mr. Hoskins who claimed that he was struck in the face first, and then that he elbowed somebody into a car in self-defense. R.149 pp.64-65.

V. SUMMARY OF THE ARGUMENT

The trial court's determination to not admit the prior felony burglary convictions was in error. However, a review of the evidence in the case demonstrates that "there is no reasonable likelihood there would have been a more favorable result for defendant absent the trial court's error." State v. Johnson, 784 P.2d 1135, 1140 (Utah 1989).

VI. ARGUMENT.

A. THE TRIAL COURT RULED INCORRECTLY REGARDING THE APPLICATION OF URE 609 IN THIS CASE.

Utah Rule of Evidence 609 states:

> (a) *General rule.* For the purpose of attacking the credibility of a witness:
> (a)(1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the under which witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(a)(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(Emphasis added.)

The wording of URE 609(a)(1) itself does not make it clear that the URE 403 balancing test referred to applies only to the interests of the defendant. The Advisory Committee Note to the rule does state however that the rule grants "the court discretion in convictions not involving dishonesty or false statement to refuse to admit the evidence if it would be prejudicial to the defendant. Current Utah law [meaning the law prior to the change in the rule] mandates the admission of such evidence." URE 609, Advisory Committee Note, 1992 Amendment, amended effective October 1, 1992, (2004 Ed.).

It appears from the record that both the trial court and the prosecution misinterpreted the correct application of URE 609(a)(1) with regard to a government witness, as opposed to a defendant. It is noteworthy that defense counsel did not cite specifically to Utah Rule of Evidence 609 in his second motion in limine, referring only to "the admissibility of evidence of previous convictions on the part of the alleged victim" and stating "Defendant believes that all or most of those convictions involve crimes of dishonesty." R.38-39. Defense counsel provided no substantive argument or analysis regarding URE 609 at the motion hearing. R.164. Further, defense counsel provided to case law or analysis of what constitutes a crime of dishonesty.

The misunderstanding is clarified based on a review of State v. Smith, 817 P.2d

828 (Utah Ct. App. 1991). That case deals squarely with the issue of "evidence of prior convictions" of a government witness:

> At issue is whether the rule's limitation on prejudicial effect is designed to protect only the defendant, or any witness. The Utah rule is identical to its federal counterpart n1 and therefore federal interpretations of the rule are persuasive. See *Salt Lake City v. Holtman, 806 P.2d 235, 237 n.2 (Utah App. 1991).* While the federal appeals courts have not been consistent in answering whom the rule is intended to protect, the Supreme Court resolved the conflict in *Green v. Bock Laundry Mach. Co., 490 U.S. 504, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989).* n2 The Court stated that "the Rule was meant to authorize a judge to weigh against prejudice against no one other than a criminal defendant [,]" id. at 1991, and concluded that impeaching evidence which is detrimental to the prosecution in a criminal case shall be admitted without any balancing of its probativeness and prejudicial effect. See id. at 1984. See also 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence para. 609[04] at 609-94 (1990) ("The rule on prejudice does not apply if the defense offers the conviction.").

Smith, 817 P.2d at 829.

However, failure to admit prior convictions does not require reversal and remand for a new trial:

> In the [Smith] case, the trial judge did not allow defendant to cross-examine [the government's witness] about [the government witness's] prior theft convictions because the evidence was prejudicial to [the government's witness]. This was error. Although we "will not reverse a trial court's evidentiary ruling unless it is manifest that 'the court so abused its discretion that there is a likelihood that injustice resulted[,]'" *Holtman, 806 P.2d at 237 (quoting State v. Gentry, 747 P.2d 1032, 1035 (Utah 1987))*, in this instance [the government witness's] testimony was critically important to the prosecution and was the only evidence contradicting defendant's testimony regarding intent. Therefore, absent this error, there is a reasonable likelihood of a more favorable outcome for defendant. * * * *

Smith, 817 P.2d at 829-830.

The corollary is that where the witness's testimony is not critically important to the prosecution, and where there is other evidence contradicting the defendant, there should not be a reversal if there is not a reasonable likelihood of a more favorable outcome for defendant. Lee Wanlass's testimony was important to the government's case and the resulting conviction, but it was not crucial. Mr. Wanlass's testimony was not the only evidence contradicting the defendant's testimony. Indeed, with the other available witnesses, the government could have proceeded to trial even without Mr. Wanlass. Mr. Garcia's testimony was sufficient to try and convict Mr. Hoskins of the charge of simple assault. The interplay between the testimony of Ms. Montoya, Mr. Hoskins, and Detective Parks ultimately reinforced Mr. Garcia's testimony, providing a basis for the jury decision of simple assault. Given the weight of the evidence in this case, there is not a reasonable likelihood of a more favorable outcome for defendant.

