

2005

The State of Utah v. Calvin Moore : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

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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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Annotated § 77-18a-1 and 78-2a-3(2)(e) (1953 as amended).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Whether the trial court violated Mr. Moore's constitutional right to procedural due process when it acknowledged his motion for a new trial based on claims of ineffective assistance of counsel, yet the same court still failed to provide him with substitute counsel to make such a motion or to present evidence on his behalf in a timely manner. Issues of constitutional interpretation are questions of law, which we review for correctness. *See State v. Maguire*, 1999 UT App 45, ¶ 5, 975 P.2d 476.
2. Whether the defendant's (trial) counsel was ineffective in advising his client that he was not entitled to another attorney because he already had been represented by other attorneys and in not informing the court about their potential conflict of interest. "To establish ineffective assistance of counsel, 'a defendant must show (1) that counsel's

performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'" Mvers v. State, 2004 UT 31, ¶ 20, 94 P.3d 211.

3. Did the trial court fail to make an appropriate inquiry into whether Mr. Moore should have received substitute counsel? "[A] trial court's failure to investigate a . . . timely substitution request [made by an indigent party with appointed counsel] is per se error." State v. Vessey, 967 P.2d 960, 962 (Utah App.1998). While the inquiry itself may be subject to an abuse of discretion standard, *see* State v. Pursifell, 746 P.2d 270, 272 (Utah App.1987), "the court's failure to sufficiently explore Appellant's complaints in this case leaves us without the information needed to evaluate whether [he] was entitled to substitute counsel either as a matter of sound discretion or as a matter of law." L.K. v. State, 48 P.3d 244, 2002 UT App 149.

The right to effective assistance of counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error." Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (quoting Chapman v. California, 386 U.S. 18, 23 (1967)); State v. Velarde, 806 P.2d 1190, 1192 (Utah App.1991). "Because error in assessing whether a defendant may represent himself is structural, it can never be harmless." United States v. Peppers, 302 F.3d 120, 127-37 (3d Cir. 2002) (citing McKaskle v. Wiggins, 465 U.S. 168, 177 (1984)).

4. Whether the defendant's (trial) counsel was ineffective in not appropriately investigating and securing alibi testimony or exculpatory evidence favorable to the defense. *See* above standard of review for ineffective assistance of counsel

5. Whether the defendant's (trial) counsel should have objected to, or whether the trial court should have recognized the plain error of, jury instructions that allowed Mr. Moore to be convicted of both aggravated burglary and aggravated assault. "Whether one crime is a lesser included offense of another is a question of law reviewed for correctness." State v. Jaimez, 817 P.2d 822, 827 (Utah App. 1991); State v. Yates, 918 P.2d 136, 138 (Utah App. 1996); *cf.* State v. Daniels, 2002 UT 2, 40 P.3d 611, 617 ("[A] trial court's decision to use a jury instruction may be alleged to have impacted the defendant's right to a fair trial, and such a conclusion would be reviewed for correctness."); State v. Houskeeper, 2002 UT 118, ¶ 11, 62 P.3d 444 ("[w]hether a jury instruction correctly states the law presents a question of law which we review for correctness."); *see* above standard of review for ineffective assistance of counsel; *see also* State v. Cruz, 2005 UT 45 ¶ 41 (To establish plain error, appellant must show "(I) [a] n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.").

PRESERVATION OF THE ARGUMENT

Mr. Moore’s attorney on appeal is different from Mr. Moore’s attorney at the trial court level. Appellate counsel now raises issues that prior defense counsel failed to address below or constitute plain error as a basis for this Court’s review of the matter(s).

