

2003

West Jordan City v. Daniel H. Smith : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST JORDAN CITY,

Plaintiff/Appellee,

v.

DANIEL H. SMITH,

Defendant/Appellant.

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BRIEF OF APPELLANT

Case No. 20031055-CA

ON APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE TERRY L. CHRISTIANSEN

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FILED
UTAH APPELLATE COURTS
JUL 16 2004

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)	
Plaintiff/Appellee,)	BRIEF OF APPELLANT
)	
v.)	
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)	
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Utah Code Ann., Section 76-9-102 (attached as Exhibit C)

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II. STATEMENT OF JURISDICTION

This is an appeal from a final judgment entered by the Honorable Terry L. Christiansen of the Third Judicial District Court, West Valley Department, in and for Salt Lake County, State of Utah. The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (2002), whereby the Defendant in a district court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony. Appellant was convicted of Resisting Arrest/Failure to Comply, a class B misdemeanor, in violation of Utah Code Ann. § 76-8-305; Possession of Drug Paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1) (2003); Disorderly Conduct, a class C misdemeanor, in violation of Utah Code Ann., Section 76-9-102; and Driving Under the Influence of Alcohol and/or Drugs, a class B misdemeanor, in violation of Utah Code Ann. § 41-6-44 (1998).

III. STATEMENT OF THE ISSUES & STANDARDS OF REVIEW

a) **Issue 1.** Did the district court err in failing to suppress evidence obtained from a blood draw where the Defendant did not consent, and where any alleged consent was not freely and voluntarily made? This issue was preserved for appeal through the filing of Defendant's Motion to Suppress and the trial court's ruling thereon. (R. 65-70 and 315, pp. 3-6)

Standard of review. This Court "review[s] the factual findings underlying the trial court's decision to grant or deny a motion to suppress

evidence using a clearly erroneous standard.” State v. Veteto, 2000 UT 62, ¶8 (citing State v. Pena, 869 P.2d 932, 939 n.4 (Utah 1994)). ”However, . . . the trial court’s conclusions of law based on these findings [are reviewed] for correctness, with a measure of discretion given to the trial judge’s application of the legal standard to the facts.” Id.

b) **Issue 2.** Did the district court err in failing to allow the defense to introduce evidence of prior assaultive behavior of the arresting officers pursuant to the self-defense statute which allows evidence of prior violence? This issue was preserved for appeal by Defendant’s attempt to offer the evidence at trial, the City’s objection thereto, and the trial court’s ruling to sustain that objection. (R. 320 pp. 116, 125-128, and 182)

Standard of review. “Because the admission of evidence under Rule 404(b) is a question of law, it is reviewed for correctness. However, the trial court’s subsidiary factual determinations should be given deference by the appellate court and only be overruled when they are clearly erroneous.” State v. O’Neil, 848 P.2d 694, 695-696 (Utah App. 1993) (citing State v. Taylor, 818 P.2d 561, 569 (Utah App. 1991)). “We review a trial court’s decision to admit evidence under rule 404(b) . . . under an abuse of discretion standard. We review the record to determine whether the admission of other bad acts evidence was ‘scrupulously examined’ by the trial judge ‘in the proper exercise of that discretion.’” State v. Mead, 2003 UT App 39, ¶61 (citing State v. Nelson-Waggoner, 2000 UT 59, ¶16, 6 P.3d 1120)).

c) **Issue 3.** Was sufficient evidence presented to convict the Defendant of Disorderly Conduct? This issue was preserved for appeal by the jury's verdict convicting Defendant of Disorderly Conduct. (R. 319, p.354)

Standard of review. This Court "review[s] the evidence of a jury verdict and all inferences that can be drawn therefrom in the light most favorable to the verdict. State v. Richards, 779 P.2d 689, 690-91 (Utah App. 1989) (citing State v. Tolman, 775 P.2d 422, 424 (Utah App. 1989)). "We reverse such a verdict" only when the evidence is so lacking and insubstantial that a reasonable person could not have reached that verdict beyond a reasonable doubt." Richards, 779 P.2d at 691 (citing State v. Walker, 743 P.2d 191, 192 (Utah 1987)).

IV. DETERMINATIVE PROVISIONS

STATUTES

Utah Code Ann., Section 41-6-44.10 (attached as Exhibit A)

Utah Code Ann., Section 76-2-402 (attached as Exhibit B)

Utah Code Ann., Section 76-9-102 (attached as Exhibit C)

V. STATEMENT OF THE CASE

A. Nature of the Case

The subject case is a criminal case wherein the Defendant was arrested and charged with Resisting Arrest/Failure to Comply; Assault against a Police Officer; Possession of Drug Paraphernalia; Disorderly Conduct and Driving Under the Influence of Alcohol and/or Drugs. (R. 01-06).

B. Course of the Proceedings

Defendant entered pleas of not guilty to all charges and a demand for trial by jury. (R. 08-09) Prior to trial, Defendant filed a Motion to Suppress the blood test result stemming from Defendant's DUI arrest on the grounds that Defendant did not consent to the blood test and/or that his consent was not freely and/or voluntarily given. (R. 65-69) The trial court denied Defendant's Motion to Suppress. (R. 315, pp. 3-6)

Prior to trial, Defendant also filed a Subpoena Duces Tecum to obtain copies of the arresting officers' personnel files, including any and all information pertaining to the officers' use of excessive force during other arrests. (R. 124-125) The City filed a Motion to Quash the Subpoena Duces Tecum and a Memorandum in support thereof. (R. 114-123) Following a hearing on the Motion to Quash, the trial court determined that it would review the subject personnel files, *in camera*, and would then release all potentially exculpatory evidence contained in the arresting officers' personnel files to defense counsel. (R. 317, p. 5)

At trial, defense counsel attempted to introduce as evidence information from said files pertaining to prior instances wherein the officers had used excessive force or violence during arrests, including civil lawsuits that had been filed against the officers alleging such conduct. (R. 320 at p. 116) The City objected and the officers were questioned regarding this information outside of the presence of the jury. (R. 320 at pp. 116-124). The trial court then

determined that such information constituted inadmissible prior acts under Rule 404(b) of the Utah Rules of Evidence and was not admissible under the self-defense statute. (R. 320 at pp. 125-128). At the conclusion of the trial, the case was submitted to the jury for verdict.

