2006

The State of Utah v. Roy Drake Irvin : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ROY DRAKE IRVIN,	:	Case No. 20060638-CA
Defendant/Appellant.	:	Appellant is incarcerated.

REPLY BRIEF

Appeal from a judgment of conviction for two counts of Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (2003), and one count of Failure to Respond to an Officer's Signal to Stop, a third degree felony, in violation of Utah Code Ann. § 41-6a-210 (2005), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, presiding.

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INTRODUCTION

First, this Court should merge Irvin's aggravated robbery convictions. This Court should not consider subsection (1)(c) of Utah Code Ann. § 76-6-302 (2003), because it is an alternative ground for affirmance that is not supported by the factual findings. Besides, the two aggravated robbery counts should have merged regardless of whether subsection (1)(c) applies. The State concedes the two charges stemmed from a single criminal episode. Within that single episode, there was only one crime against a person and there was only one crime against property because the items stolen, although owned by different people, were taken with one intent. Thus, under either scenario, there was only one count of aggravated robbery.

Second, this Court should reverse because private counsel provided ineffective assistance when he failed to object to the enhancement of both aggravated robbery charges. Unlike the defendant in State v. Alfatlawi, 2006 UT App 511, 153 P.3d 804,

Irvin was charged with use of one dangerous weapon to inflict force or fear upon one victim in one location. This constituted a single act that should only have been punished once. At the very least, this meant only applying the dangerous weapon enhancement once and failure to object to the additional enhancement was ineffective assistance. Irvin also asks this Court to reconsider its decision in Alfatlawi.

Third, this Court should reverse because private counsel provided ineffective assistance when he failed to object to the anecdotal statistical evidence. The record shows private counsel's failure to object to the anecdotal statistical evidence was not strategic and his later reference to it during closing argument was merely a failed attempt to minimize the damage it had caused. Further, the State was not entitled to admit the anecdotal statistical evidence as rebuttal evidence. Even if it was proper rebuttal evidence, it was inadmissible under rule 403 because it lacked probative value and presented a substantial danger of unfair prejudice. Finally, private counsel's deficient performance prejudiced Irvin. The State's case relied entirely on circumstantial evidence. This circumstantial evidence could be explained by happenstance, as Irvin claimed, but only if the jury believed Irvin was credible. Because the anecdotal statistical evidence baselessly attacked Irvin's credibility, there is a reasonable probability that but for its admission the jury would have believed Irvin's defense.

Finally, this Court may utilize rule 22(e) of the Utah Rules of Criminal Procedure to address the illegal sentence in this case. The dangerous weapon enhancements applied to Irvin's aggravated robbery convictions were not elements of the offense, but enhancements to the sentence. Accordingly, in appealing the legality of enhancing both

convictions for his single use of a dangerous weapon, Irvin is challenging the sentence itself, as required by rule 22(e), and not the underlying conviction.

ARGUMENT

I. THIS COURT SHOULD REJECT THE ALTERNATIVE GROUND FOR AFFIRMANCE PROPOSED BY THE STATE AND MERGE THE AGGRAVATED ROBBERY CONVICTIONS BECAUSE THE TRIAL COURT ERRED BY DENYING IRVIN'S MOTION TO VACATE ONE OF THE AGGRAVATED ROBBERY COUNTS

This Court should not consider subsection (1)(c) of Utah Code Ann. § 76-6-302 (2003) when reviewing whether Irvin's aggravated robbery charges should merge because (1)(c) is an alternative ground for affirmance that does not meet the requirements for affirming on an alternative ground. An appellate court may affirm a "judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action." Limb v. Federated Milk Producers Ass'n, 23 Utah 2d 222, 461 P.2d 290, 293 n. 2 (Utah 1969). The alternative ground, however, must be apparent on the record. See Dipoma v. McPhie, 2001 UT 61,¶18, 29 P.3d 1225; State v. Finlayson, 2000 UT 10,¶31, 994 P.2d 1243; Limb, 461 P.2d at 293 n. 2. It must also be supported by the factual findings. State v. Topanotes, 2003 UT 30,¶9, 76 P.3d 1159; Bailey v. Bayles, 2002 UT 58,¶20, 52 P.3d 1158. In other words,

> In the limited circumstances that an appellate court chooses to affirm on an alternate ground, it may do so only where the alternate ground is apparent on the record. When an alternate theory is apparent on the record, the court of appeals must then determine whether the facts as found by the trial court are

> sufficient to sustain the decision of the trial court on the alternate ground. The court of appeals is limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence in light of the new legal theory or alternate ground.

