

2003

West Jordan City v. Daneil H. Smith : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST JORDAN CITY,)	
)	
Plaintiff/Appellee,)	
)	BRIEF OF APPELLEE
v.)	
)	Case No. 20031055-CA
DANEIL H. SMITH,)	
)	
Defendant/Appellant.)	

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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II. STATEMENT OF JURISDICTION

This appeal is from the 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) (2004), 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.

Mr. Smith 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); Driving Under the Influence of Alcohol and/or Drugs, a class B misdemeanor, in violation of Utah Code Ann. § 41-6-44; and Disorderly Conduct, a class C misdemeanor, in violation of Utah Code Ann. § 76-9-102

III. DETERMINATIVE PROVISIONS

STATUTES

Utah Code Ann. § 76-2-402 (Appellant Exhibit B)

Utah Code Ann. § 76-9-102 (Appellant Exhibit C)

IV. 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.

B. Course of the Proceedings

Defendant entered pleas of not guilty to all charges and requested a trial by jury. (R. 08-09). Prior to trial, Defendant filed a Motion to Suppress the blood test result from Defendant's 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).

Also prior to trial, Defendant filed a Subpoena Duces Tecum to obtain copies of the arresting officers' personnel files, including any information relating to the officers' use of excessive force in 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 evidence from these files pertaining to instances where the officers had been accused of using excessive force. (R. 320 at p. 116). The City objected and the officers were questioned about these instances outside of the presence of the jury. (R. 320 at 116-124, 177-181). The trial court then determined that such information constituted prior inadmissible acts under rule 404(b) of the Utah Rules of Evidence. The trial court also found that the self-defense statute, Utah Code Ann. § 76-2-402 was not applicable to the fact situation of the current case. At the conclusion of the trial, the case was submitted to the jury for a verdict.

C. Disposition

The jury found Defendant guilty of Count I, Resisting Arrest; Count III, Possession of Drug Paraphernalia; Count IV, Disorderly Conduct; and Count V, Driving Under the Influence of Alcohol or Drugs. Defendant was found not guilty of Count II, Assault Against a Police Officer. No post-trial motions were filed by either party.

D. Statement of Facts

Facts Surrounding Consent Issues

1. On or about March 7, 2002, West Jordan Police Officer Hahn was dispatched to the vicinity of 8750 South 4560 West to assist other officers. (R. 314, p.10, lines 4-5).

2. Officer Hahn made contact with Defendant when he arrived at the scene. The Defendant was strapped in place on a gurney and was screaming obscenities directed at those around him. (R. 314, p. 11, lines 7-21).

3. Various medical personnel were attempting to interact with the Defendant and were asking for his cooperation in receiving medical treatment. The Defendant did not want medical help. (R. 314, p. 28, lines 11-20).

4. Officer Hahn also attempted to communicate with the Defendant at this time. He tried to ask generalized questions. Defendant responded by shouting obscenities at Officer Hahn. (R. 314, pp. 13-14, lines 17-25, 1-7).

5. Officer Hahn noticed a lot of needle marks on the Defendant's arm, leading him to believe that the Defendant had used drugs. (R. 314, p. 15, lines 1-11).

6. Officer Hahn never asked for consent at this time for a blood sample or any other chemical test, as he was unable to have any meaningful communication with the Defendant. (R. 314, p. 19, lines 5-11).

7. Because Officer Hahn was unable to have any type of meaningful dialogue with the Defendant, he obtained a blood draw search warrant from the West Jordan Municipal Justice Court. Although not relevant to issues of consent, Officer Hahn has admitted to making several errors while filling out the blood draw search warrant. (R. 314, p. 15, lines 18-23).

8. After obtaining the warrant from Judge Kunz, Officer Hahn proceeded to Jordan Valley Hospital. The Defendant had been taken to the hospital while Officer Hahn requested a search warrant before the Justice Court. (R. 314, p. 17, lines 1-17).

9. When Officer Hahn arrived at Jordan Valley Hospital, the Defendant was located in an area of the emergency room. Another officer had been watching over the Defendant. This officer left when Officer Hahn arrived. (R. 314, p. 47, lines 14-25).

10. When Officer Hahn went into the Defendant's room, medical personnel were treating the Defendant. The Defendant had calmed down considerably from earlier in the evening. (R. 314, pp. 17-18).