C. Disposition

After deliberating on the evidence, the jury returned a verdict of “Not Guilty” on Count II, Assault Against a Police Officer, and “Guilty” on all remaining counts. (R. 319 at p. 354) There were no post-trial motions filed by either party.

D. Statement of the Facts

Facts Surrounding Consent Issues

1. On or about March 7, 2002, West Jordan Police Officer Saunders was dispatched to the vicinity of 8750 South 4560 West on the report of a suspicious vehicle. (R. 320, p.67, lines 21-23)

2. Officer Saunders approached the subject vehicle and asked the occupant of the vehicle to produce his identification. Defendant complied with this request and provided Officer Saunders with his drivers license. (R. 320, p. 72, lines 15-23).

3. Following officer Saunders’ initial contact with the defendant, Officer Kwant arrived on the scene and the two proceeded to ask Mr. Smith to exit his vehicle. (R. 320, p.78, lines 8-11)

4. Shortly after Mr. Smith exited his vehicle in compliance with the officers' request, a lengthy physical altercation occurred which resulted in Mr. Smith being physically injured as a result of his head being slammed into an open truck door, pepper spray that had been deployed, hits from the officers' fists and batons, and being subdued by additional officers. (R. 320, pp. 109-114)

5. Eventually, the Defendant was placed in both hand and ankle cuffs, and physically restrained by a number of officers. (R. 320, p. 153, lines 2-16)

6. Subsequently, a search warrant for a sample of the Defendant's blood was sought by Officer Hahn. Before obtaining the warrant, Officer Hahn spoke to Officers Saunders and Kwant, and the two officers explained to Hahn that there was quite a struggle; that Mr. Smith had been pepper sprayed; that in the altercation, officers had hit Mr. Smith with their fists and batons; that eventually there were quite a number of officers on the scene; and that a number of the officers had to hold Mr. Smith down and restrain him. (R. 314, pp. 30, 31 and 34)

7. Further, in viewing Mr. Smith on the gurney being put into the ambulance, Officer Hahn saw that Mr. Smith's face was bloody and also later saw the injuries to Mr. Smith's body at the hospital. (R. 314, pp. 31-34)

8. Individuals were trying to interact with Mr. Smith and were requesting that he cooperate in receiving medical treatment. Mr. Smith did not want medical help. (R.314, p.28, lines 11-20)

9. Officer Hahn never asked for consent at this time for a blood sample or any other chemical test. (R. 314, p.19, lines 5-11 and pp. 35-36)

10. Thereafter, Officer Hahn sought and obtained a blood draw search warrant from the justice court judge. Within the affidavit in support of that warrant, Officer Hahn admittedly made a number of false statements and omissions. (R. 314, pp. 40-45)

11. In doing so, Officer Hahn swore that the Defendant “refused” or failed to perform a chemical test. After obtaining the warrant, Officer Hahn went to Jordan Valley Hospital to serve the warrant. (R. 314 pp. 40-45)

12. When Officer Hahn arrived at Jordan Valley Hospital, Mr. Smith was located in an area of the emergency room. Another officer had been watching over Mr. Smith, and left when Officer Hahn arrived. (R. 314, p. 47, lines 14-25 and p. 48, lines 1-5)

13. When Officer Hahn went into Mr. Smith’s room, two nurses and a doctor were already treating Mr. Smith. One nurse was starting an IV and Mr. Smith had seemingly calmed down. (R. 314, p. 50)

14. In the hospital room, Mr. Smith was still in cuffs and restrained to the hospital bed. He was not fighting against the restraints and was not yelling

obscurities. However, he was still a bit agitated and confused. (R. 314, pp. 49-50)

15. Mr. Smith complained of pain and was describing to medical personnel his injuries. (R. 314, p. 50, lines 7-16)

16. Moreover, at the hospital, Mr. Smith was mainly under the watch of Officer Hahn. However, Officer Saunders was also at the hospital and would at times relieve Officer Hahn for breaks. (R. 314, p. 51, lines 9-20)

17. It is unknown what was said to Mr. Smith while under the watch of Officer Saunders, one of the individuals involved in the prior altercation. (R. 314, p. 51, lines 21-25; and p. 52, line 1)

18. At some point, Officer Hahn attempted to obtain Mr. Smith's consent to a blood draw. (R. 314, p.52, lines 2-5)

19. Officer Hahn claims that he informed Mr. Smith that he was under arrest for DUI and questioned Mr. Smith as to whether he understood. Mr. Smith allegedly responded, "I guess." (R. 314, p.20, lines 9-14)

20. Officer Hahn then read the admonition from the DUI form to request consent and requested a blood test. Mr. Smith allegedly responded, "Sure, I'll pee in a cup, too." (R. 314, p 21, lines 8-16)

21. Ultimately, the blood technician arrived and drew blood from Mr. Smith. The blood technician instructed Mr. Smith how to be cooperative, and Mr. Smith did not act counter to the instructions. (R. 314, p. 24)

22. In the context of these circumstances, the City decided to not rely on the warrant as a basis for the blood draw, but on consent and claimed that Mr. Smith consented to a blood draw.

