

2006

State of Utah v. Christopher Simon Castillo : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

CHRISTOPHER SIMON CASTILLO,

Defendant/Appellant.

Case No. 20060811-CA

BRIEF OF APPELLEE

APPEAL FROM A CONDITIONAL GUILTY PLEA TO ONE COUNT OF AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, AND ONE COUNT OF POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, A SECOND DEGREE FELONY, IN THE SECOND DISTRICT COURT, WEBER COUNTY, THE HONORABLE ROGER S. DUTSON PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

CHRISTOPHER SIMON CASTILLO,

Defendant/Appellant.

Case No. 20060811-CA

BRIEF OF APPELLEE

* * *

JURISDICTIONAL STATEMENT

Defendant entered guilty pleas to one count of aggravated assault, a third degree felony, and one count of possession of a dangerous weapon by a restricted person, a second degree felony. Defendant's guilty pleas were entered conditionally pursuant to *State v. Sery*, 758 P.2d 935, 937-40 (Utah Ct. App. 1988). This Court has jurisdiction over appeals from second and third degree felonies pursuant to Utah Code Annotated § 78-2a-3(2)(e) (West 2004).

ISSUE ON APPEAL & STANDARD OF REVIEW

Defendant was arrested for pointing a chrome pistol at two different victims while trying to avoid arrest. A chrome pistol matching the description given by both victims was later found buried under some bushes alongside the path where defendant had been running. The district court admitted the gun over defendant's objection.

Issue: Did the district court abuse its discretion when it held that the probative value of the gun was not substantially outweighed by the danger of unfair prejudice under Rule 403 of the Utah Rules of Evidence?

Standard of Review: Appellate courts “review a trial court's decision to admit or exclude evidence under Rule 403 . . . under an abuse of discretion standard, and will not overturn a lower court's determination of admissibility unless it is beyond the limits of reasonability.” *Glacier Land Co., L.L.C. v. Claudia Klawe & Assocs., L.L.C.*, 2006 UT App 516, ¶12, -- P.3d -- (internal quotation marks and citation omitted). Even if the evidence was erroneously admitted, “that fact alone is insufficient to set aside a verdict unless it has had a substantial influence in bringing about the verdict.” *Id.* (internal quotation marks and citations omitted).

DETERMINATIVE PROVISIONS

Rule 403 of the Utah Rules of Evidence states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

STATEMENT OF THE CASE

On November 11, 2005, defendant pointed a gun at two persons while running away from police. R. 1. An amended information was filed on May 11, 2006, charging defendant with aggravated assault, avoiding apprehension, and purchase, transfer, possession or use of a firearm by restricted person. R. 36-37.

Trial was originally scheduled for May 30-31, 2006. R. 49-50. On May 2, 2006, the State located a gun that it believed defendant had been carrying during the November 11 encounter, and the parties agreed to continue the trial. R. 52, 94. On July 17, 2006, defendant filed a motion in limine asking that the gun be excluded under Rule 403 of the Utah Rules of Evidence. R. 68-71. The court denied defendant's motion. R. 100: 8.

On August 7, 2006, defendant entered conditional guilty pleas to one count of aggravated assault and one count of possession or use of a firearm by a restricted person. R. 86-87; 100: 10-16. In exchange, the State dropped the avoiding apprehension charge and reduced the aggravated assault charge to a third degree felony. R. 100: 10-11. Defendant expressly reserved the right to appeal the district court's denial of his motion to suppress the gun. R. 100: 10-11. The district court sentenced defendant to one 0-5 year prison term and one 1-15 year prison term. R. 86-87; 100: 15-16. Defendant timely filed a notice of appeal on August 14, 2006. R. 84.

STATEMENT OF FACTS¹

On November 11, 2005, police were called when defendant was seen pointing a "silver or chrome gun" at another man on a street corner close to the Hostess Bakery Plant in Ogden, Utah. R. 91-92. Before officers arrived, Brian Pierce, an employee of the bakery,

¹ The district court entered Findings of Fact and Conclusions of Law in support of its decision to deny the motion in limine. R. 91-97 (attached as Addendum). Defendant has not marshaled the evidence nor offered any direct challenge to any of the court's factual findings. The State accordingly cites to those findings as being accepted for purposes of this appeal. *Johnson v. Higley*, 1999 UT App 278, ¶¶36-37, 989 P.2d 61.

saw defendant and began chasing him through the parking lot. R. 93.² During the course of this chase, defendant turned toward Mr. Pierce, told him “to back off,” and pointed a gun at Mr. Pierce from a distance of four feet. *Id.* Mr. Pierce later described the gun as being a “chrome pistol.” *Id.*

Officer Ken Hammond of the Ogden City Police Department responded to the scene shortly thereafter. R. 91. When defendant saw Officer Hammond, defendant “immediately began running,” and Officer Hammond began to chase defendant on foot. R. 92. Defendant then pulled out what Officer Hammond later described as a “shiny, chrome handled, fully framed, full size, semiautomatic handgun” and pointed it at Officer Hammond from a distance of approximately fifteen yards *Id.* Though “Officer Hammond yelled at the Defendant to drop the gun several times,” defendant did not drop the gun, but instead kept running and “pointed the gun at Officer Hammond a couple more times.” R. 92-93.