Bailey, 2002 UT 58 at ¶20; see Topanotes, 2003 UT 30 at ¶9.

The aggravated robbery statute has three possible aggravators:

> (1) A person commits aggravated robbery if in the course of committing robbery, he:
>
> (a) uses or threatens to use a dangerous weapon . . . ;
>
> (b) causes serious bodily injury upon another; or
>
> (c) takes or attempts to take an operable motor vehicle.

Utah Code Ann. § 76-6-302 (2003). In count one of the information, the State alleged Irvin violated subsection (1)(a) by using a knife in the course of committing a robbery. R. 2-4; 251-52; 366:80-81. In count two, the State alleged Irvin violated subsection (1)(c) by taking or attempting to take a vehicle in the course of committing a robbery. R. 2-4; 251-52; 366:80-81.

This is not, however, the case that the State presented to the jury. Rather, at trial, the State proposed elements instructions that excluded any reference to subsection (1)(c). R. 239; 240; 244. These instructions were adopted by the trial court and given to the jury verbatim. R. 268; 269; 270 (omitting language related to lesser-included offense of Theft of an Operable Motor Vehicle which, much like subsection (1)(c), was dropped from count two prior to trial). Then, in its closing, the State did not argue subsection (1)(c). R. 367:33-34. Instead, it referred the jury to "the elements [instructions] in your possession" for a list of the elements of the crime. R. 367:34.

Thus, the jury did not convict Irvin under subsection (1)(c). Rather, it found Irvin was guilty of both aggravated robbery counts based on his alleged use of a dangerous weapon under subsection (1)(a). R. 268; 269; 270. In a jury trial, the only factual findings supporting the conviction are those made by the jury. Thus, because the jury was not instructed as to making factual findings under subsection (1)(c), subsection (1)(c) is not a proper alternative ground for affirmance. R. 268; 269; 270.

To hold otherwise would give the State an unfair advantage by allowing it to change the elements of the crime for which Irvin was convicted in order to suit its argument on appeal. It is reasonable to presume regularity here: the prosecutor, who investigated the case and was informed of the relevant facts, made a decision not to instruct the jury as to subsection (1)(c). See State v. Eloge, 762 P.2d 1, 2 (Utah 1988) ("Absent a record, this Court presumes regularity in the proceedings below." (citation omitted)). Whether this decision was for strategic or ethical reasons, the decision was made and the State should not now be allowed to change its tactics and rely on subsection (1)(c) in order to further its argument on appeal. Cf. Lovendahl v. Jordan Sch. Dist., 2002 UT 130,¶51, 63 P.3d 705 (stating appellate court "will not consider evidence not made part of the record on appeal"); In re W.M., 2007 UT App 15, 2007 WL 127938, *1 ("In the absence of an adequate record on appeal, we cannot address the issues raised and 'presume the correctness of the proceedings below.'" (quoting State v. Mead, 2001 UT 58,¶48, 27 P.3d 1115)); Utah R. App. P. 24(a)(9) (providing that argument section of an appellate brief "shall contain ... citations to the ... parts of the record relied on"); Utah R.