Facts Surrounding Issues of Officers' Prior Violence

23. Prior to trial, counsel subpoenaed personnel files of three of the arresting officers. (R. 124-125)

24. At trial, counsel sought to question the officers concerning allegations of prior unreasonable beatings during arrest. (R. 320 at p. 116)

25. The City objected and the officers were questioned out of the presence of the jury. (R. 320 at pp. 116-124)

26. In this questioning – (both had suits filed against them, and one had been accused on two prior occasions of overzealousness) – the district court judge found that such evidence was inadmissible prior acts under 404(b) and not admissible under the self-defense statute. (R. 320 at pp. 125-128)

Facts Surrounding Issues of Insufficient Evidence of Disorderly Conduct

27. Officer Saunders testified that Mr. Smith was “verbally belligerent” and called the officer names. (R. 320, p. 78, lines 19-21)

28. Officer Saunders testified that Mr. Smith “resisted” the officers and had to be forced to the ground. (R. 320, p. 79, lines 17-25)

29. Officer Saunders testified that he and Officer Kwant were trying to grab Mr. Smith’s arms to take him into custody and Mr. Smith started screaming. (R. 320, p. 82, lines 1-2)

30. Officer Saunders offered testimony regarding a physical altercation that took place between the officers and Mr. Smith and acknowledges that during the altercation, the officers stuck Mr. Smith several times with batons and fists, pepper-sprayed him twice, took him down to the ground with a “hair pull” maneuver and were “yelling” at Mr. Smith to stop resisting. (R. 320, pp 80-88)

31. Officer Saunders testified that he yelled at Mr. Smith to “get on the ground” and that Mr. Smith complied with this command. (R. 320 p. 110, lines 14-22)

32. Officer Saunders testified that while Officer Kwant was hitting Mr. Smith with a baton, Officer Saunders was yelling at him to “quit resisting.” (R. 320 p. 111, lines 3-14)

33. In describing Mr. Smith’s conduct, Officer Kwant testified as follows:

We attempted to try to put the hands behind the back, he started to pull away from us and started to resist, tightening up his muscles in an attempt to pull away from us. He muttered something that we know better than do this and we continue to tell him, you know, quit resisting us, just cooperate and relax. He continued to pull away and at one point I think he broke away from our grasp and turned around and we immediately tried to reattach and regained control of him.

(R. 320 p. 142, lines 9-17)

34. Officer Kwant testified that he initiated a “hair pull” take down of Mr. Smith and that during the course of this take-down, Mr. Smith’s face and

head stuck the open door of his vehicle, and Officer Saunders deployed his pepper spray on Mr. Smith at that time as well. (R. 320, pp. 144-145)

35. Officer Kwant acknowledges that while Mr. Smith was face-down on the ground, flailing during the subject arrest, his face was being scraped across the asphalt. (R. 320, p.148, lines 18-25 and p. 149, lines1-2)

36. Officer Kwant acknowledges striking Mr. Smith with his asp baton two to three times on his back shoulder-blade and once in his leg. (R. 320, p. 151, lines 4-25)

37. Officer Kwant also witnessed Officer Saunders strike Mr. Smith two times in the abdomen with his fist and spray him with pepper-spray on at least two occasions as well during the altercation. (R. 320 p. 152, lines 11-25)

38. Officer Kwant testified that Mr. Smith was screaming throughout the physical altercation with the police officers. (R. 320, p.150, lines 5-8)

39. Officer Haun testified that when he initially spoke to the defendant, Mr. Smith yelled profanities at him and at the other paramedics and officers. (R. 319, p. 199, lines 12-15)

40. In describing the manner in which Mr. Smith was yelling, Officer Haun testified as follows: "He was yelling, but when he was yelling, it was slowed down. It was taking him a while to blurt things out. It was slurred. It was very difficult to understand." (R. 319, p. 200, lines 9-11)

41. Officer Haun acknowledged during his testimony that Mr. Smith could have been yelling "in pain." (R.319, p. 217, lines 14-18)

42. Officer Haun also acknowledged that Mr. Smith was moaning. (R. 319, p. 218, lines 1-2)

43. Witness Dolores Lopez testified that she heard Mr. Smith yelling and it sounded to her like he was “yelling in pain.” (R. 319, p. 271, lines 6-8).

44. In response to the question “was Mr. Smith yelling anything,” witness Mandy Burke testified that she heard Mr. Smith saying “Stop, don’t hit me,” and “stuff like that.” (R. 319, p. 280, lines 2-5)

45. Another witness, Caddo Wadsworth, testified that Mr. Smith was “yelling every time a police officer would hit him.” According to Mr. Wadsworth’s observations, Mr. Smith was just “reacting” to what the officers were doing to him. (R. 319, p. 301, lines 7-21.

46. The jury was instructed with respect to the elements that the City must prove in order for it to convict the defendant of the offense of disorderly conduct. Specifically, the court instructed the jury as follows:

Before you may convict the defendant of the offense of disorderly conduct, every one of the following elements must be proved beyond a reasonable doubt:

(1) that the events took place in West Jordan, Salt Lake County, Utah; and

(2) on or about March 7, 2002, the defendant

(a) after a request to desist, refused to comply with the lawful order of the police to move from a public place; OR

(b) knowingly created a hazardous or physically offensive condition by any act which serves no legitimate purpose OR

- (c) intending to cause public annoyance or alarm or recklessly creating a risk thereof (1) engaged in violent, tumultuous or threatening behavior; (2) made unreasonable noises in a public place; (3) made unreasonable noises in a private place which could be heard in a public place; or (4) obstructed vehicle or pedestrian traffic.

(R. 319, p. 328, lines 19-25 and p. 329, lines 1-8)

47. The City failed to introduce any testimony at trial that Mr. Smith was ever asked to move from a public place.

48. The City failed to introduce any testimony at trial that Mr. Smith knowingly created a hazardous or physically offensive condition during the subject arrest.

49. The City failed to introduce any testimony at trial with respect to whether any noises made by Mr. Smith during his arrest were reasonable and/or unreasonable.

50. The City failed to introduce any testimony at trial with respect to whether Mr. Smith intended to cause public inconvenience annoyance or alarm or recklessly created a risk thereof during his arrest.

VI. SUMMARY OF THE ARGUMENTS

Defendant's Motion to Suppress the blood evidence obtained in this case should have been granted. Due the condition of the Defendant at the time the consent was solicited, as a result of the severe beating and intimidation the Defendant had just suffered at the hands of the police officers, the Defendant could not have consented to the blood draw and/or any alleged consent

obtained was not freely and voluntarily given. The trial court's failure to grant Defendant's Motion to Suppress constitutes reversible error.