11. In the hospital room, although still restrained to the hospital bed, the Defendant was not fighting against the restraints and was not yelling obscenities. (R. 314, pp. 18, 49-50)

12. After arriving in the room, Officer Hahn attempted to get consent for the blood draw. He decided to attempt to get consent because the Defendant was calmer and could have a conversation, whereas this was not possible at the crime scene. Officer Hahn did not inform the Defendant that he had obtained a warrant to seize a sample of Mr. Smith's blood, nor did he claim any legal right to seize a blood sample. (R. 314, pp. 18-19). (See also: findings of trial court. R. 315, p. 6, lines 1-6).

13. Officer Hahn commenced his conversation with the Defendant by informing the Defendant that he was under arrest for Driving under the influence and asked if he understood. Defendant responded, "I guess." (R. 314, p. 20, lines 9-14) (See also: findings of trial court. R. 315, p. 4, lines 19-24).

14. Officer Hahn then read the admonition to request consent from the DUI report form, requesting a blood test. He specifically read, "What is your response to my request that you submit to a chemical test?" Defendant responded, "Sure, I'll pee in a cup, too." (R. 314, p. 21, lines 8-16). (See also: findings of trial court. R. 315, p. 4, line 24 p.5, lines 1-4).

15. After obtaining the Defendant's consent to submit to a chemical test, Officer Hahn informed the defendant of his Miranda rights, and asked the Defendant to speak to Officer Hahn about this incident. The Defendant refused to answer any further questions after receiving a Miranda warning. (R. 314, pp. 21-22, lines 19-25, 1-15). (See also: findings of trial court. R. 315, p. 5, lines 1-4).

16. Within a short time the blood technician arrived to draw the blood sample. The blood technician instructed the Defendant on how to be cooperative, and the Defendant cooperated with the blood technician. At no time did the Defendant express his desire to not have the blood sample taken. At no time did Defendant physically resist the blood draw. (R. 314, p. 24).

17. After hearing Officer Hahn's testimony, the trial court found that the facts established the Defendant indeed consented to a blood draw. (R. 315, p. 5, lines 17-18).

18. The trial court carefully considered whether the Defendant's consent was freely and voluntarily given. The trial court found that the Defendant's altercation with police occurred almost two hours before officer Hahn requested a blood sample from the Defendant at a nearby hospital. The trial court found there was no exhibition of force by officers, nor was there any hostility displayed by the defendant during officer Hahn's interview at the hospital. Therefore, the initial altercation with police did not negate the voluntariness of the defendant's consent. (R. 315, p. 6, lines 7-16).

Facts Surrounding Issues of Officers' Prior Acts

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

20. At trial, counsel sought to question Officers Saunders and Kwant concerning allegations of prior uses of excess force during arrest. (R. 320, pp. 116-124, 177-183).

21. The City objected and the officers were questioned out of the presence of the jury. (R. 320, pp. 116-124, 177-183).

22. The lawsuit that Defendant questioned Officer Saunders and Officer Kwant about was relating to Dale Miller (R. 320, pp. 116-124, 177-183).

23. The lawsuit had never been brought to trial and was only an accusation at the time of the trial for the Defendant. (R. 320, p. 119, lines 18-21).

24. Officer Saunders had already been dismissed from the lawsuit at the time Defendant's trial occurred. (R. 320, p. 119, lines 22-23).

25. Officer Saunders arrived at the Miller incident after any alleged excess force had occurred. He was merely there to provide back-up. For this reason he was dismissed from the complaint. (R. 320, p. 125, lines 1-2).

26. Officer Kwant also arrived afterwards in the Miller case to keep security and to watch over the rest of the crowd. He had very little involvement with the case. (R. 320, p. 178, lines 13-19).

27. There may have been another incident where Officer Kwant was accused of using excessive force. Again, this was only an accusation with no actual conviction finding or entry of judgment. (R. 320, p. 179-182).

28. In this questioning the trial court found that allegations of prior excess force were inadmissible prior acts under rules 404(b) and 608 of the Utah Rules of Evidence. The trial court also found that these acts were not admissible under the self-defense statute. (R. 320, pp. 125-128).

Facts Surrounding the Disorderly Conduct Conviction

29. Before Officer Saunders contacted the Defendant, he activated audio and video recording devices in order to preserve facts collected while investigating this case. Officer Saunders' testimony continually referred to and explained episodes recorded on audio and video. (R. 320 p. 66, lines 11-25; pp., 67, 68, 69).