Prof. Cond. 3.8 (2004), comment ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

To hold otherwise would also implicate Irvin's Fourteenth Amendment right to due process and Sixth Amendment rights to a jury trial and the effective assistance of counsel. As explained in Apprendi v. New Jersey, 530 U.S. 466 (2000), the Sixth and Fourteenth amendments "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Apprendi, 530 U.S. at 477 (citations omitted). Thus, "'[t]he jury must be instructed with respect to all the legal elements that it must find to convict of the crime charged, and the absence of such an instruction is reversible error as a matter of law.'" State v. Bluff, 2002 UT 66,¶26, 52 P.3d 1210 (citation omitted); see State v. Laine, 618 P.2d 33, 35 (Utah 1980) ("An accurate instruction upon the basic elements of the offense charged is essential, and the failure to so instruct constitutes reversible error."). But see Neder v. United States, 527 U.S. 1, 15 (1999) (holding "omission of an element is an error that is subject to harmless-error analysis"); State v. Smith, 2002 UT App 49,¶7, 42 P.3d 1261 (same). At trial, the jury convicted Irvin of two counts of aggravated robbery based on his alleged use of a dangerous weapon. R. 268; 269; 270. On appeal, Irvin should be able to rely on the constancy of the jury's conviction in order to make his argument that the charges should have merged.

Besides, the two aggravated robbery counts should have merged regardless of whether Irvin was convicted under only subsection (1)(a) or under both subsections (1)(a)

and (1)(c).[1] The State concedes that the aggravated robbery charges stemmed from a single criminal episode. See Aple. Br. at 11, 17. Thus, the question is whether they were based on one act or two. See Utah Code Ann. § 76-1-402(1) (2003).

"A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404 (2003). Theft becomes robbery or aggravated robbery if the defendant takes property "in the possession of another from his person, or immediate presence, against his will, by means of force or fear." Utah Code Ann. § 76-6-301(1)(a) (Supp. 2005). In other words, aggravated robbery requires the victim to be present and to suffer "force or fear." Id. In this way, aggravated robbery resembles a crime against a person. As such, "a single criminal act or episode" of aggravated robbery may only "constitute as many offenses as there are victims" of force or fear. State v. James, 631 P.2d 854, 855 (Utah 1981). In this case, the record shows Celis was the only person present and was the only person to suffer force or fear. R. 366-67. Thus, there was only one offense because there was only

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[1] Irvin's argument is statutory: Under Utah Code Ann. § 76-1-402, the trial court erred by denying his motion to vacate one of the aggravated robbery counts. See Aplt. Br. at 14-19. The State does not challenge the preservation of this argument. See Aple. Br. at 15 n.4. This is appropriate because Irvin's argument was preserved through various motions, memoranda, and arguments. See R. 292-302 (motion to vacate and memorandum in support); 367:57 (motion to vacate); 368 (motion hearing); Aplt. Br. at 2. Irvin's citations to the Double Jeopardy clauses of the United States and Utah constitutions are provided for reference only and do not require separate preservation. See Aplt. Br. at 14. Section 76-1-402 cross-references the double jeopardy clauses and was enacted "to prevent violations of constitutional double jeopardy protection." State v. Smith, 2005 UT 57,¶7, 122 P.3d 615; see Utah Code Ann. § 76-1-402, cross-references; State v. Lopez, 2004 UT App 410,¶8, 103 P.3d 153 ("Courts apply the merger doctrine as one means of alleviating the concern of double jeopardy that a defendant should not be punished twice for the same crime.").

one victim of force of fear. This result remains true regardless of which aggravating factor the State alleged. See Utah Code Ann. § 76-6-302(1)(a), (1)(c). Accordingly, the record supports only one count of aggravated robbery.

The State responds, however, that the property taken was owned by two entities: Celis and Fast Track. See Aple. Br. at 17. This argument shifts the focus from the number of victims who suffered force or fear, to the number of victims who lost personal property. As illustrated above, taking another's personal property, whether by theft or robbery, is a larcenous act. Compare Utah Code Ann. § 76-6-404 (2003) and Utah Code Ann. § 76-6-301 & -302. Thus, in this light, aggravated robbery is subject to Utah's "single larcenous taking" rule. State v. Barker, 624 P.2d 694, 695 (Utah 1981).