Defendant should have been allowed to introduce evidence of the police officers' prior assaultive behavior during other arrests under Subsection (5) of the self-defense statute that allows the introduction of prior acts of violence in support of a claim of self-defense. The trial court's failure to allow this information into evidence constitutes reversible error.

Finally, there was insufficient evidence presented at trial to support a conviction of the Defendant for the crime of disorderly conduct. Consequently, the same should be overturned.

VII. ARGUMENT

A. THE DISTRICT COURT ERRED IN FAILING TO SUPPRESS EVIDENCE OBTAINED FROM A BLOOD DRAW WHERE THE DEFENDANT DID NOT CONSENT AND WHERE ANY ALLEGED CONSENT WAS NOT FREELY AND VOLUNTARILY GIVEN.

It is well established that "the Fourth Amendment prohibits unreasonable searches and seizures, including where the drawing and ensuing chemical analysis of blood is concerned." State v. Bredehoft, 966 P.2d 285, 292 (Utah App. 1998) (citations omitted) Admittedly, a search "conducted pursuant to a consent that is voluntary in fact does not violate the fourth

amendment.” Id. However, in this case, the Defendant asserts that he neither consented, nor that any alleged consent was voluntary.¹ According to Bredehoft, whether the requisite voluntariness exists depends on “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of police conduct.” Bredehoft, 966 P.2d at 292-293 (citing State v. Arroyo, 796 P.2d 684, 689 (Utah 1990) and Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). Indeed, “[c]onsent is not voluntary if obtained as the product of duress or coercion, express or implied.” State v. Bisner, 37 P.3d 1073, 1088 (Utah 2001). As such, in determining whether a defendant voluntarily consented to a warrantless search, “[w]e further look to see if there is clear and positive testimony that the consent was unequivocal and freely given.” Bredehoft, 966 P.2d at 293 (citations omitted). In making this determination, courts look to several factors:

Specific factors guiding the voluntariness determination include (1) the absence of a claim of authority to search by the officers; (2) the absence of an exhibition of force by the officers; (3) a mere request to search; (4) cooperation by the [party being searched] and (4) the absence of deception or trick on the part of the officer.

Bredehoft, 966 P.2d at 193 (citing State v. Whittenback, 621 P.2d 103, 106 (Utah 1980)). See also, Bisner, 37 P.3d at 1088.

¹ Utah’s implied consent law and refusal provision does not support actual consent in this case. Importantly, the Utah provisions grant individuals the ability to refuse with the caveat that such refusal, while stopping the blood or chemical test, will have the consequence of the refusal being mentioned in court. See, Utah Code Ann., Section 41-6-44.10.

In this case, the arresting officers testified that Mr. Smith resisted arrest, was belligerent and uncooperative and denied medical treatment at the scene. They also acknowledge that they engaged in a significant physical altercation with Mr. Smith during which time Mr. Smith was taken down to the ground by a “hair-pull” technique, thrown into the door of his vehicle, with his face and head making direct contact with the door’s metal frame, pepper-sprayed on two occasions, struck by Officer Saunders in the stomach on two occasions, struck by Officer Haun’s asp baton at least 3 to 4 times, held down to the ground while his face was “scraped across the asphalt” and eventually placed in both hand and leg restraints. See, Statement of Facts, #1-22 and 27-50.

Additionally, the evidence presented at the suppression hearing established that Officer Haun sought a search warrant for the blood draw and included a statement in his Affidavit in support of that warrant that Mr. Smith had refused a chemical test. Id. The officers admitted that Mr. Smith had sustained significant injuries during the physical altercation and was receiving medical treatment at the hospital when Officer Haun asked him to consent to the blood test. Id. Under the circumstances of Mr. Smith’s physical and mental condition at the time Officer Haun requested his consent, as well as the proximity in time of the Officer’s request to the beating Mr. Smith had just received at the hands of the West Jordan police officers, Defendant contends that any alleged consent on his part was not voluntarily given. Accordingly, the trial court should have suppressed the blood evidence obtained in this

case, and in light of the evidence received at the suppression hearing, it was error not to do so.

B. THE DISTRICT COURT ERRED IN FAILING TO ALLOW THE DEFENSE TO INTRODUCE EVIDENCE OF PRIOR ASSAULTIVE BEHAVIOR OF THE ARRESTING OFFICERS PURSUANT TO THE SELF-DEFENSE STATUTE THAT ALLOWS EVIDENCE OF PRIOR VIOLENCE.

Prior to trial, counsel subpoenaed personnel files of three of the arresting officers. (R. 124-125) At trial, counsel sought to question the officers concerning allegations of prior unreasonable beatings during arrest. (R. 320 at p. 116) The City objected and the officers were questioned out of the presence of the jury. (R. 320 at pp. 116-124) In this questioning – (both had suits filed against them, and one had been accused on two prior occasions of overzealousness) – the district court judge found that such evidence was not admissible under the self-defense statute. (R. 320 at pp. 125-128) This ruling was erroneous and should be reversed.

Section 76-2-402 of the Utah Code is known as the self-defense statute and provides that a person is justified “in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself . . . against such other’s imminent use of unlawful force.” Utah Code Ann., Section 76-2-402 (1). Under Section (5) of that same provision, the statute provides, in relevant part, as follows:

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

- (a) the nature of the danger;
- (b) the immediacy of the danger;

- (c) the probability that the unlawful force would result in death or serious bodily injury;
- (d) **the other's prior violent acts or violent propensities;**
and
- (e) any patterns of abuse or violence in the parties' relationship.

(Emphasis added).

In the present case, both Officers Saunders and Kwant had reports in their personnel files of claims being made against them for the excessive use of force, including a civil lawsuit that was filed naming said officers in connection with the brutal beating of an individual during his arrest. Under the subject statute, it is clear that the fact finder should be allowed to consider evidence of the officers' prior violent acts or violent propensities. The trial court should have allowed this information to be admitted into evidence and its failure to do so constitutes reversible error. Consequently, Defendant asks this court to reverse the trial court's ruling on this issue and remand for further proceedings.