B. GIVEN THE EVIDENCE AT TRIAL, ADMISSION OF THE BURGLARY PRIORS WOULD NOT CREATE A REASONABLE LIKELIHOOD OF A MORE FAVORABLE OUTCOME FOR DEFENDANT.

The Smith court indicated that consideration of the other evidence available to contradict the defendant's testimony is crucial in evaluating whether there is a reasonable likelihood of a more favorable outcome for the defendant. Smith, 817 P.2d at 830. An analysis of that other available evidence follows.

1. The burglary convictions were contained in a single criminal episode.

Mr. Wanlass testified that he entered pleas to four third-degree burglaries in

September 2000. Those pleas were for burglaries that occurred at the same time in July 2000 at "Diamond Storage". R.164 p.13. When defense counsel refers to the four felony counts of burglary, it should be noted that those four counts were contained in one Third District Court case, 001913285. R.38 (Defendant's Third Motion in Limine).

The fact that the four counts resulted from one criminal episode and were contained in one criminal case further minimizes their potential evidentiary impact and impeachment value. These were not four burglaries occurring on four different dates.

2. The trial court incorrectly described the burglary convictions as offenses of dishonesty.

Mr. Wanlass testified that he entered four separate storage units using bolt cutters to take locks off, one of which was his own, that tools and "other off-the-wall things like that" were taken out of those storage units. R.164 p.14. Mr. Wanlass testified that he had not tried to get rid of any of the stolen items at the time he was caught (one day to two weeks later). R.164 p.15. Mr. Wanlass testified that his purpose in taking the items was "to get money to help the pay bills and do some drugs." R.164 p.15. On this basis, the trial court referred to the burglaries as an act of dishonesty. R.164 p.24.

Burglary convictions are not necessarily considered to be crimes of dishonesty:

> The trial court ruled that the prior convictions were crimes of dishonesty or false statement under Utah Rule of Evidence 609(a)(2). It may be claimed that nearly all crimes involve some form of dishonesty or false statement. However, in *State v. Bruce*, n10 we held that crimes of theft and burglary are not necessarily crimes of dishonesty or false statement within the meaning of rule 609(a)(2). *Bruce* noted that crimes of dishonesty or false statement are those which involve "'some element of deceit, untruthfulness,

> or falsification bearing on the accused's propensity to testify truthfully.'" n11 In most cases, theft is not classified as a crime of dishonesty or false statement because it is generally not indicative of a witness's inclination to lie. n12 However, when a prior theft is "committed by fraudulent or deceitful means bearing directly on the accused's likelihood to testify truthfully," it can be considered a crime of dishonesty or false statement under rule 609(a)(2). n13

State v. Johnson, 784 P.2d 1135, 1139-40 (Utah 1989).

Defense counsel adduced no evidence from which the trial court should have made a finding that Lee Wanlass's burglary convictions involved dishonesty or false statement. Given the evidence, the trial court would not have been able to make a finding of dishonesty or false statement as to the burglary convictions. The net result is that based on the available record, the record generated by defense counsel questioning of the government witness, the trial court should not have suggested that burglary was an offense of dishonesty or false statement. Based on the evidence brought out at the evidentiary hearing on the motion in limine, there is no suggestion that the convictions would have provided any additional impeachment value to the defense.

3. Direct testimony of the victim Lee Wanlass.

It is important to note that the City's victim witness Lee Wanlass testified at trial in a jail jumpsuit with handcuffs on. R.164 p.24-25. Further, he admitted to having had a methamphetamine problem. R.164 p.17.

At trial, Mr. Wanlass indicated that there was one other male associated with Mr. Hoskins during this incident, and described this other male as "a pretty good sized guy".

R.149 p.4.

Mr. Wanlass testified that Mr. Hoskins hit him when the two of them were standing face-to-face. R.149 p.6.

Mr. Wanlass testified that he was sure that it was Mr. Hoskins that hit him, with Hoskin's right hand to Wanlass's left side of his face in his mouth. Mr. Wanlass was unable to recall whether the other male did anything. R. 149 p.7.

Mr. Wanlass recited the injuries received during this event: a scar to his bottom lip, loss of feeling to his bottom lip, and four "busted" teeth broken off at the gum line. R.149 p.7-8.

Mr. Wanlass admitted to the two charges that had him in jail at the time of trial and also to the previous felony joyriding conviction while on the witness stand before the jury. R.149 p.22.

4. Direct Testimony of witness Ms. Montoya

Angela Montoya was sworn and testified as a city witness. R.149 p.26.

Ms. Montoya testified that she "saw a large African American man push a Caucasian man into a car". R.149 p.27.

She indicated that she saw two black men fighting a white man, but that she did not see the other black male (as opposed to the one she described as "large") touch the white male. R.149 p.28.