30. When Officer Saunders and Kwant arrived at 8750 South 4560 West, Defendant's truck was stopped in the intersection of the two roads with his truck perpendicular to the curb, his vehicle halfway through the intersection. (R. 320, p. 139, lines 8-11).

31. Officer Saunders testified that Defendant was verbally belligerent and called the officer names before any physical confrontation between the officers and Defendant. (R. 320, p. 78, lines 19-21).

32. The Defendant resisted the officers' attempts to put handcuffs upon him and had to be forced to the ground. (R. 320, p. 79, lines 17-25).

33. The Defendant started to kick the officers, resisting arrest, after he had been forced to the ground. (R. 320, p. 80, lines 9-11).

34. When the officers tried to grab the Defendant's arms to take him into custody he began screaming. Neither one of the officers were inflicting any pain upon the Defendant at this point. (R. 320, p. 82, lines 1-2; p. 150, lines 2-4).

35. At one point during his struggle against Officers Saunders and Kwant, the defendant kicks his own truck, causing it to roll out into the intersection. (R. 320, p. 83, lines 8-10.)

36. Officer Kwant indicated that the Defendant was "flailing wildly, screaming at the top of his lungs, flailing his arms, kicking his legs." (R. 320, p. 170, lines 23-25).

37. Officer Kwant further testified that throughout their struggle to detain the Defendant, he and Officer Saunders continually told the defendant to quit resisting, cooperate and relax. (R 320, p. 142, lines 9-17).

38. Relying on the video recording of this incident, Officer Saunders testified that the Defendant fought being taken into custody for four minutes, until officers finally subdued the Defendant. (R. 320 p. 87, lines 3-11).

39. Fireman Donald Chase stated that Defendant was agitated and was screaming and yelling obscenities after the physical altercation between the officers and Defendant had finished. (R. 320, pp. 188, 193).

40. When Officer Hahn attempted to speak with the Defendant he yelled obscenities at Officer Hahn. (R. 319, p. 199, lines 7-15).

41. Witness Delores Lopez, testified that she observed this incident from inside her own home. While observing this incident, the defendant observed the defendant “slammed” his arms onto his truck while before he was frisked, then instantly went from a calm posture to “completely out of control”. (R. 319, p. 259, lines 20-25; p. 260, lines 1-260).

42. 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)

V. SUMMARY OF THE ARGUMENTS

The trial court correctly ruled that the blood evidence should have been allowed to be used during the trial. Defendant's motion to suppress the blood evidence in this case should not have been granted. Defendant gave his consent to the blood draw verbally as well as by implied consent.

The trial court correctly ruled that Defendant should not have been allowed to introduce allegations of prior uses of excess force by the arresting officers. The self defense statute, Utah Code Ann. § 76-2-402 (5)(d), does not apply to this case, since the defendant must have knowledge of prior violent behavior by the others involved to be able to invoke this subsection of the statute. The Defendant in this case had no prior dealings with the officers, thus the subsection does not apply. Furthermore, the Defendant cannot invoke the self-defense statute where the force employed by the defendant was during the course of the Defendant's own arrest. A Defendant cannot use force in defense of an arrest under Utah law.

Finally, defendant's conviction for disorderly conduct is supported by the record and by applicable statutes. The Defendant screamed and yelled at officers on a public street while the Defendant fought against officers as they conducted an arrest. These actions drew the attention of the public to the Defendant's arrest. The Defendant, while fighting police officers, was reckless as to whether such fighting, tumultuous conduct would also cause public annoyance or alarm. The conviction for disorderly conduct should be upheld.

VI. ARGUMENTS

A. THE DISTRICT COURT CORRECTLY RULED THAT THE EVIDENCE OBTAINED FROM THE BLOOD DRAW WAS ADMISSIBLE. THE DEFENDANT'S CONSENT TO THE BLOOD DRAW WAS FREELY AND VOLUNTARILY GIVEN.

Courts have long recognized that “a warrantless search conducted pursuant to a consent that is voluntary in fact does not violate the fourth amendment.” State v. Webb, 790 P.2d 65, 82 (Utah Ct. App. 1990) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)). Utah courts have indicated that “generally, whether the requisite voluntariness exists depends on the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the police conduct.” State v. Arroyo, 796 P.2d 684, 689 (Utah 1990) (citing Schneckloth, 412 U.S. at 226).