C. THE EVIDENCE PRESENTED IN THIS CASE IS INSUFFICIENT TO REASONABLY SUPPORT A CONVICTION FOR DISORDERLY CONDUCT.

The disorderly conduct statute requires the satisfaction of certain elements before a conviction for the offense may stand. Specifically, in order to sustain its burden on this crime, the City must prove one of three alternative elements in order to obtain a conviction. The first alternative that would establish disorderly conduct is that the Defendant refused to comply with the lawful order of the police to move from a public place. In the present case, the

City failed to introduce any testimony at trial that Mr. Smith was ever asked (let alone refused) to move from a public place. Consequently, the Defendant's conviction is not supported under this alternative element of the crime.

The second alternative element is that the Defendant knowingly created a hazardous or physically offensive condition. Similarly, in the present case, the City failed to introduce any testimony at trial that Mr. Smith knowingly created a hazardous or physically offensive condition during his arrest. Thus, the Defendant's conviction for disorderly conduct is not supported by this alternative element of the crime.

Finally, the third alternative under which the City can prove a defendant guilty of disorderly conduct is to establish that the defendant intended to cause public inconvenience, annoyance, or alarm, or recklessly created a risk thereof, and (1) engaged in fighting or in violent, tumultuous, or threatening behavior; (2) made unreasonable noises in a public place; (3) made unreasonable noises in a private place which can be heard in a public place; or (4) obstructed vehicular or pedestrian traffic. See, Utah Code Ann., Section 76-9-102 (1953, as amended). Under this alternative, two elements must be proved, to wit: the intention and the act. In the present case, the City failed to introduce any evidence that would establish that the Defendant acted with the intention of causing public inconvenience, annoyance or alarm or that he recklessly created the risk thereof. Consequently, Defendant contends that

the court need not go any further in its analysis of the third alternative, because the first prong has not been satisfied.

Assuming arguendo that this Court disagrees, Defendant directs the Court's attention to the second element of the third alternative for further examination. Specifically, Defendant acknowledges that there was testimony presented during trial that there was yelling and screaming and that he was verbally offensive. However, this testimony, alone, is insufficient to satisfy all of the elements necessary to support a conviction for disorderly conduct. Noise, alone, is not enough. In addition to proof that the defendant was "intending" to cause or "recklessly" caused public inconvenience, alarm or annoyance, there must also be proof that the noise made by the defendant was "**unreasonable** noise." See, State v. Richards, 779 P.2d 689 (Utah App. 1989) (emphasis added). In the present case, the testimony as a whole establishes that the noise made by Mr. Smith during his arrest was not unreasonable.

Specifically, Officer Saunders admitted during his testimony that during the altercation between the officers and Mr. Smith, the officers stuck Mr. Smith several times with batons and fists, pepper-sprayed him twice, took him down to the ground with a "hair pull" maneuver and that **the officers were "yelling"** at Mr. Smith to stop resisting. (R. 320, pp 80-88) Officer Saunders testified that **he yelled** at Mr. Smith to "get on the ground" and that Mr. Smith complied with this command. (R. 320 p. 110, lines 14-22) Officer Saunders further testified that while Officer Kwant was hitting Mr. Smith with a baton,

Officer Saunders was yelling at him to “quit resisting.” (R. 320 p. 111, lines 3-14)

In describing Mr. Smith’s conduct, Officer Kwant testified as follows:

We attempted to try to put the hands behind the back, he started to pull away from us and started to resist, tightening up his muscles in an attempt to pull away from us. He muttered something that we know better than do this and we continue to tell him, you know, quit resisting us, just cooperate and relax. He continued to pull away and at one point I think he broke away from our grasp and turned around and we immediately tried to reattach and regained control of him.

(R. 320 p. 142, lines 9-17)

Officer Kwant testified that he initiated a “hair pull” take down of Mr. Smith and that during the course of this take-down, Mr. Smith’s face and head stuck the open door of his vehicle, and Officer Saunders deployed his pepper spray on Mr. Smith at that time as well. (R. 320, pp. 144-145) Officer Kwant acknowledges that while Mr. Smith was face-down on the ground, flailing during the subject arrest, his face was being scraped across the asphalt. (R. 320, p.148, lines 18-25 and p. 149, lines1-2) Officer Kwant further acknowledges striking Mr. Smith with his asp baton two to three times on his back shoulder-blade and once in his leg. (R. 320, p. 151, lines 4-25) Officer Kwant also witnessed Officer Saunders strike Mr. Smith two times in the abdomen with his fist and spray him with pepper-spray on at least two occasions as well during the altercation. (R. 320 p. 152, lines 11-25) Officer Kwant testified that Mr. Smith was screaming throughout the physical altercation with the police officers. (R. 320, p.150, lines 5-8) In light of what

was happening to Mr. Smith at the hands of the police officers, Defendant asserts that any noise he was making was reasonable.

Officer Haun testified that when he initially spoke to the defendant, Mr. Smith yelled profanities at him and at the other paramedics and officers. (R. 319, p. 199, lines 12-15) In describing the manner in which Mr. Smith was yelling, Officer Haun testified as follows: “He was yelling, but when he was yelling, it was slowed down. It was taking him a while to blurt things out. It was slurred. It was very difficult to understand.” (R. 319, p. 200, lines 9-11) Officer Haun acknowledged during his testimony that Mr. Smith could have been **yelling “in pain.”** (R.319, p. 217, lines 14-18) Officer Haun also acknowledged that Mr. Smith was **moaning.** (R. 319, p. 218, lines 1-2)

Witness Dolores Lopez testified that she heard Mr. Smith yelling and it sounded to her like he was **“yelling in pain.”** (R. 319, p. 271, lines 6-8). In response to the question “was Mr. Smith yelling anything,” witness Mandy Burke testified that she heard Mr. Smith saying **“Stop, don’t hit me,” and “stuff like that.”** (R. 319, p. 280, lines 2-5) Another witness, Caddo Wadsworth, testified that Mr. Smith was **“yelling every time a police officer would hit him.”** According to Mr. Wadsworth’s observations, Mr. Smith was just **“reacting”** to what the officers were doing to him. (R. 319, p. 301, lines 7-21.