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

The texts of the following relevant constitutional and statutory provisions are contained in this brief or Addendum A:

| | |
|-------------------------|----------------------------------|
| Utah Const. art. 1, § 7 | Utah Code Ann. § 76-1-402(3) |
| Utah R. App. P. 23B | Utah Code Ann. § 76-5-103 (1)(b) |
| Utah R. Crim. P. 24 | Utah Code Ann. § 76-6-203 |
| Utah R. Evid 402 | Utah Code Ann. § 77-18a |
| Utah R. Evid 403 | Utah Code Ann. § 78-2a-3(2)(e) |
| Utah R. Evid. 802 | |

STATEMENT OF THE CASE

The State’s Information initially charged the Defendant with a number of counts although some of them were dismissed at the preliminary hearing. R 32-33. At the time of trial, held on November 23-24, 2005, the State’s Amended Information alleged Count I, Aggravated Burglary; Count II, Aggravated Assault (against Marcus Anderson); and Count III, Aggravated Assault (against Antionette Ragsdale Jones). R 247-48.

Following the trial, the jury returned a verdict of “Guilty” on Counts I and II, and “Not Guilty” on Count III. R 296-98.

On December 27, 2004, the trial court sentenced Mr. Moore “to an indeterminate term of not less than five years and which may be life in the Utah State Prison” on Count I, Aggravated Burglary, a 1st degree felony. R 314. The court also imposed a consecutive sentence “of not less than one year nor more than fifteen years” in prison on Count II, Aggravated Assault, a 2nd degree felony. R 314.

In a letter dated January 3, 2005 (and filed on January 5, 2005), Kevin Kurumada filed a Motion to Withdraw because “[t]he defendant desires to file a Motion for a new trial, based on ineffective assistance of counsel. Counsel requests that the Legal Defender’s Association [LDA] be appointed to represent the defendant until conflict counsel can be assigned.” R 316.

On January 6, 2005, the trial court allowed Mr. Kurumada to withdraw as counsel. However, the court failed to immediately appoint LDA or conflict counsel in a manner which would have allowed new counsel to timely file a Motion for a New Trial.

On January 21, 2005, Kent Hart entered an Appearance of Counsel to handle Mr. Moore’s appeal and later filed a motion to withdraw as counsel on April 22, 2005. Current appellate counsel filed his appearance of counsel on April 29, 2005.

Current counsel then filed a Rule 23B Motion to remand for supplementation of the record on appeal and entry of findings of fact. In the alternative, counsel also moved for a remand pursuant to a procedural due process violation. The

State opposed appellant's motions on various grounds including the position that such claims should be addressed on appeal and fell outside the scope of a Rule 23B motion. The Court of Appeals denied appellant's Rule 23B motion and his alternative motion for remand.

The State also moved to strike extra-record information from Appellant's opening brief. Mr. Moore replied in opposition to the State's motion. This Court granted the State's motion and ordered Appellant to resubmit an amended brief. Mr. Moore complied with this Court's Order. For the record, he maintains his previously stated objections.

STATEMENT OF THE FACTS

At or around 1:15 a.m., on February 5, 2003, Calvin Moore was residing in his house when he "[g]ot into an argument with [his] wife because she ... assumed [he] was cheating when he wasn't." R 351, page 193. In an effort to let matters cool down, Calvin Moore called a friend to pick him up and to avoid further argument. The friend, Jenna West, drove Calvin to Tuan Jones' residence where he remained for the rest of the night. R 351, pages 193, 197. Calvin Moore testified about his whereabouts to the jury, but his trial attorney failed to buttress Calvin's alibi with any corroborative witnesses.

Trial counsel did not call any other defense witnesses who could have verified Calvin's activities or behaviors during the night in question. R 351, page 206. Instead, at trial defense counsel merely proffered a vague statement by Jenna West – a recollection so nebulous that the prosecution stipulated to its admissibility.

The following evidentiary statement was read to the jury: “Jenna West is a friend of Calvin Moore. She has on occasion associated with the defendant. She recalls on one occasion she was called by the defendant sometime after midnight to pick him up because he had a fight with his wife. She does not remember the date or month but that it was in the winter time. She dropped him off several hours later.” R 351, page 207.

Noticeably absent from the statement, though, was evidence from Ms. West that the one time Calvin called Jenna to pick him up was “the only time I’ve been over there.” R 350, page 9.