Under the single larcenous taking rule, it does not matter that more than one item was taken, that one of the items was a vehicle, or that the items had multiple owners. See Aplt. Br. at 15-18; Utah Code Ann. § 76-6-302(1)(a), (1)(c). The items were taken with one intent, "namely to [rob the convenience store] and avoid being caught." State v. Lopez, 789 P.2d 39, 42 (Utah Ct. App. 1990).[2] Thus, because taking the items was "part of a continuing plan," State v. Kimbel, 620 P.2d 515, 518 (Utah 1980); there was "one

[2] In Lopez, this Court reviewed a trial court's decision to deny a defendant's motion to sever the charges. See Aple. Br. at 14 n.3. Specifically, it addressed whether the charged events were "closely related in time and incident to the accomplishment of a single criminal objective." Lopez, 789 P.2d at 42; see Utah Code Ann. § 76-1-401 (2003). It held the charges were properly joined because they stemmed from "a single criminal objective, namely to kill [the victim] and avoid being caught." Lopez, 789 P.2d at 42. This Court's decision in Lopez is helpful here because it illustrates what this Court has previously held to be a single criminal objective. Id.

offense and the multiple ownership of the property taken is immaterial." Barker, 624 P.2d at 695.

II. THIS COURT SHOULD REVERSE BECAUSE PRIVATE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ENHANCEMENT OF BOTH AGGRAVATED ROBBERY CHARGES

This case is distinguishable from State v. Alfatlawi, 2006 UT App 511, 153 P.3d 804, because the aggravated robbery charges were based on a single act within a single criminal episode. In Alfatlawi, the defendant was charged with committing multiple robberies that involved different victims and different locations. See Alfatlawi, 2006 UT App 511 at ¶3. Accordingly, in that case, the trial attorney was effective when he did not object to the application of the dangerous weapon enhancement to each separate charge because the charges represented separate criminal episodes, involving separate uses of a dangerous weapon, separate victims, and separate locations. Id.

Conversely, in this case, Irvin was charged with using one dangerous weapon to inflict force or fear upon one victim in one location. As acknowledged by the State, the charges stemmed from a single criminal episode. See Aple. Br. at 11, 17. Moreover, as explained in Irvin's opening brief, the charges constituted a single act within the single criminal episode and should only have been punished once. See Aplt. Br. at 14-33; Utah Code Ann. § 76-1-402(1) (2003) ("[W]hen 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 [Utah's] code, the act shall be punishable under only one such provision."). At the very least, this meant only applying the dangerous weapon

enhancement once. See Aplt. Br. at 20-33.

Thus, at the very least, private counsel was ineffective when he did not even object to the trial court's decision to apply the dangerous weapon enhancement twice—once for each aggravated robbery conviction. See Aplt. Br. at 32-34; R. 315-16; 369:11-13. It is clear from the record that private counsel's failure was not due to some strategic plan, but simply because he had not "looked at" the issue. R. 369:10-11. As argued in Irvin's opening brief, this lack of preparation gave credence to Irvin's pretrial motion to discharge private counsel because he was not prepared to try the case. See Aplt. Br. at 24. Regardless, it is questionable whether private counsel should have been allowed to proceed as Irvin's attorney at all once Irvin moved to discharge him because Irvin hired him using private funds. R. 207-08; 366:6-9. "In cases where a defendant has retained his own counsel," the Sixth Amendment guarantees "'the right of a defendant . . . to choose who will represent him.'" State v. Gall, 2007 UT App 85,¶12, --- P.3d --- (quoting United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2561 (2006)). "'Where the right to be assisted by counsel of one's choice is wrongly denied, . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is complete when the defendant is erroneously prevented from being represented by the lawyer he wants[.]" Id. (citation omitted).