When read in context, the testimony regarding the noises made by Defendant during his arrest establishes that the noises were not unreasonable

and were, in large part if not entirely, attributable to the conduct and actions of the police officers, who, by their own testimony acknowledge that they were “yelling” at Mr. Smith as well.

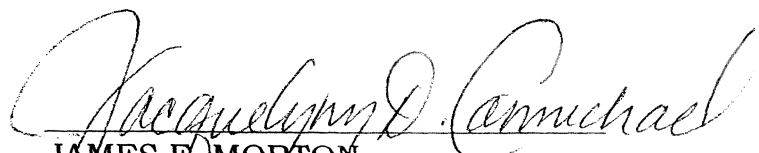
Based upon the foregoing, Defendant contends that the evidence presented at trial was insufficient to support a conviction of disorderly conduct and requests that this Court overturn the same.

VIII. CONCLUSION

Based upon the foregoing, Defendant asks this Court to (1) find that the trial court erred in failing to grant Defendant’s Motion to Suppress, reverse the ruling and remand to the trial court for further proceedings; (2) find that the trial court erred in failing to allow Defendant to introduce evidence of the police officers’ prior assaultive behavior in connection with effecting arrests, reverse the ruling and remand to the trial court for further proceeding; and/or (3) find that there was insufficient evidence presented to support the jury’s conviction of Mr. Smith for the crime of disorderly conduct and reverse the same.

RESPECTFULLY SUBMITTED this 15th day of July, 2004.

MORTON & CARMICHAEL, L.C.



JAMES E. MORTON
JACQUELYNN D. CARMICHAEL
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify this 15th day of July, 2004, I caused to be served 2 copies of the foregoing by the method indicated below, and addressed to the following:

Ryan Carter, Esq.
West Jordan City Attorney
8000 South Redwood Road
West Jordan, Utah 84088

☒ U.S. MAIL
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ TELECOPY (FAX)

Jacquelyn D. Carmichael

Exhibit A

41-6-44.8. Municipal attorneys for specified offenses may prosecute for certain DUI offenses and driving while license is suspended or revoked.

The following class A misdemeanors may be prosecuted by attorneys of cities and towns, as well as by prosecutors authorized elsewhere in this code to prosecute these alleged violations:

(1) alleged class A misdemeanor violations of Section 41-6-44; and

(2) alleged violations of Section 53-3-227, which consist of the person operating a vehicle while the person's driving privilege is suspended or revoked for a violation of Section 41-6-44, a local ordinance which complies with the requirements of Section 41-6-43, Section 41-6-44.10, Section 76-5-207, or a criminal prohibition that the person was charged with violating as a result of a plea bargain after having been originally charged with violating one or more of those sections or ordinances. 1996

41-6-44.10. Implied consent to chemical tests for alcohol or drug — Number of tests — Refusal — Warning, report — Hearing, revocation of license — Appeal — Person incapable of refusal — Results of test available — Who may give test — Evidence.

(1) (a) A person operating a motor vehicle in this state is considered to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44, 53-3-231, or 53-3-232, while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6, if the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44, 53-3-231, or 53-3-232, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6.

(b) (i) The peace officer determines which of the tests are administered and how many of them are administered.

(ii) If an officer requests more than one test, refusal by a person to take one or more requested tests, even though he does submit to any other requested test or tests, is a refusal under this section.

(c) (i) A person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine, may not select the test or tests to be administered.

(ii) The failure or inability of a peace officer to arrange for any specific chemical test is not a defense to taking a test requested by a peace officer, and it is not a defense in any criminal, civil, or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(2) (a) If the person has been placed under arrest, has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1), and refuses to submit to any chemical test requested, the person shall be warned by the peace officer requesting the

test or tests that a refusal to submit to the test or tests can result in revocation of the person's license to operate a motor vehicle.

(b) Following the warning under Subsection (2)(a), if the person does not immediately request that the chemical test or tests as offered by a peace officer be administered a peace officer shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle. When the officer serves the immediate notice on behalf of the Driver License Division, he shall:

(i) take the Utah license certificate or permit, if any, of the operator;

(ii) issue a temporary license effective for only 29 days; and

(iii) supply to the operator, on a form approved by the Driver License Division, basic information regarding how to obtain a hearing before the Driver License Division.

(c) A citation issued by a peace officer may, if approved as to form by the Driver License Division, serve also as the temporary license.

(d) As a matter of procedure, the peace officer shall submit a signed report, within ten calendar days after the date of the arrest, that he had grounds to believe the arrested person had been operating or was in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44, 53-3-231, or 53-3-232, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6, and that the person had refused to submit to a chemical test or tests under Subsection (1).

(e) (i) A person who has been notified of the Driver License Division's intention to revoke his license under this section is entitled to a hearing.

(ii) A request for the hearing shall be made in writing within ten calendar days after the date of the arrest.

(iii) Upon written request, the division shall grant to the person an opportunity to be heard within 29 days after the date of arrest.

(iv) If the person does not make a timely written request for a hearing before the division, his privilege to operate a motor vehicle in the state is revoked beginning on the 30th day after the date of arrest for a period of:

(A) 18 months unless Subsection (2)(e)(iv)(B) applies; or

(B) 24 months if the person has had a previous license sanction after July 1, 1993, under this section, Section 41-6-44.6, 53-3-223, 53-3-231, 53-3-232, or a conviction after July 1, 1993, under Section 41-6-44.

(f) If a hearing is requested by the person, the hearing shall be conducted by the Driver License Division in the county in which the offense occurred, unless the division and the person both agree that the hearing may be held in some other county.