The Court in State v. Bredehoft enumerated specific factors that guide the voluntariness determination. These factors include the following: “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 5) the absence of deception or trick on the part of the officer” State v. Bredehoft, 966 P.2d 285, 293 (Utah App. 1998) (citing State v. Whittenback, 621 P.2d 103, 106 (Utah 1980)). In addition, in the context of a warrantless blood draw, additional considerations include whether the defendant resisted the blood draw or reasonably believed the blood was being drawn for medical rather than law enforcement purposes. Bredehoft at 293.

The facts of this case show that the blood draw was obtained through Defendant's consent. First, Smith verbally assented to the blood draw, even volunteering that he would also consent to giving a urine sample. Furthermore, Smith's actions indicate his consent to the blood draw. Similar to the defendant in Bredehoft, Smith "did not resist, say "no," or object in any way..." Id. at 293. On the contrary, Smith cooperated with Officer Hahn and the technician who drew the blood sample. Cooperation alone, even without verbal consent, has been found to be consent for a blood draw in the absence of resistance or struggle by the defendant. Id. at 293. In this case, Defendant both verbally consented and physically cooperated with the blood draw.

Officer Hahn's testimony further demonstrates that Smith's consent was freely given. Officer Hahn never claimed that he had any legal right to draw the blood without the defendant's consent. Officer Hahn merely requested that the Defendant give his consent to a blood draw, while reading from a DUI admonition form. No deception or trickery was used by Officer Hahn in obtaining consent. He stated to the Defendant that the blood sample was for police purposes and was not for hospital purposes. The Defendant had already had a blood sample taken by the hospital.

Lastly, Officer Hahn did not use physical force or threats to obtain the blood sample, and was not involved in the struggle to arrest the Defendant. Any physical confrontation between Smith and the other officers had occurred almost two hours before. At the time of the blood draw the Defendant was in a hospital receiving treatment, not at the police station, which also decreases the coercive nature of the request. See Bredehoft at 293. The situation was no longer volatile and the defendant

had calmed down considerably. The trial court found these facts persuasive in determining the initial conflict with police did not render the Defendant's consent to be involuntary. Thus, Officer Hahn asked for the consent of the defendant for a blood draw in the absence of coercive factors. The trial court was correct to deny the motion to suppress the evidence. This Court should accord a measure of discretion to the trial court's application of the facts surrounding Officer Hahn's interview, and affirm the trial court's conclusion that the prior conflict with police did not negate the voluntariness of Defendant's consent.

B. THE DISTRICT COURT CORRECTLY PROHIBITED THE DEFENSE FROM INTRODUCING EVIDENCE OF PRIOR, UNRELATED, CONDUCT OF THE ARRESTING OFFICERS.

Prior to trial, defendant subpoenaed personnel files of three of the arresting officers. (R. 124-125). At trial, defense counsel sought to question the officers concerning allegations of prior unreasonable beatings during arrest. The City objected and the officers were questioned out of the presence of the jury. 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 correct and should not be reversed for two reasons. First, the self-defense statute does not apply to situations where the defendant does not know of the other person's prior violent acts. Second, defendants are not allowed to invoke the statutory justification defenses, including self-defense, when the charge is resisting arrest or assaulting a police officer.

The self-defense statute, Utah Code Ann. § 76-2-402, does not apply because the part of the section that the defendant emphasizes requires defendant's knowledge of prior violent acts by the other parties. Without knowledge of others' prior violent acts the defendant would have no reason to use self-defense. Utah courts interpreting the self-defense statute have indicated that the defendant should have knowledge of prior violent acts for this part of the self-defense statute to be invoked. See State v. Starks, 627 P.2d 88 (Utah 1978) (Jury instruction of victim's prior violent acts should have been given when defendant had knowledge of victim's prior acts).

Furthermore, Utah Courts have indicated that a defendant cannot use the self-defense statute to combat a charge of resisting arrest. Thus, any exclusion of the officer's prior violent acts is harmless, since the defendant could not have used the self-defense statute as a defense. Under the law of the State of Utah, a citizen may not use force to resist an arrest, even an illegal arrest, unless an officer is acting wholly outside of the scope of his authority as a peace officer in the State of Utah. State v. Gardiner, 814 P.2d 568, 574 (Utah 1991).

The Utah Court of Appeals, in interpreting Gardiner, rejected the proposition that a person may invoke the statutory justification defenses against a charge of resisting arrest. Salt Lake City v. Smoot, 921 P.2d 1003, 1010 (Utah App. 1996). At the time that Officers Kwant and Saunders arrested the defendant they were in uniform, had arrived at the street where the defendant was parked in a marked patrol vehicle, and were acting in response to a call to the police department. Under these facts it is obvious that the officers were not "engaging in a personal frolic of their own." Gardiner at 574.