The State attempted to ignore the defendant’s alibi by relying on witnesses whose inconsistent statements and ongoing drug use directly impacted their lack of credibility. Antionette Ragsdale Jones testified that she used cocaine “on my days off.” R 350, page 88. According to her skewed perspective, such drug use did not amount to “using it that much.” *Id.* Ms. Jones claimed that the defendant told her to open the door. She claimed that he entered her residence and hit her in the cheekbone and the eye with a gun. R 350, page 78. The jury, however, apparently did not credit her testimony. In response to the State’s allegation of Aggravated Assault, the jury returned a verdict of “Not Guilty” on the count involving Ms. Jones. R 298.

Defense counsel allowed the State to present other evidence, including Marcus Anderson’s testimony, in a relatively uncontested manner. During the preliminary hearing for this case, held on August 13, 2003, Mr. Anderson testified under oath that Mr. Moore “never asked you [Mr. Anderson] about the \$30[.]” R 346, page 39. Moreover, Mr.

Anderson acknowledged that the incident had nothing to do with owing \$30 for a drug deal. R 346, page 39.

Rather than filing a motion in limine to exclude such admittedly unstated and irrelevant testimony from the trial proceedings, defense counsel's inactions allowed the jury to consider such prejudicial evidence. With almost no investigation or evidence available for Mr. Moore's defense, the State was able to establish Counts I & II.

For the aggravated burglary charge, the State alleged that on or about February 5, 2003, defendant entered or remained unlawfully in the dwelling of Marcus Anderson and Antionette Ragsdale, that he did so intentionally or knowingly with the intent to commit an assault on any person, and caused bodily injury or used or threatened the immediate use of a dangerous weapon (a gun) against any person. R 285. For the aggravated assault charge involving Marcus Anderson, the State alleged that on the same date, defendant intentionally or knowingly assaulted Marcus and caused serious bodily injury. R 291. In short, the prosecution claimed that Calvin kicked open a door, hit Antionette in the face with a gun, and shot Marcus in the hand. The State further argued that the parties knew one another and that there was no mistake in the identification.

SUMMARY OF THE ARGUMENT

Mr. Moore's trial counsel failed to represent his client in a manner that would have protected his best interests. Counsel's errors were significant in stature and deprived the defendant of effective representation and a right to a fair trial. Counsel inexcusably procrastinated in his efforts to secure a key alibi witness and counsel

ineffectively failed to convey to the jury how the prosecution's witnesses harbored bias and motive against Mr. Moore. While the evidence showed that the State witnesses knew Mr. Moore, trial counsel neglected to present any reasons as to why those witnesses would falsely accuse him.

At times during the lower court proceedings the trial court either knew or should have known that much friction and tension existed between Mr. Moore and his defense counsel. However, the trial court overlooked its duty to at least inquire into their tumultuous relationship. When defense counsel finally disclosed that his client was alleging ineffective assistance of counsel claims against him, without requiring any further explanation the court immediately granted counsel's motion to withdraw.

The court's inactions towards Mr. Moore continued during the post-sentencing proceedings. Prior counsel had informed the court of Mr. Moore's desire to file a motion for a new trial, yet the court did nothing to allow that to happen. The court effectively precluded him from presenting evidence at a hearing on a motion for a new trial which could have then been part of the record for further arguments on appeal. The factual evidence that would have been considered on a motion for a new trial is much broader than the limited evidence allowed in a Rule 23B motion on appeal. The lower court's actions and inactions violated Mr. Moore's procedural due process rights.

The instructions used at trial improperly instructed the jury. The trial court either committed plain error in allowing the jury to consider them or defense counsel was ineffective in not objecting to them. Given the circumstances of Mr. Moore's case, he

should not have been convicted of both aggravated burglary and aggravated assault. In order to be convicted of aggravated burglary, he also had to commit aggravated assault and he should not have been convicted of each separate offense due to their impermissible overlapping nature.