Regarding the remainder of his argument in Part II.A. of the opening brief, Irvin recognizes that Alfatlawi, which was issued after Irvin filed his opening brief, addressed the state and federal double jeopardy ramifications of applying the dangerous weapon enhancement to an aggravated robbery conviction. See Alfatlawi, 2006 UT App 511 at

¶¶37-44. Irvin, however, maintains his position from the opening brief—applying the dangerous weapon enhancement to a robbery conviction that was already aggravated due to use of a dangerous weapon violates the double jeopardy clauses of the United States and Utah constitutions. See Aplt. Br. at 19-34. Thus, based on the arguments presented in Irvin's opening brief, Irvin asks this Court to reconsider its decision in Alfatlawi and hold private counsel provided ineffective assistance when he failed to object to the trial court's decision to impose the dangerous weapon enhancements.

III. THIS COURT SHOULD REVERSE BECAUSE PRIVATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE ANECDOTAL STATISTICAL EVIDENCE

As explained in Irvin's opening brief, this Court should reverse because private counsel provided ineffective assistance when he failed to object to the State's admission of the anecdotal statistical evidence. See Aplt. Br. at 34-39. Contrary to the State's argument, private counsel's failure to object to the anecdotal statistical evidence was not a strategic decision, the State was not entitled to admit the anecdotal statistical evidence as rebuttal evidence, and there is a reasonable probability that the outcome of the trial would have been different but for the admission of the anecdotal statistical evidence.

A. Private Counsel's Failure to Object to the Anecdotal Statistical Evidence Was Not a Strategic Decision.

In this Court's recent decision in State v. Marble, 2007 UT App 82, 157 P.3d 371, the defendant claimed his attorney offered ineffective assistance when "he elicited testimony from [the investigating officer] that impermissibly bolstered [the alleged victim's] character for truthfulness in violation of rule 608 of the Utah Rules of

Evidence." Marble, 2007 UT App 82 at ¶8. Without addressing whether the evidence violated rule 608, this Court affirmed because it was "clear from the record that counsel had a conceivable trial strategy in eliciting the challenged testimony." Id. at ¶15. Specifically, counsel "effectively used [the investigating officer's] statements to elicit additional testimony . . . that suggested he had relied too heavily on [the alleged victim's] allegations and therefore failed to adequately investigate." Id. at ¶13. Then, during closing, counsel used the "additional testimony" he elicited to argue the investigating officer "had failed to adequately investigate due to his misplaced reliance on [the alleged victim's] version of the events and his bias against [defendant]." Id. at ¶¶13-14.

Unlike Marble, the record in this case shows private counsel's failure to object to the anecdotal statistical evidence was not strategic, and his later reference to the anecdotal statistical evidence during closing argument was merely a failed attempt to minimize the damage caused by the anecdotal statistical evidence.

Private counsel did not object to the State's anecdotal statistical evidence, even though it was inadmissible and directly challenged Irvin's defense. See Aplt. Br. at 34-39. Following its admission, private counsel did not use cross-examination to reveal the weaknesses in the evidence (such as the fact that it was based on a "dozen, give or take" foot chases, rather than scientific research) or to demonstrate how the evidence could possibly help Irvin's defense or undermine the prosecution. R. 366:155, 156-58. Then, during closing argument, private counsel said:

> [C]ounsel has stated that, well, they all say they have warrants, so that's not a valid reason. I don't know if that's true or not, but in this case there was a warrant. He did have a warrant, and that's

> why he ran. He panicked. You know, I don't know what happened in other cases, but we know what happened in this case, he had a warrant. He had a warrant that he knew about.

R. 367:36-37.

Private counsel's brief reference to the anecdotal statistical evidence during closing argument was not a strategic use of the evidence for the benefit of Irvin's case. Id. Rather, it was an acknowledgement that the anecdotal statistical evidence was harmful to Irvin's case and an attempt to minimize the damage caused by it. Id.

