

2005

The State of Utah v. Calvin Moore : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
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 Plaintiff/Appellee, :
 :
 v. :
 :
 CALVIN MOORE, : Case No. 20050072-CA
 : Priority No. 2
 Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Burglary, a 1st degree felony, in violation of Utah Code Ann. § 76-6-203 and Aggravated Assault, a 2nd degree felony, in violation of Utah Code Ann. § 76-5-103, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable William W. Barrett, Judge, presiding.

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INTRODUCTION

Defendant/Appellant Calvin Moore relies on his opening brief and also refers this Court to that brief for the statements of jurisdiction, the issues, the standard of review, the case, and the facts. Mr. Moore otherwise responds to the State's answer to his opening brief on the jury instruction issue as follows. (The jury instruction issue is Point V in Mr. Moore's Opening Brief and Point III in the State's Brief.)

SUMMARY OF THE ARGUMENT

Mr. Moore maintains his previously stated arguments in his opening brief. In this reply brief, he addresses the issue concerning whether the jury was improperly instructed on both aggravated burglary and aggravated assault. In sum, the confusing and conflicting jury instructions defined aggravated assault in a manner which allowed the jury to improperly convict him of both the greater offense (aggravated burglary) and the lesser included offense (aggravated assault).

ARGUMENT

POINT I. THE CONFUSING AGGRAVATED ASSAULT INSTRUCTIONS IMPROPERLY ALLOWED A CONVICTION FOR A LESSER INCLUDED OFFENSE

The State claims that because trial counsel agreed to the jury instructions, the instructions may not be raised under the theory of invited error. See Appellee’s Brief, page 23 (citing *State v. Geukgeuzian*, 2004 UT 16). While case law apparently supports its invited error argument, the doctrine of ineffective assistance of counsel (IAC) still allows this Court to review the jury instruction issue. Invited error is a basis different than IAC and the State does not contend otherwise.

The gravamen of the State’s argument is that “jurors convicted defendant of *second degree* aggravated assault because he ‘intentionally cause[d] serious bodily injury to another’ – e.g., Marcus Anderson. *See* Jury Instruction 32, R. 291[.]” Appellee’s Brief, page 26 (footnote omitted). The State relies on the above language from Jury Instruction 32 to argue that “[t]his element is not necessary to defendant’s aggravated burglary conviction.” Appellee’s Brief, page 26; *cf.* Utah Code Ann. § 76-5-103(1)(b)(*third degree* Aggravated Assault requires use of “a dangerous weapon ... or other means of force likely to produce death or serious bodily injury”).

Under the State’s argument and its reading of *State v. Bradley*, 752 P.2d 874 (Utah 1985), it claims the Aggravated Assault element of “uses a dangerous weapon ... or other means of force likely to produce death or serious bodily injury” is inapplicable to Mr. Moore’s case because the jury would have had no occasion to consider such language.

In contrast to the State's claim, however, the plain language of the jury instructions demand otherwise. Mr. Moore's jury was in fact instructed on the Aggravated Assault definition that contained the alleged inapplicable language. Jury Instruction 31 expressly defined Aggravated Assault as follows:

A person commits Aggravated Assault if that person commits assault and

- (a) intentionally causes serious bodily injury to another; or
- (b) uses a dangerous weapon or other means or force likely to produce death or serious bodily injury.

Jury Instruction 31, R 290 (emphasis added) (attached hereto as Addendum 2).

Since Jury Instruction 31 told the jury that the underscored language constituted Aggravated Assault, R 290, and Jury Instruction 26 similarly allowed such language to provide the basis for Aggravated Burglary, R 285, Addendum 2, once the jury convicted Moore of the greater charge they may have similarly believed that Aggravated Assault was simultaneously established. Accordingly, the *Bradley* analysis applies and the lesser included offense should be vacated. *State v. Bradley*, 752 P.2d 874 (Utah 1985). Trial counsel was ineffective in not objecting to the instructions.

In Mr. Moore's case, Aggravated Assault was inadequately defined for the jury. "The parties are 'entitled to ... a presentation of the case to the jury under instructions that clearly, concisely and accurately state the issues and the law applicable thereto so that the jury will understand its duties.'" *Nielsen v. Pioneer Valley Hosp.*, 830 P.2d 270, 274-75 (Utah 1992) (explaining that trial court's failure to simplify and clarify jury instructions

resulted in confusing instructions that “may well have prejudiced [appellant’s] ... case.”); *Pollack v. State*, 2002 FL 2264 (Fla. App. 2002) (“An instruction which tends to confuse rather than enlighten the jury is cause for reversal if it may have misled the jury and caused them to arrive at a conclusion that otherwise they would not have reached.”).