She testified that the victim male had hit a car, his back to the car, that he fell on

his rear end, that the large male who had pushed him started kicking him, and at that point she stopped watching and went inside her workplace. R.149 p.29.

Testimony indicated that she observed this from a distance of forty-five feet. R.149 p.30. Ms. Montoya's testimony was more in agreement with Mr. Garcia's testimony than Mr. Wanlass's, identifying the larger male of the two as the initial assailant.

Mr. Hoskins later testified: "The argument continued on. I was standing on the steps. There was a young lady [previous witness Ms. Montoya] that said that there was a really big gentleman. I may have looked pretty big because I was standing on the top step in between the apartment complex and the parking lot and I was standing up on that step talking to them and he [Lee Wanlass] was down on the very bottom step so I may have looked like the same height as him [Lee Wanlass] or, you know, possibly or whatnot." R.149/52.

Mr. Hoskins' testimony was trying to explain why Ms. Montoya thought he looked larger at the time – Ms. Montoya said there were two males of different size confronting the victim, where Mr. Hoskins' story was that he was the only African-American male present until both he and Lee Wanlass were both on the ground. On this point, Mr. Hoskins was trying to explain the clear contradiction between Montoya and Garcia and his story as to the presence of the other male. This could have diminished his credibility in the eyes of the jury as well.

5. Direct Testimony of witness Mr. Garcia

Jesse L. Garcia II was sworn and testified as a city witness. R.149 p.32. Mr. Garcia testified that he had "come over from the jail with Mr. Wanlass" but had not discussed his testimony with Mr. Wanlass. R.149 p.44. Although not explicitly set out in the record, it is important to note that Mr. Garcia was attired similarly to Mr. Wanlass: jail jumpsuit and handcuffs.

Mr. Garcia testified he initially watched the altercation from his balcony, observing two males arguing with his neighbor. He described them as black males, one a decent size guy and the other a "pretty big man" weighing at least 250. R.149 p.33.

Mr. Garcia testifies that he sees "All of a sudden out of the middle of nowhere the big guy just hits [Mr. Wanlass] in his mouth and then the other dude, they both just start socking him and [Mr. Wanlass] falls to the ground." Mr. Garcia indicates that he watches this from a distance of approximately thirteen (13) feet. He has a front view of Mr. Wanlass and a back view of the other two men. R.149 p.34-35.

Mr. Garcia was asked how he could be sure that the defendant Mr. Hoskins was one of the two men he saw assault Lee Wanlass. He responded: "Because after they was done giving Lee [Wanlass] a real good butt-whipping, the guy turned around and (inaudible) all of us and said, 'You guys testify, take this to court, you will be dealt with.'" R.149 p.37. Mr. Garcia was sure that person was Mr. Hoskins.

Mr. Garcia indicated that the other male, not Mr. Hoskins, struck Mr. Wanlass first. Then, Mr. Hoskins struck Mr. Wanlass immediately after, and before he lost his

footing. R.149 p.38. While this was in conflict with Mr. Wanlass's testimony, it was largely in agreement with the testimony of Ms. Montoya.

Mr. Garcia testified that once Mr. Wanlass went to the ground, both males kicked Mr. Wanlass while he was down. Mr. Garcia stated specifically that Mr. Hoskins had kicked Mr. Wanlass in his chest, in the ribs. R.149 p.39.

Mr. Garcia testified that the larger male hit Mr. Wanlass ten to fifteen times, while the smaller male (Mr. Hoskins, by Mr. Garcia's testimony) struck him five to ten times. He testified that each of the assailants kicked Mr. Wanlass three or four times. R.149 p.42.

6. Direct Testimony of the defendant Mr. Hoskins.

Roy Benjamin Hoskins, the defendant, was sworn and testified on his own behalf. R.149 p.47.

Mr. Hoskins testified: "Actually that made five of us because he [Lee Wanlass] was walking with a young lady. The young lady that I was looking for to do damage to, he was walking with her. That's who he testified that he said he was walking from the store with." Mr. McCullough then asked: "Now hold it. Mr. Hoskins, were you looking for this young lady to do damage to her?" Mr. Hoskins responded: "No, sir." R.149 p.51. The comment about a "young lady [Mr. Hoskins] was looking for to do damage to", combined with an immediate retraction at the urging of his defense counsel, must have brought Mr. Hoskins' credibility into question with the jury.

Mr. Hoskins testified: "The argument continued on. I was standing on the steps. There was a young lady [previous witness Ms. Montoya] that said that there was a really big gentleman. I may have looked pretty big because I was standing on the top step in between the apartment complex and the parking lot and I was standing up on that step talking to them and he [Lee Wanlass] was down on the very bottom step so I may have looked like the same height as him [Lee Wanlass] or, you know, possibly or whatnot." R.149 p.52.