ARGUMENT

POINT I. THE TRIAL COURT DEPRIVED MR. MOORE OF HIS RIGHT TO PROCEDURAL DUE PROCESS WHEN IT FAILED TO TIMELY APPOINT SUBSTITUTE COUNSEL OR TO PROVIDE EVIDENCE IN A MOTION FOR A NEW TRIAL.

“Timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness.” Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1983). “The purpose of due process is to prevent fundamental unfairness, and one of its essential elements is the *opportunity* to defend.” Provo City v. Werner, 810 P.2d 469, 472 (Utah App. 1991) (emphasis in original); Utah Const. art. I, § 7 (“No person shall be deprived of life, liberty or property, without due process of law.”).

As alluded to above, Mr. Moore’s motion for a new trial fell through the proverbial cracks. The lower court procedurally deprived him of his right to due process and the opportunity to inform the court of evidence that had been ignored or overlooked by his trial counsel.

On December 27, 2004, the trial court imposed Mr. Moore’s sentence. R 313-315. On January 5, 2005, Kevin Kurumada filed a Motion to Withdraw that read in pertinent part: “The defendant desires to file a Motion for a new trial, based on ineffective

assistance of counsel. Counsel requests that the Legal Defender's Association be appointed to represent the defendant until conflict counsel can be assigned." R 316.

The January 5th motion to withdraw was filed within the ten day period for filing a motion for a new trial. "A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period." Utah R. Crim. P. 24.

Accompanying the Motion to Withdraw was an "Order to Withdraw", which said, "Based upon Motion of defense counsel and good cause appearing; IT IS HEREBY ORDERED that KEVIN J. KURUMADA be allowed to withdraw as counsel for defendant." R 318. The court signed the order on January 6, 2005, the last day of the ten day period "after imposition of sentence." Utah R. Crim. P. 24; R 318. The court, having found "good cause appearing," cannot disclaim knowing that "[t]he defendant desire[d] to file a Motion for a new trial, based on ineffective assistance of counsel." R 316

Notwithstanding such knowledge, however, nothing in the court's order allowed Mr. Moore to maintain his previously listed desire to file a motion for a new trial with substitute counsel. The court also failed to fix "such further time" for the motion. Utah R. Crim. P. 24. The end result is that the court deprived Mr. Moore of the ability to file a motion for a new trial.

Appellant Moore cannot be faulted. He raised the issue by communicating his desire to file a motion for a new trial within the ten day period after sentencing. Mr.

Kurumada, in turn, informed the trial court of Mr. Moore's desire within the ten day period after sentencing. The matter had been brought to the court's attention.

The unique glitch in this case, though, is that in Mr. Kurumada's motion for a new trial, he was not obligated to argue his own ineffectiveness. See Carter v. Galetka, 44 P.3d 626, 2001 UT 96 ("Counsel cannot be found ineffective for failing to raise an ineffectiveness of counsel issue against himself or herself.").

For the trial court, though, a more prudent action should have been followed. The trial court should not be able to both acknowledge that "[t]he defendant desires to file a Motion for a new trial" by granting Mr. Kurumada's motion to withdraw, R 316, 318, and, at the same time, to then preclude Mr. Moore from filing the desired motion by failing to enlarge the time for substitute counsel to do so.

By not acting appropriately within the ten day period after sentencing, the trial court deprived Mr. Moore of his motion for a new trial. At the very least, at the trial court level his ability to raise facts and circumstances in support of a motion for a new trial was not then as restricted as it is now at the appellate court level.

State v. Templin, 802 P.2d 182 (Utah 1991), is instructive on this point. There, after a jury convicted Templin, he fired his trial counsel and hired new counsel who claimed ineffective assistance of counsel in a motion for a new trial. *Id.* at 185. Newly hired counsel presented evidence during a hearing on the motion and established that prior counsel did not contact several people who were with the defendant and the alleged victim on the date in question.