Attempting to minimize the damage caused by the anecdotal statistical evidence, however, did not excuse private counsel's deficient performance in allowing the evidence to be admitted in the first place. In Utah, anecdotal statistical evidence is "routinely excluded" because it "invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies." State v. Rammel, 721 P.2d 498, 501 (Utah 1986) (citation omitted).[3] In fact, this Court has held that "anecdotal 'statistical' evidence concerning matters not susceptible to quantitative analysis such as witness veracity" is "one of the categories of evidence leading to undue prejudice." State v. Iorg, 801 P.2d 938, 941 (Utah Ct. App. 1990) (citations omitted). In other words, when the State offers anecdotal statistical evidence,

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[3] Contrary to the State's claim, Rammel did not involve "sexual child abuse" or a concern that the anecdotal statistical evidence was used "'to conclude that late reporting does not mean a victim is not telling the truth.'" Aple. Br. at 30 (citation omitted). Rather, similar to this case, the defendant in Rammel was convicted of aggravated robbery. Rammel, 721 P.2d at 499. On appeal, our supreme court reversed the trial court's admission of a detective's statement that, "[b]ased on his experience interviewing several hundred criminal suspects," he believed "no criminal suspect ever admitted 'right off the bat' to committing a crime," which the State used for impeachment. Id. at 500-01.

"the burden [under rule 403] shifts, and the [State] must show that the evidence's probativeness outweighs its prejudice." Id. (citation omitted). Thus, as explained in Irvin's opening brief, a proper objection would have ensured Officer Anderson's anecdotal statistical evidence was excluded, thereby wholly averting the prejudice that private counsel, due to his deficient performance, could only attempt to minimize. See Aplt. Br. at 34-39.

This is especially true here, where private counsel's attempt to minimize the damage caused by the anecdotal statistical evidence failed. Once the anecdotal statistical evidence was admitted, private counsel did not use cross-examination to expose its foundational weaknesses, question Anderson's qualifications as an expert, or challenge the quality of the research. R. 366:156-59. Accordingly, when it came time for closing argument, private counsel's attempt to minimize the anecdotal statistical evidence was limited to an acknowledgement that he did not "know if" the anecdotal statistical evidence was "true or not" or "what happened in other cases," and the claim that Irvin was telling the truth, even though statistical evidence showed 90 percent of people in his situation were lying, because "in this case there was a warrant." R. 367:36-37.

B. The State Was Not Entitled to Admit the Anecdotal Statistical Evidence As Rebuttal Evidence.

The State did not become "entitled" to admit the anecdotal statistical evidence simply because Irvin claimed he fled from police due to a warrant. See Aple. Br. at 30-31. As explained in Irvin's opening brief, the anecdotal statistical evidence was inadmissible under rule 403. See Aplt. Br. at 34-39. Specifically, as in Rammel, the

anecdotal statistical evidence lacked foundation. "There was no showing that the anecdotal data from which [Officer Anderson] drew his conclusions had any statistical validity. Nor was there any evidence to establish that [Officer Anderson's] experience uniquely qualified him as an expert." Rammel, 721 P.2d at 501. In fact, the anecdotal statistical evidence in this case had even less foundation than that presented in Rammel. In Rammel, the anecdotal statistical evidence was based on the testifying detective's "experience interviewing several hundred criminal suspects." Rammel, 721 P.2d at 500. Whereas, in this case, the anecdotal statistical evidence was based on Officer's Anderson's experience in a "dozen, give or take" foot chases. R. 366:155.

Further, as in Rammel and Iorg, the prosecution used the anecdotal statistical evidence "to establish, in effect, that there was a high statistical probability that" Irvin was lying about his defense.[4] Rammel, 721 P.2d at 501. As such, the evidence had no

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[4] It is irrelevant to Irvin's argument that Officer Anderson, after providing the anecdotal statistical evidence, did not specifically opine whether Irvin "had fabricated the reason for his flight." See Aple. Br. at 30 n.11. To what extent an expert can comment on a particular witness's credibility is a question governed by rule 608 of the Utah Rules of Evidence and is not at issue here. See Utah R. Evid. 608 ("The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," but "may refer only to character for truthfulness or untruthfulness"); Marble, 2007 UT App 82 at ¶9 (noting rule 608 "permits testimony concerning a witness's general character or reputation for truthfulness or untruthfulness but prohibits any testimony as to a witness's truthfulness on a particular occasion" (quoting State v. Rimmasch, 775 P.2d 388, 391 (Utah 1989) (emphasis omitted))); State v. Ramsey, 782 P.2d 480, 485 (Utah 1989) (holding experts' testimonies inadmissible even though they "did not directly assert that they believed the children told the truth," because their "unconditional opinions were clearly based . . . on the acceptance of the truthfulness of the children's out-of-court statements"). The issue here is whether the anecdotal statistical evidence was admissible under rule 403. As conceded by the State, the anecdotal statistical evidence was directly tied to Irvin by the State's "argument to the jury." Aple. Br. at 30 n.11. Moreover, as explained previously, it lacked foundation, contained no probative value, and created a