(g) The hearing shall be documented and shall cover the issues of:

(i) whether a peace officer had reasonable grounds to believe that a person was operating a motor vehicle in violation of Section 41-6-44, 41-6-44.6, or 53-3-231; and

- (ii) whether the person refused to submit to the test.
- (h) (i) In connection with the hearing, the division or its authorized agent:
 - (A) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers; and
 - (B) shall issue subpoenas for the attendance of necessary peace officers.
- (ii) The division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section 78-46-28.
- (i) If after a hearing, the Driver License Division determines that the person was requested to submit to a chemical test or tests and refused to submit to the test or tests, or if the person fails to appear before the Driver License Division as required in the notice, the Driver License Division shall revoke his license or permit to operate a motor vehicle in Utah beginning on the date the hearing is held for a period of:
 - (i) (A) 18 months unless Subsection (2)(i)(B) applies; or
 - (B) 24 months if the person has had a previous license sanction after July 1, 1993, under this section, Section 41-6-44.6, 53-3-223, 53-3-231, 53-3-232, or a conviction after July 1, 1993, under Section 41-6-44.
 - (ii) The Driver License Division shall also assess against the person, in addition to any fee imposed under Subsection 53-3-205(13), a fee under Section 53-3-105, which shall be paid before the person's driving privilege is reinstated, to cover administrative costs.
 - (iii) The fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this Subsection (2) that the revocation was improper.
- (j) (i) Any person whose license has been revoked by the Driver License Division under this section may seek judicial review.
 - (ii) Judicial review of an informal adjudicative proceeding is a trial. Venue is in the district court in the county in which the offense occurred.
- (3) Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided for in Subsection (1), and the test or tests may be administered whether the person has been arrested or not.
- (4) Upon the request of the person who was tested, the results of the test or tests shall be made available to him.
- (5) (a) Only a physician, registered nurse, practical nurse, or person authorized under Section 26-1-30, acting at the request of a peace officer, may withdraw blood to determine the alcoholic or drug content. This limitation does not apply to taking a urine or breath specimen.
 - (b) Any physician, registered nurse, practical nurse, or person authorized under Section 26-1-30 who, at the direction of a peace officer, draws a sample of blood from any person whom a peace officer has reason to believe is driving in violation of this chapter, or hospital or medical facility at which the sample is drawn, is immune from any civil or criminal liability arising from drawing the sample, if the test is administered according to standard medical practice.
- (6) (a) The person to be tested may, at his own expense, have a physician of his own choice administer a chemical test in addition to the test or tests administered at the direction of a peace officer.

(b) The failure or inability to obtain the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer.

(c) The additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(7) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested does not have the right to consult an attorney or have an attorney, physician, or other person present as a condition for the taking of any test.

(8) If a person under arrest refuses to submit to a chemical test or tests or any additional test under this section, evidence of any refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, combination of alcohol and any drug, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body. 2002

41-6-44.11. Repealed.

1991

41-6-44.12. Reporting test results — Immunity from liability.

(1) As used in this section, "health care provider" means a person licensed under Title 58, Chapter 31b, Nurse Practice Act, Title 58, Chapter 67, Utah Medical Practice Act, or Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(2) A health care provider who is providing medical care to any person involved in a motor vehicle crash may notify, as soon as reasonably possible, the nearest peace officer or law enforcement agency if the health care provider has reason to believe, as a result of any test performed in the course of medical treatment, that the:

(a) person's blood alcohol concentration meets or exceeds the limit under Subsection 41-6-44(2)(a)(i) or (iii);

(b) person is younger than 21 years of age and has any measurable blood, breath, or urine alcohol concentration in the person's body; or

(c) person has any measurable controlled substance or metabolite of a controlled substance in the person's body which could be a violation of Subsection 41-6-44(2)(a)(ii) or Section 41-6-44.6.

(3) The report under Subsection (2) shall consist of the:

(a) name of the person being treated;

(b) date and time of the administration of the test; and

(c) results disclosed by the test.

(4) A health care provider participating in good faith in making a report or assisting an investigator from a law enforcement agency pursuant to this section is immune from any liability, civil or criminal, that otherwise might result by reason of those actions.

(5) A report under Subsection (2) may not be used to support a finding of probable cause that a person who is not a driver of a vehicle has committed an offense. 2002

41-6-44.20. Drinking alcoholic beverage and open containers in motor vehicle prohibited — Definitions — Exceptions.

(1) A person may not drink any alcoholic beverage while operating a motor vehicle or while a passenger in a motor vehicle, whether the vehicle is moving, stopped, or parked on any highway.

(2) A person may not keep, carry, possess, transport, or allow another to keep, carry, possess, or transport in the passenger compartment of a motor vehicle, when the vehicle is on any highway, any container which contains any alcoholic beverage if the container has been opened, its seal broken, or the contents of the container partially consumed.

Exhibit B

76-2-306. Voluntary intoxication.

Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense; however, if recklessness or criminal negligence establishes an element of an offense, and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense. 1973

76-2-307. Voluntary termination of efforts prior to offense.

It is an affirmative defense to a prosecution in which an actor's criminal responsibility arises from his own conduct or from being a party to an offense under Section 76-2-202 that, prior to the commission of the offense, the actor voluntarily terminated his effort to promote or facilitate its commission and either:

- (1) gave timely warning to the proper law enforcement authorities or the intended victim; or
- (2) wholly deprives his prior efforts of effectiveness in the commission. 1995

76-2-308. Affirmative defenses.

Defenses enumerated in this part constitute affirmative defenses. 1973

PART 4**JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY****76-2-401. Justification as defense — When allowed.**

(1) Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed.

- (a) when the actor's conduct is in defense of persons or property under the circumstances described in Sections 76-2-402 through 76-2-406 of this part;
- (b) when the actor's conduct is reasonable and in fulfillment of his duties as a governmental officer or employee;
- (c) when the actor's conduct is reasonable discipline of minors by parents, guardians, teachers, or other persons in loco parentis, as limited by Subsection (2);
- (d) when the actor's conduct is reasonable discipline of persons in custody under the laws of the state; or
- (e) when the actor's conduct is justified for any other reason under the laws of this state.

(2) The defense of justification under Subsection (1)(c) is not available if the offense charged involves causing serious bodily injury, as defined in Section 76-1-601, serious physical injury, as defined in Section 76-5-109, or the death of the minor. 2000

76-2-402. Force in defense of person — Forcible felony defined.