However, “the judge concluded that failure to contact the prospective defense witnesses did not constitute ineffective assistance of counsel. Furthermore, the trial judge concluded that even if the witnesses had been called, there was not a reasonable probability that the outcome of the trial would have been different. The motion for a new trial was therefore denied.” *Templin*, 802 P.2d at 185.

Nevertheless, on appeal *Templin* was able to argue all the evidence presented during the hearing on a motion for a new trial. *Templin* was not limited by the evidentiary restrictions of a Rule 23B motion. The standards for presenting evidence are simply different and more accommodating with a motion for a new trial. *Compare* Utah R. Crim. P. 24 (the court may “grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party”) *with* Utah R. App. P. 23B (limiting remand to “show the claimed deficient performance of the attorney”); *accord* *State v. Johnston*, 13 P.3d 175, 181, 2000 Utah App. 290. The trial court’s failure, here, to allow Mr. Moore to properly move for a new trial, *see infra* Point III, deprived him of procedural due process and the more appropriate way of presenting evidence omitted by prior counsel. Utah R. Crim. P. 24.

POINT II. DEFENSE COUNSEL WAS INEFFECTIVE IN NOT RESPONDING APPROPRIATELY TO MR. MOORE’S REQUESTS FOR A SUBSTITUTION OF COUNSEL AND FOR NOT NOTIFYING THE COURT.

In deference to this Court’s Order striking extra-record information from

Appellant's opening brief, he notes the prior existence of Point II and proceeds to the next issue.

POINT III. THE TRIAL COURT FAILED TO ADHERE TO ITS DUTY OF INQUIRY

Once a defendant requests a substitution of counsel, the trial court has a duty to inquire into the legitimacy of the complaint. A summary denial of the defendant's request is improper. *See State v. Vessey*, 967 P.2d 960, 964 (Utah App. 1998) ("By summarily denying defendant's motion in this case, the trial court put the defendant in the position of choosing between proceeding to trial with counsel whom he believed was unprepared and incompatible or proceeding pro se."); *United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991) .

In a letter filed with the court on August 24, 2004, Mr. Moore submitted his "Plea for Withdraw[al] of Counsel & Evidentiary Hearing". R 233. Since he felt his attorney was not protecting his rights, Mr. Moore requested a hearing on a number of matters including due process violations, discovery problems, and evidentiary issues. The trial court did not inquire about his letter, nor did it hold any hearings. The court either declined or neglected to ask about the letter and such inaction amounted to a summary denial. Remand is one remedy that would allow the court to fulfill its duty of inquiry:

Furthermore, a trial court's refusal to substitute counsel can only be properly reviewed if the trial court conducts a meaningful inquiry. Only the trial court can conduct a full evidentiary hearing to explore the substantiality of defendant's allegations without reference to subsequent developments and later-acquired knowledge. Such an inquiry is not clouded by the possibility that the defendant's claim may have been motivated simply by his conviction at trial. The pretrial

scrutiny not only reduces the likelihood of a post conviction ineffective assistance claim, but also creates a record that reviewing courts can rely upon when an ineffectiveness issue is raised on appeal.

State v. Vessey, 967 P.2d 960, 964 (Utah App. 1998) (citation omitted).

The lack of inquiry extended to other occasions as well. At sentencing, Mr. Moore again attempted to inform the court about Mr. Kurumada's ineffectiveness. Moore said he had "several issues that [he] need[ed] to address to the judge" including his attorney's conduct in telling a witness that she didn't have to testify on behalf of Calvin at his trial. R 352, page 8.

The trial court's response was shortsighted: "Well, we're not going to revisit the trial. That's something that's done on appeal." R 352, pages 8-9. The lower court declined to address any of Mr. Moore's complaints, preferring instead to leave them in the hands of the appellate courts. The trial court shirked its duty of inquiry.

Even when the court's exchange with Moore became more heated, the court continued to pass up its opportunity to make an inquiry. For instance, when the court tried to paint Mr. Kurumada as doing "a fine job in your defense," Moore remarked, "Bullshit." R 352, page 9. There was no inquiry into the reasons that would prompt such a comment, nor was a hearing held on the matter.