probative value because it applied "anecdotal 'statistical' evidence" to credibility, which is a matter "not susceptible to quantitative analysis." Iorg, 801 P.2d at 941 (citations omitted). On the other hand, it was extremely prejudicial because it "invite[d] the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies." Rammel, 721 P.2d at 501.

The possibility that the anecdotal statistical evidence was rebuttal evidence does not change this result.[5] Rule 403 excludes all evidence, including rebuttal evidence, that poses an unacceptable "danger of unfair prejudice." See, e.g., State v. Tarrats, 2005 UT 50,¶41, 122 P.3d 581 (holding impeachment evidence that is "admissible under rule 608(b), may still be limited or prohibited by the trial court in its sound discretion under rule 403"); Rammel, 721 P.2d at 501 (excluding anecdotal statistical evidence used for "impeachment" because "its potential for prejudice substantially outweighed its probative value"); State v. Harter, 2007 UT App 5,¶31, 155 P.3d 116 (applying rule 403 to determine admissibility of prior bad acts evidence offered to "rebut" the defense).

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substantial danger of unfair prejudice. See Aplt. Br. at 34-39; supra at Part III.B. Thus, the anecdotal statistical evidence was inadmissible under rule 403 and it was deficient performance for private counsel not to object to its admission.

[5] It is doubtful whether the anecdotal statistical evidence was really rebuttal evidence, as claimed by the State. See Aple. Br. at 29-31. "Rebuttal evidence is evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent's evidence." Randle v. Allen, 862 P.2d 1329, 1338 (Utah 1993) (citation omitted). It "should be limited to evidence made necessary by the opponent's case-in-reply, and evidence required to counter new facts presented in the defendant's case-in-chief." Astill v. Clark, 956 P.2d 1081, 1086 (Utah Ct. App 1998) (citations omitted). In this case, the State admitted the anecdotal statistical evidence during its case-in-chief and before Irvin presented any evidence that he had a warrant at the time he fled from the police. R. 366:155-58.

In this case, the anecdotal statistical evidence was inadmissible under rule 403 regardless of its status as rebuttal evidence. As rebuttal evidence, the anecdotal statistical evidence still lacked foundation because there was still no showing of "any statistical validity" and there was still no "evidence to establish that [Officer Anderson's] experience uniquely qualified him as an expert." Rammel, 721 P.2d at 501. Likewise, the anecdotal statistical evidence still lacked probative value and presented a substantial danger of unfair prejudice because it still "invite[d] the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies." Id. Thus, this Court should reject the State's argument that Irvin "opened the door" to the unfairly prejudicial anecdotal statistical evidence simply by presenting his defense. Aple. Br. at 30.

C. Irvin Was Prejudiced By Private Counsel's Failure to Object to the Anecdotal Statistical Evidence.

Prejudice is not measured by the amount of evidence presented at trial, but by whether "'there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" State v. Hales, 2007 UT 14,¶86, 152 P.3d 321 (citation omitted). "'A reasonable probability is a probability sufficient to undermine confidence in the [jury verdict].'" Id. (citation omitted) (alteration in original).