In the eyes of the jury, this testimony may have resolved any conflict between Mr. Wanlass, Ms. Montoya, and Mr. Garcia. It provides a basis on which to Ms. Montoya could have mistaken Mr. Hoskins as a larger male. It provides a basis explaining why Mr. Garcia might have been confused as to who struck Mr. Wanlass first, if Mr. Wanlass was correct in asserting that Mr. Hoskins struck first.

Mr. Hoskins characterized the other male as a "little bit" bigger than himself. R.149 p.53.

Mr. Hoskins testified that he was the only African American male in the immediate area until after both he and Lee Wanlass had gone to the ground. R.149 p.55. This was in direct contradiction to the testimony of Mr. Wanlass (R.149 p.4), Ms. Montoya (R.149 p.28), and Mr. Garcia (R.149 p.33-35). This testimony could have raised additional questions in the eyes of the jury as to Mr. Hoskins' credibility.

Mr. Hoskins testified that Lee Wanlass grabbed him, that he stood his ground, and

when he stood his ground he slipped off the steps. R.149 p.60. Mr. Garcia had testified that the other male, not Mr. Hoskins, struck Mr. Wanlass first. Then, Mr. Hoskins struck Mr. Wanlass immediately after, and before he lost his footing. R.149 p.38.

Mr. Garcia testified that once Mr. Wanlass went to the ground, both males kicked Mr. Wanlass while he was down. Mr. Garcia stated specifically that Mr. Hoskins had kicked Mr. Wanlass in his chest, in the ribs. R.149 p.39. This testimony by itself was sufficient to meet the elements of simple assault. That was the charge to which the jury returned a conviction. R.93. While there may have been some confusion among the witnesses as to which of the two men hit Lee Wanlass first, or which caused the substantial injury (R83,84), the jury resolved that confusion by returning a verdict of guilt to the lesser included offense (R.85A) of simple assault (R.86).

Mr. Hoskins testified that he did not later tell the police detective that he had elbowed someone into a car. He stated that he told the police detective "the exact same thing I just told you, right now, the exact same thing, word for word." R.149 p.61.

7. Direct Testimony of Detective Parks.

Detective Cordon Parks was sworn and testified on rebuttal for the city. R.149 p.62. Detective Cordon Parks indicated that eleven days after this incident, he had interviewed Mr. Hoskins who claimed that he was struck in the face first, and then that he elbowed somebody into a car in self-defense. R.149 p.64-65. Mr. Hoskins's testimony on the day of trial was he had been grabbed by Mr. Wanlass, not struck in the face, and

denied elbowing anyone. The detective's testimony, set off against Mr. Hoskins', raised further questions about the defendant's credibility.

Consideration of the other evidence available to contradict the defendant's testimony in this case indicates that substantial evidence supporting the jury's determination was present. That evidence demonstrates that there was NOT a reasonable likelihood of a more favorable outcome for the defendant. Smith, 817 P.2d at 830.

The ultimate determination of the jury shows that they considered the evidence and made a deliberate, informed decision. Presented with the first option of assault causing substantial injury, the jury rendered a verdict convicting the defendant of the lesser-included-offense of simple assault. This means that the jury either discounted Mr. Wanlass's testimony about the nature and source of his injuries, or that they were unable to determine which of the two men assaulting Mr. Wanlass could be held accountable for the injuries.

In light of the substantial evidence supporting the simple assault conviction, there is not a likelihood of a result more favorable to the defendant if the burglary convictions are admitted. "The Utah Supreme Court has stated, 'for an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict.'" State v. Wilson, 771 P.2d 1077, 1080 (Utah App. 1989). Further,

> While the trial court erred in admitting defendant's 1985 theft conviction, the error was harmless. Rule 30(a) of the Utah Rules of Criminal Procedure states: "Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." In

> dealing with nonconstitutional error, "we will not reverse a conviction unless the error is substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a more favorable result for the defendant." n14 Considering all of the circumstances in this case and the evidence against defendant, there is no reasonable likelihood there would have been a more favorable result for defendant absent the trial court's error.

State v. Johnson, 784 P.2d 1135, 1140 (Utah 1989).

VII. CONCLUSION

The trial court's determination that the victim's prior felony burglary convictions were not admissible was in error.

However, a review of the evidence available at trial demonstrates that there was not a reasonable likelihood of an outcome more favorable to the defendant, absent the error.

The City respectfully requests that this court deny the defendant's appeal, allowing the defendant's conviction to stand upon remand to the trial court.

RESPECTFULLY SUBMITTED this 28TH day of May, 2004.

BY:

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Attorney for Plaintiff/Appellant

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that he/she caused true and correct originals and/or copies of the foregoing Brief of the Appellee to be mailed or delivered as indicated below on this 28TH day of May, 2004:

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