The judge's lauding of trial counsel was simply a misplaced emphasis on an irrelevant issue. See United States v. Adelzo-Gonzalez, 268 F.3d 772, 778 (9th Cir. 2001) ("There was too much emphasis on the appointed counsel's ability to provide adequate representation and not enough attention to the status and quality of the attorney-client

relationship”); *see also id.* (citation omitted) (“Even if a defendant’s counsel is competent, a serious breakdown in communication can result in an inadequate defense”).

Feeling unheard, frustrated, and desperate about being convicted of a crime that he didn’t commit, Calvin Moore’s statements should have triggered a trial court inquiry:

[Mr. Moore]: “What I’m telling you [the court] is he [Kevin Kurumada] didn’t do his job. That’s what I’m telling you.”

[The Court]: We’re not going to sit here and argue --

[Mr. Moore]: I’m not trying to argue with you either.

[The Court]: Listen to me.

[Mr. Moore]: They’re trying to railroad me.

[The Court]: Will you listen to me?

[Mr. Moore]: You listen to me.

[The Court]: No. I’m not going to if you’re just going to rant and rave and argue.

[Mr. Moore]: Whatever, Dude.

[The Court]: That’s not going to do you any good. Mr. Kurumada, do you have anything you would like to say?

[Mr. Kurumada]: No, your Honor. I just renew my objection and request the additional time so he can have his family here.

R 352, pages 9-10.

Most problematic with the trial court’s handling of the issue is that when Mr. Kurumada later raised the very same issue that Mr. Moore had been complaining about,

the court simply granted counsel's request. Again, the court made no inquiry into the dispute. Its summary grant of Mr. Kurumada's motion to withdraw was as improper as its inaction or summary denial of Mr. Moore's "Plea for Withdraw[al] of Counsel & Evidentiary Hearing". R 233.

Mr. Kurumada's motion to withdraw said nothing more substantive than, "The defendant desires to file a Motion for a new trial, based on ineffective assistance of counsel." R 316. However, Kurumada's written motion paled in comparison to Mr. Moore's verbal face-to-face plea with the judge: "What I'm telling you [the court] is he [Kevin Kurumada] didn't do his job." R 352, pages 9-10; *see also id.* ("They're trying to railroad me"). Ineffective assistance of counsel was alleged in both instances, but the court took action only when counsel raised the issue.

In State v. Vessey, 967 P.2d 960 (Utah App. 1998), defendant Vessey "stated he felt counsel could not represent him because they had a 'conflict of interest' and because counsel 'refuses evidence I have brought forth ... for defence [sic] of my case.' The trial court summarily denied defendant's motion for substitution of counsel, the case proceeded to trial, and defendant was convicted." *Id.* at 961.

On appeal, this court found that "a trial court's refusal to substitute counsel can only be properly reviewed if the trial court conducts a meaningful inquiry." *Id.* at 964. The *Vessey* court then fashioned a remedy there which applies potentially to Mr. Moore's situation.

We therefore remand this case to the trial court to hold an evidentiary hearing to determine if defendant's complaints about his appointed counsel justified the appointment of substitute counsel. If so, the trial court should grant defendant a new trial. However, if the court determines defendant's request for substitution of counsel was unfounded, the judgment of conviction would stand as entered.

Id. Alternatively, in light of the structural nature of the involved constitutional error, *see supra* Point III, and the temptation for the trial court to rationalize improperly as to whether good cause existed for the substitution of counsel, Mr. Moore instead requests a new trial. *See State v. Bakalov*, 862 P.2d 1354, 1355 (Utah 1993) (*per curiam*) (citing *State v. Ramirez*, 817 P.2d 774, 789 (Utah 1991) (“To ask the trial court to address the admissibility question now would be to tempt it to reach a post hoc rationalization for the admission of this pivotal evidence. Such a mode of proceeding holds too much potential for abuse. The only fair way to proceed is to vacate defendant's conviction and remand the matter for retrial.”)).