(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2) A person is not justified in using force under the circumstances specified in Subsection (1) if he or she:

- (a) initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(b) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(c) (i) was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force; and

(ii) for purposes of Subsection (i) the following do not, by themselves, constitute "combat by agreement":

(A) voluntarily entering into or remaining in an ongoing relationship; or

(B) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(c).

(4) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, and arson, robbery, and burglary as defined in Title 76, Chapter 6. Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony. Burglary of a vehicle, defined in Section 76-6-204, does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

- (a) the nature of the danger;
- (b) the immediacy of the danger;
- (c) the probability that the unlawful force would result in death or serious bodily injury;
- (d) the other's prior violent acts or violent propensities; and
- (e) any patterns of abuse or violence in the parties' relationship. 1994

76-2-403. Force in arrest.

Any person is justified in using any force, except deadly force, which he reasonably believes to be necessary to effect an arrest or to defend himself or another from bodily harm while making an arrest. 1973

76-2-404. Peace officer's use of deadly force.

(1) A peace officer, or any person acting by his command in his aid and assistance, is justified in using deadly force when:

(a) the officer is acting in obedience to and in accordance with the judgment of a competent court in executing a penalty of death;

(b) effecting an arrest or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape; and

(i) the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or

(ii) the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed;

Exhibit C

Section

- 76-9-301.6. Dog fighting exhibition — Authority to arrest and take possession of dogs and property.
 76-9-301.7. Cruelty to animals — Enhanced penalties.
 76-9-301.8. Bestiality — Definitions — Penalty.
 76-9-302, 76-9-303. Repealed.
 76-9-304. Allowing vicious animal to go at large.
 76-9-305. Officer's authority to take possession of animals — Lien for care.
 76-9-306. Police service animals — Causing injury or interfering with handler — Penalties.
 76-9-307. Injury to service animals — Penalties.

Part 4**Offenses Against Privacy**

- 76-9-401. Definitions.
 76-9-402. Privacy violation.
 76-9-403. Communication abuse.
 76-9-404. Criminal defamation.
 76-9-405. Repealed.
 76-9-406. Injunctive relief against privacy offenses — Damages.
 76-9-407. Crime of abuse of personal identity — Penalty — Defense — Permitting civil action.

Part 5**Libel and Slander**

- 76-9-501. "Libel" defined.
 76-9-502. Libel — Elements — Classification of offense.
 76-9-503. Presumption of malice — Reading or seeing by another not necessary — Liability of newspaper or serial publication personnel.
 76-9-504. Fair reporting privilege of newspaper or broadcasting station personnel as to public official proceedings — Privilege as to defamatory matter not subject to censorship.
 76-9-505. Libelous matter not privileged.
 76-9-506. Privilege as to communications between interested persons.
 76-9-507. Slander — Imputing unchastity to female.
 76-9-508. Slander — Imputation need not be proven false — Truth as defense.
 76-9-509. Conveying false or libelous material to newspaper or broadcasting stations.

Part 6**Offenses Against the Flag**

- 76-9-601. Abuse of a flag.

Part 7**Miscellaneous Provisions**

- 76-9-701. Intoxication — Release of arrested person or placement in detoxification center.
 76-9-702. Lewdness — Sexual battery — Public urination.
 76-9-702.5. Lewdness involving a child.
 76-9-702.7. Voyeurism offense — Penalties — Exemptions.
 76-9-703. Repealed.
 76-9-704. Abuse or desecration of a dead human body — Penalties.
 76-9-705. Participation in an ultimate fighting match.

PART 1**BREACHES OF THE PEACE AND RELATED OFFENSES****76-9-101. Riot — Penalties.**

- (1) A person is guilty of riot if:
 (a) simultaneously with two or more other persons he engages in tumultuous or violent conduct and thereby knowingly or recklessly creates a substantial risk of causing public alarm; or
 (b) he assembles with two or more other persons with the purpose of engaging, soon thereafter, in tumultuous or violent conduct, knowing, that two or more other persons in the assembly have the same purpose; or
 (c) he assembles with two or more other persons with the purpose of committing an offense against a person or property of another who he supposes to be guilty of a violation of law, believing that two or more other persons in the assembly have the same purpose.
 (2) Any person who refuses to comply with a lawful order to withdraw given to him immediately prior to, during, or immediately following a violation of Subsection (1) is guilty of riot. It is no defense to a prosecution under this Subsection (2) that withdrawal must take place over private property; provided, however, that no persons so withdrawing shall incur criminal or civil liability by virtue of acts reasonably necessary to accomplish the withdrawal.
 (3) Riot is a felony of the third degree if, in the course of and as a result of the conduct, any person suffers bodily injury, or substantial property damage, arson occurs or the defendant was armed with a dangerous weapon, as defined in Section 76-1-601; otherwise it is a class B misdemeanor 1997

76-9-102. Disorderly conduct.

- (1) A person is guilty of disorderly conduct if:
 (a) he refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or
 (b) intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he:
 (i) engages in fighting or in violent, tumultuous, or threatening behavior;
 (ii) makes unreasonable noises in a public place;
 (iii) makes unreasonable noises in a private place which can be heard in a public place; or
 (iv) obstructs vehicular or pedestrian traffic.
 (2) "Public place," for the purpose of this section, means any place to which the public or a substantial group of the public has access and includes but is not limited to streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.
 (3) Disorderly conduct is a class C misdemeanor if the offense continues after a request by a person to desist. Otherwise it is an infraction. 1999

76-9-103. Disrupting a meeting or procession.

- (1) A person is guilty of disrupting a meeting or procession if, intending to prevent or disrupt a lawful meeting, procession, or gathering, he obstructs or interferes with the meeting, procession, or gathering by physical action, verbal utterance, or any other means.
 (2) Disrupting a meeting or procession is a class B misdemeanor. 1973

76-9-104. Failure to disperse.

- (1) A person is guilty of failure to disperse when he remains at the scene of a riot, disorderly conduct, or an unlawful assembly after having been ordered to disperse by a peace officer.