The evidence listed in the State's response brief as supporting Irvin's conviction is circumstantial and can be explained by happenstance, as Irvin claimed in his defense. See Aple. Br. at 33. Specifically, Irvin claimed he was not involved in the robbery and knew nothing about it. R. 366:90-93; 367:36-43. He borrowed the stolen car from an

acquaintance who also worked at CR Trucking and had a Comdata card; the bandanas, pack of cigarettes, and small folding knife found in the stolen car did not belong to him and were in the car when he borrowed it; Celis' description of the robber was very generic and just happened to be similar to his appearance; and when he was stopped, Irvin just happened to be carrying some cash (which was in an amount different than the amount of cash stolen and was never linked to the robbery). R. 366:90-93; 367: 36-43.

The State had no eyewitness identification testimony. R. 366-67. Its case was entirely circumstantial. R. 367:34. This made Irvin's credibility crucial. If the jury believed Irvin's claim that the circumstantial evidence was the result of happenstance, then it would acquit even if the circumstantial evidence seemed strong.

The State presented just one argument to attack Irvin's credibility—Irvin divulged a guilty mind by fleeing from the police. R. 367:35. In order to explain why he fled, Irvin revealed his preexisting warrant to the jury and said he fled from police because he knew about the warrant. R. 366:92, 158; 367:36-37. Informing the jury about his warrant was an enormous gamble because it showed he had been in trouble with the law before. R. 366:92, 158; see Aplt. Br. at 38. But Irvin determined the gamble was necessary in order to explain why he fled from the police. R. 366:92, 158; 367:36-43.

The State's admission of the anecdotal statistical evidence, however, improperly robbed Irvin of the force of his gamble. See Aplt. Br. at 38-39. Even though the anecdotal statistical evidence could not help the jury to decide whether Irvin fled due to a warrant or a guilty mind, it was admitted for that specific purpose—encouraging the jury

to find Irvin fled because he was guilty of the robbery and then lied to police in order hide his guilt. R. 367:35.

Thus, there is a reasonable likelihood the result would have been different but for the improper admission of the anecdotal statistical evidence because there would have been no seemingly scientific conclusion in the evidence that Irvin fled because he was guilty and then lied in order to hide his guilt. Rather, the jury could have conducted an untainted review of the evidence to determine the credibility of Irvin's defense.

IV. THIS COURT SHOULD CORRECT IRVIN'S SENTENCE PURSUANT TO RULE 22(e) BECAUSE THE TRIAL COURT'S IMPOSITION OF THE DANGEROUS WEAPON ENHANCMENTS RESULTED IN AN ILLEGAL SENTENCE

In State v. Brooks, 908 P.2d 856 (Utah 1995), the defendant was convicted of robbery and burglary and argued on appeal that the convictions should have merged. Brooks, 908 P.2d at 858. The defendant's sentence was not subject to any enhancements. Id. Our supreme court determined that rule 22(e) of the Utah Rules of Criminal Procedure did not apply in that case because "an appellate court may not review the legality of a sentence under rule 22(e) when the substance of the appeal is, as it is here, a challenge, not to the sentence itself, but to the underlying conviction." Id. at 859.

Unlike Brooks, Irvin's aggravated robbery convictions were each enhanced for use of a dangerous weapon, resulting in two enhanced terms of six years to life. R. 315-16; 369:10-11. The dangerous weapon enhancements were not elements of the offense, but enhancements to the sentence. R. 369:10-11. Accordingly, in appealing the legality of enhancing both convictions for his single use of a dangerous weapon, Irvin is challenging

"the sentence itself," not "the underlying conviction." Brooks, 908 P.2d at 859. Thus, as argued in Irvin's opening brief, this Court should correct Irvin's sentence pursuant to rule 22(e) because the trial court's imposition of the dangerous weapon enhancements to both convictions resulted in an illegal sentence. See Aplt. Br. at 39.

CONCLUSION

Irvin respectfully requests this Court to reverse and remand his case to the trial court for a new trial on a single charge of aggravated robbery, with an order to refrain from enhancing the aggravated robbery charge if Irvin's new trial results in a conviction.

SUBMITTED this 12th day of June, 2007.

LORI J. SEPPI
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, 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 12th day of June, 2007.

Lori Seppi
LORI J. SEPPI

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of June, 2007.