POINT IV. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND TO SECURE WITNESSES FAVORABLE TO THE DEFENSE.

“If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the ‘wide range or reasonable professional assistance.’ This is because a decision not to investigate cannot be considered a tactical decision.” *State v. Templin*, 805 P.2d 182, 188 (Utah 1990).

Jenna West was an important alibi witness for the defense. Mr. Moore testified that on the night that he got into an argument with his wife, his friend, Jenna

West, picked him up and drove him away to let matters cool down for awhile. R 351, pages 193, 197. Mr. Kurumada conducted some investigation into her testimony, but his inability to secure her attendance or her testimony constituted deficient performance. The eleventh hour attempt to issue a material witness warrant was simply too little, too late. R 242-45. Given the many delays in this case, including one continuance by Mr. Kurumada to “subpoena alibi witness” over a year before trial, *see* 06-28-04 (minute entry), defense counsel can point to no excuse for not earlier procuring her attendance.

Along the same lines, defense counsel’s also erred in failing to object to Sergeant Judd’s proffered testimony as to what Jenna West may or may not have testified about. R 350, page 18-28. Judd’s contentions were inadmissible hearsay and should not have factored into any court ruling. Utah R. Evid. 802.

Further error resulted from defense counsel’s failure to investigate and to expose the biases of Marcus Anderson and Antionette Ragsdale Jones. Despite their claimed familiarity with Mr. Moore or precisely because of their prior associations with Mr. Moore, Mr. Kurumada’s lack of investigation gave the jury little choice other than to simply accept their allegations as true.

Minimally, defense counsel should have motioned in limine to preclude any reference to the \$30 and the alleged drug debt. Mr. Anderson admitted that it was irrelevant to the incident, R 350, page 66, and its admission was prejudicial. Utah R. Evid. 402 and 403.

He similarly didn't attempt to identify the two eyewitnesses at the scene of the crime. R 350, page 79. The failure to look into such matters may not be deemed harmless in this type of "he said, she said" war of words.

POINT V. THE TRIAL COURT COMMITTED PLAIN ERROR IN ITS INSTRUCTIONS TO THE JURY

Where "two crimes are 'such that the greater cannot be committed without necessarily having committed the lesser,' then as a matter of law they stand in the relationship of greater and lesser offenses, and the defendant cannot be convicted or punished for both." State v. Bradley, 752 P.2d 874, 877 (Utah 1985) (*per curiam*) (citing State v. Hill, 674 P.2d 96, 97 (Utah 1983); State v. Baker, 671 P.2d 152, 155 (1983); Utah Code Ann. § 76-1-402(3)).

In the case at bar, Calvin Moore was improperly convicted of both aggravated burglary and aggravated assault. R 296-297. The analogous circumstances of the Bradley opinion make clear that Mr. Moore should not have been convicted of both offenses.

In Bradley, the defendant and two companions entered or remained unlawfully in the building of Bill and Gina Rider. "One of the companions ('Spider') pulled Rider's shotgun from a rack on the wall, drew a pistol from his waist, and pointed it at Rider's head." 752 P.2d at 875, 878.

The Aggravated Burglary jury instruction in Bradley, as in Mr. Moore's case, charge the defendant with having "use[d] or threaten[ed] the immediate use of a

dangerous or deadly weapon against any person.” Id. at 878; R 284-85 (a copy of Instruction # 26 and 32 for Mr. Moore’s case are attached in Addendum B). “When that element is relied upon by the prosecution to prove aggravated burglary, aggravated assault is simultaneously proven. Bradley, 752 P.2d at 878 (citing Utah Code Ann. § 76-5-103(1)(b) (emphasis added).