Jury Instruction 31 defined Aggravated Assault in a manner which allowed the jurors to convict Mr. Moore of both the greater and the lesser included offense, R. 290, Addendum 2, while Jury Instruction 26 and 32 defined Aggravated Assault under a different alternative theory. R 285, 291, Addendum. Instructions 26, 31 and 32 conflict with one another.

For no error to occur, the definition of Aggravated Assault under Jury Instruction 31 would have had to be rendered superfluous by the jury (or this Court). But such a result is precluded under the well-established rule that jury instructions must be construed as a whole. *See, e.g., State v. Johnson*, 774 P.2d 1141, 1146 (Utah 1989). The jury is not allowed to ignore one instruction in favor of another. *See* R 262 (Jury Instruction 3).

Moreover, “[n]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict. *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

“It is not sufficient for the jury instruction merely to be susceptible to an

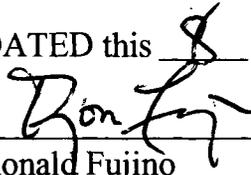
interpretation that is technically correct. The important question is whether there is a ‘reasonable likelihood’ that the jury was misled or confused by the instruction, and therefore applied it in a way that violated the Constitution. *Victor v. Nebraska*, 511 U.S. 1 (1994) (Blackmun, J., concurring in part and dissenting in part); *see also Cage v. Louisiana*, 498 U.S. 39, 41(1990) (“In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole.”).

Trial counsel was ineffective. *Myers v. State*, 2004 UT 31, ¶ 20, 94 P.3d 211. His performance fell below an objective standard of reasonableness, and but for counsel’s failure to object to the instruction the outcome of the trial would have been different. *Id.*; *Bradley*, 752 P.2d at 877.

CONCLUSION

Based on the foregoing, Appellant Moore respectfully requests that his convictions be reversed and the case remanded to the trial court for a new trial. In the alternative, he asks this Court to vacate the lesser included offense of Aggravated Assault.

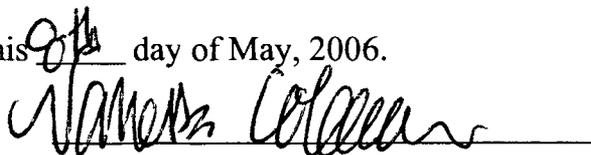
DATED this 8 day of May, 2006.



Ronald Fujino
Attorney for Mr. Moore

CERTIFICATE OF DELIVERY

I hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 9th day of May, 2006.

A handwritten signature in black ink, appearing to read "James Colman", is written over a horizontal line.

ADDENDA

ADDENDUM 1

STATUTORY PROVISIONS

Utah Code Ann. § 76-5-103 (1)(b) Aggravated assault.

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

Amended by Chapter 291, 1995 General Session

ADDENDUM 2

INSTRUCTION NO. 31

A person commits Aggravated Assault if that person commits assault and

- (a) intentionally causes serious bodily injury to another; or
- (b) uses a dangerous weapon or other means or force likely to produce death or serious bodily injury.

INSTRUCTION NO. 26

Before you can convict the defendant, Calvin Leroy Moore, of the offense of Aggravated Burglary as charged in count I of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 5th day of February, 2003, in Salt Lake County, State of Utah, the defendant, Calvin Leroy Moore, entered or remained in the dwelling of Marcus Anderson and Antionette Ragsdale; and

2. That the defendant entered or remained unlawfully; and

3. That the defendant entered or remained intentionally or knowingly; and

4. That the defendant entered or remained with the intent to commit an assault on any person; and

5. That in attempting, committing or fleeing from a burglary, the defendant or another participant in the crime either:

(a) caused bodily injury to any person who was not a participant in the crime; or

(b) used or threatened the immediate use of a dangerous weapon against any person who is not a participant in the crime.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Burglary as charged in count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count I.

INSTRUCTION NO. 32

Before you can convict the defendant, Calvin Leroy Moore, of the crime of Aggravated Assault, as charged in count II of the information, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:

1. That on or about the 5th day of February, 2003, in Salt Lake County, State of Utah, the defendant, Calvin Leroy Moore, assaulted Marcus Anderson; and
2. That the said defendant intentionally or knowingly assaulted Marcus Anderson; and
3. That the said defendant then and there intentionally caused serious bodily injury to Marcus Anderson.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Assault as charged in count II of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count II.