Accordingly, the officers were acting within the scope of their authority, and the defendant was without right to use force to resist the officers' actions.

The trial court was correct to exclude evidence of prior violent acts by the police officers. Additionally, any decision to not allow evidence of the officer's prior actions was harmless to the Defendant, since he is not permitted to invoke the statutory defenses.

C. DEFENDANT HAS FAILED TO MARSHAL ALL EVIDENCE BEFORE THIS COURT IN SUPPORT OF JURY'S CONVICTION FOR THE OFFENSE OF DISORDERLY CONDUCT.

Defense Counsel's marshaling of evidence before this Court presents an incomplete view of the evidence presented to the jury when it convicted the defendant for Disorderly Conduct. ""To demonstrate that the evidence is insufficient to support [a] jury verdict, the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict."" State v. Hopkins, 989 P.2d 1065, 1069 (Utah 1999); *quoting* Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991).

The Brief of Appellant avoids any discussion of the evidence presented to the jury from a video and audio recording of this incident. Failure to present the video and audio recordings invites this Court to overturn the Jury's verdict without first examine all evidence submitted at trial.

Before approaching the Defendant for the first time, Officer Saunders had parked his patrol vehicle perpendicular to the driver's side of the Defendant's vehicle, to video record this incident from a patrol vehicle camera. Officer Saunders further utilized an

audio recorder during his interaction with the Defendant. (*See generally* R. 320 p. 66, lines 11-25; pp., 67, 68, 69). A general examination of Officer Saunders' testimony reveals that his testimony oftentimes serves as a mere supplement to explain the details of events submitted to the Jury vis-à-vis the video and audio recording.

Officer Saunders' video and audio recording of this incident preserved several violent acts committed by the defendant which, when coupled with his continued shouting, caused public alarm. Presentation of Officer Saunders' recordings enabled the Jury to consider whether the Defendant's shouting, and acts of violence were unreasonable. Once the recordings are omitted from the present discussion, Defense Counsel suggests to this Court that each instance in which the Defendant screams occurs in reaction to force employed by the officers. This argument calls for an inquiry into the chronology of the struggle in between the Defendant and police, which audio and video recordings would irrefutably establish.

Appellee further submits that the audio recordings of this incident document several instances where Officers Saunders and Kwant tell the Defendant to relax and stop resisting. This evidence is crucial to consider whether Appellee satisfied its burden to show the defendant continued to engage in fighting or violent, tumultuous, threatening behavior after receiving a command to desist.

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

The evidence presented by the City satisfied the elements required for a conviction of disorderly conduct. In order to sustain a conviction for disorderly conduct the City must prove one of three alternative theories. Although the City need only prove one of the three theories, evidence presented at trial is such that a reasonable jury could have convicted under at least two of these three theories.

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. Utah Code Ann. § 76-9-102 (a)(1) (2004). The City concedes that because Defendant was in an intoxicated state the officers who first arrived at the scene did not ask him to move his motor vehicle from the intersection.

The second theory the City can advance for a disorderly conduct conviction is that the Defendant knowingly created a hazardous or physically offensive condition. Id. In this case, evidence presented at trial established that Defendant had stopped his truck perpendicular to the curb with the truck jutting out into the street. Police were originally called to the crime scene by concerned citizens because Defendant's truck was in the intersection, posing a hazard to passing automobiles. Because Defendant's car was in the roadway there was only enough room for one lane of traffic to get around his car, increasing the likelihood of an accident between two cars trying to maneuver around the Defendant. Defendant created a "physically offensive" and dangerous condition for

every passing vehicle. This circumstance was aggravated by the Defendant's subsequent kick to his own truck, which caused the same to roll further into the intersection.

In addition, Defendant resisted arrest by the police officers, posing danger to the police officers, thus creating a hazardous condition. Since the officers were attempting to arrest the Defendant near his car, the altercation between the police officers and the Defendant occurred in the street, in full view of neighbors who witnessed the incident. This caused a hazardous situation for Defendant, the police officers, and any passing vehicles during the altercation.