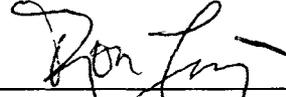
According to our supreme court, when the deadly weapon provision of aggravated burglary is compared to the elements of aggravated assault, “it is apparent that the jury did not have to find any additional elements for conviction of the crime [aggravated assault] beyond the elements of the crime of aggravated burglary.” 752 P.2d at 878. Since the State in Mr. Moore’s case relied on that same element to prove the greater offense, convictions on both counts was improper. Utah Code Ann. § 76-6-203.

Consequently, “when a defendant has been improperly convicted of both the greater and the included offense, the conviction on the included offense is treated as mere surplusage and the conviction of the greater offense remains unaffected.” Bradley, 752 P.2d at 877. The trial court either committed plain error in allowing the jury to consider them or defense counsel was ineffective in not objecting to them. State v. Cruz, 2005 UT 45 ¶ 41; Mvers v. State, 2004 UT 31, ¶ 20, 94 P.3d 211. Pursuant to the above principles, Mr. Moore’s conviction on the lesser offense should be similarly vacated.

CONCLUSION

Defendant/Appellant, Calvin Moore, respectfully requests that this Court reverse his conviction and remand the case for a new trial.

SUBMITTED this 7 day of March, 2006.



Ronald S. 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 7 day of March, 2006.



Addendum A

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Const. art. 1, § 7: No person shall be deprived of life, liberty or property, without due process of law.

Utah Code Ann. § 76-1-402(3) Separate offenses arising out of single criminal episode -- Included offenses.

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

Amended by Chapter 32, 1974 General Session

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

Utah Code Ann. § 76-6-203. Aggravated burglary.

(1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:

(a) causes bodily injury to any person who is not a participant in the crime;
(b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or
(c) possesses or attempts to use any explosive or dangerous weapon.

(2) Aggravated burglary is a first degree felony.

(3) As used in this section, "dangerous weapon" has the same definition as under Section 76-1-601.

Amended by Chapter 170, 1989 General Session

Utah Code Ann. § 77-18a-1. Appeals -- When proper.

(1) A defendant may, as a matter of right, appeal from:

(a) a final judgment of conviction, whether by verdict or plea;
(b) an order made after judgment that affects the substantial rights of the defendant;
(c) an order adjudicating the defendant's competency to proceed further in a pending prosecution; or

(d) an order denying bail, as provided in Subsection 77-20-1(7).

(2) In addition to any appeal permitted by Subsection (1), a defendant may seek discretionary appellate review of any interlocutory order.

(3) The prosecution may, as a matter of right, appeal from:

(a) a final judgment of dismissal, including a dismissal of a felony information following a refusal to bind the defendant over for trial;

(b) a pretrial order dismissing a felony charge on the ground that the court's suppression of evidence has substantially impaired the prosecution's case;

(c) an order granting a motion to withdraw a plea of guilty or no contest;

- (d) an order arresting judgment or granting a motion for merger;
 - (e) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;
 - (f) an order holding a statute or any part of it invalid;
 - (g) an order adjudicating the defendant's competency to proceed further in a pending prosecution;
 - (h) an order finding, pursuant to Title 77, Chapter 19, Part 2, Competency for Execution, that an inmate sentenced to death is incompetent to be executed;
 - (I) an order reducing the degree of offense pursuant to Section 76-3-402; or
 - (j) an illegal sentence.
- (4) In addition to any appeal permitted by Subsection (3), the prosecution may seek discretionary appellate review of any interlocutory order entered before jeopardy attaches.

Amended by Chapter 106, 2005 General Session

Utah Code Ann. § 78-2a-3(2)(e) Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(I) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or

capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(I) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Amended by Chapter 255, 2001 General Session

Amended by Chapter 302, 2001 General Session

Utah R. App. P. 23B states, in pertinent part: "A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion shall be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective."

Utah R. Crim. P. 24 states, in pertinent part that a trial court may "grant a new trial in the interest of justice if there is any error or impropriety which had a substantial impact upon the rights of a party."

Utah R. Evid. 802: "Hearsay is not admissible except as provided by law or by these rules."

Addendum B

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.

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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.