Finally, the third alternative theory under which the City can prove a defendant guilty of disorderly conduct is to establish that the Defendant "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." Utah Code Ann. § 76-9-102 (1)(b) (2004). Appellee believes its most convincing case for the offense of disorderly conduct falls under § 76-9-102(b).

"Clearly, defendant's fighting with police and yelling of obscenities in public violated [§ 76-9-102]." State v. Griego, 933 P.2d 1003, 1009 (Utah App. 1997). In Griego, officers attempted to arrest the defendant, while he was intoxicated, and the defendant subsequently fought efforts of police to complete the arrest by use of force and continued yelling. *Id.* at 1004-1005. The evidence presented in this case is nearly identical to the facts presented to the Griego court. Testimony presented at trial by

several West Jordan police officers, as well as medical personnel at the scene, established that the Defendant was yelling obscenities and screaming throughout the entire altercation. Officers Kwant and Saunders both testified that the Defendant screamed at them and yelled profanities towards them before any physical altercation occurred between the officers and the Defendant. Ronald Chase indicated that after the physical altercation between the officers and the Defendant that the Defendant was screaming and yelling obscenities. Officer Hahn also stated that the Defendant was yelling obscenities after the physical altercation between Defendant and the officers. This testimony establishes that the yelling by the Defendant occurred not only during the physical altercation, but also before and after the altercation. A jury could reasonably conclude that the Defendant's yelling and screaming of obscenities at people, including those who were trying to give him medical treatment, was "unreasonable."

Furthermore, Defendant's conviction of resisting arrest shows that he used violent, tumultuous, or threatening behavior. Officers Kwant and Saunders indicated that Defendant kicked them and resisted their attempts to place him in handcuffs, after repeated commands to stop resisting, and relax. These actions fit the definition of "violent, tumultuous, or threatening behavior," which constitutes a class C misdemeanor if the defendant continues fighting after a request to desist.

The City's evidence presented at trial also supports the notion that Defendant possessed the requisite intent, which in this case is recklessness, to cause public alarm. It is well established that intent can be proven by circumstantial evidence. State v. James, 819 P.2d 781, 789 (Utah 1991). The court in James indicated that " Indeed, unless a

confession is made by the defendant concerning intent, or unless the court is somehow able to open the mind of the defendant to examine his motivations, intent is of necessity proven by circumstantial evidence.” Id. The testimony of witnesses is such that a juror could reasonably draw inferences from the evidence that has a basis in logic sufficient to prove that the Defendant possessed the requisite intent. See State v. Brown, 948 P.2d 337, 344 (Utah 1997).

In the present case, the testimony of the police officers at the scene that the Defendant actively resisted their efforts to detain him while located in a public street. Under such circumstances, a jury could readily find intent to cause public alarm, annoyance and inconvenience. Where specific intent can be found, the less specific mental state of recklessness as to whether public alarm would result. Defendant could have complied with the officers but instead chose to resist. Furthermore, Defendant placed his car in the middle of an intersection of a road. The Defendant knew, or at least should have known, that this would cause public inconvenience annoyance, or alarm.

As long as there is some evidence and reasonable inferences to support the jury’s verdict, a court should not disturb a jury’s findings. To reverse a jury verdict the court must find that “the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.” State v. Bradley, 57 P.3d 1139, 1150 (Utah App. 2002). Sufficient evidence exists on two fronts to sustain the jury’s verdict. The Defendant placed his car in an intersection making a dangerous situation for passing motorists; resisted the police officers, engaging in


fighting and violent behavior; and made unreasonable noises, thereby causing public alarm.

VII. CONCLUSION

Based upon the preceding, the City asks this court to (1) find that the trial court was correct in denying Defendant's Motion to Suppress the blood draw evidence; (2) find that the trial court was correct in not allowing Defendant to introduce evidence of prior claims of excessive force by the police officers; and (3) find that there was sufficient evidence presented to support the jury's conviction of the Defendant for the crime of disorderly conduct. On the basis of these findings the City asks the Court to affirm the jury's conviction of Mr. Smith on all counts.

RESPECTFULLY SUBMITTED this 17 day of September, 2004.

CITY OF WEST JORDAN



RYAN CARTER
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify this 17th day of September, 2004, I caused to be served 2

copies of the foregoing by the method indicated below, and addressed to the following:

James E. Morton
Jacquelynn D. Carmichael
Morton & Carmichael, L.C.
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Salt Lake City, Utah 84121

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

A handwritten signature in black ink, appearing to read "Ryan G. H.", is written over a horizontal line.