While running away from Officer Hammond, defendant ran by “some bushes . . . through a grassy area,” and proceeded “between two semi trailers” into a large parking lot that adjoined the Hostess Bakery Plant. R. 92. “Due to the numerous areas the Defendant could hide and ambush him, Officer Hammond slowed his chase” and “took cover.” R. 93. Officer Hammond “lost sight of the Defendant for approximately fifteen (15) seconds before he heard on his radio that another officer had the Defendant at gun point.” *Id.* Though defendant was handcuffed and arrested on the scene, the officers were not able to locate the silver, chrome handgun at that time. R. 94.

² Defendant indicated in his motion below that Mr. Pierce “began to pursue Defendant through the parking lot because he thought he might have broken into one of the trucks.” R. 69.

Defendant was charged with several criminal counts stemming from the incident, R. 36-37, and a trial was scheduled for May 30-31, 2006. R. 49-50. On May 2, 2006, “an employee of the bakery plant was cleaning some tall bushes on the West side of the property near where the Defendant would have run on November 11, 2005.” R. 94. “As the employee was raking some leaves underneath the bushes he discovered a very dirty, but silver Lorcin .380 semiautomatic handgun.” *Id.* The “gun appeared as if it had been outside all winter and was very muddy and fouled with dirt.” R. 95. Defendant’s counsel later admitted that this gun matched the descriptions given by Officer Hammond and Brian Pierce regarding the gun that defendant had pointed at them. R. 100: 4.

SUMMARY OF ARGUMENT

Defendant argues that the gun’s probative value is substantially outweighed by the danger of unfair prejudice and that the gun therefore should have been excluded under Rule 403 of the Utah Rules of Evidence. This argument should be rejected for three reasons.

First, contrary to defendant’s assertions, the evidence linking this gun to his crime was at least sufficient to present it to the jury without any danger of unfair prejudice. Defendant’s concerns over the gun’s evidentiary value go to its weight, not its admissibility, and therefore are not a basis for excluding the gun under Rule 403. Second, although defendant may indeed have been prejudiced by the admission of this gun, this prejudice would have resulted from the gun’s probative weight, not from a tendency to appeal to an improper basis for conviction. Defendant’s reliance on Rule 403 is therefore improper. Third, even if this Court determines that the gun should have been excluded, the district

court's error was harmless given the unrebutted testimony showing that defendant pointed a gun at both Officer Hammond and Brian Pierce.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT THE GUN WAS ADMISSIBLE UNDER RULE 403 OF THE UTAH RULES OF EVIDENCE

Rule 403 of the Utah Rules of Evidence states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “A Rule 403 analysis involves a balancing of probative value against the non-probative factors listed in Rule 403. The court’s balancing under Rule 403 is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.” R. Collin Mangrum & Hon. Dee Benson, *Mangrum & Benson on Utah Evidence* 121 (2005).

Defendant’s arguments implicate both prongs of the Rule 403 balancing analysis. Specifically, defendant argues (1) that the evidence connecting this gun to this crime was too attenuated to allow it to be presented to the jury, and (2) that the gun would have unfairly prejudiced him by leading the jury to conclude that he had possessed and pointed it on November 11. Aplt. Br. 9-15. These arguments should be rejected.

- a. The evidence before the court created a reasonable inference that the gun was used by defendant in committing this crime. Defendant’s concerns over the gun’s evidentiary support go to its weight, not its admissibility.

Under Rule 403, the probative value and the prejudicial effect of a piece of evidence are not considered in isolation, but are instead balanced against each other to determine

whether the evidence's prejudicial effect "substantially outweighs" the probative value. In this case, defendant asserts that the challenged gun's probative value was "virtually nonexistent." Aplt. Br. 14. This argument should be rejected.

The Utah Supreme Court has held that a gun may be introduced for indirect, "illustrative purposes" in the absence of direct proof linking it to the crime in question. *State v. Banks*, 541 P.2d 808, 809 (Utah 1975). The State did not attempt to introduce this gun below as a mere illustration, however, but instead argued that this was in fact the gun that defendant used while committing his crime. R. 100: 8.

It does not appear that any Utah appellate court has considered the question of how much evidentiary foundation a weapon must have in order to have probative value at trial. Other states that have examined this question, however, have consistently held that the prosecution does not need to irrefutably link a weapon to the actual crime in order to introduce the weapon at trial. In *Aiken v. State*, 647 A.2d 1229 (Md. Ct. Spec. App. 1994), for example, the Maryland Court of Special Appeals held that "physical evidence need not be positively connected with the accused or the crime to be admissible; it is admissible where there is a reasonable probability of its connection with the accused or the crime." *Id.* at 1237 (internal quotation marks and citation omitted). In *State v. Miller*, 208 S.W.3d 284 (Mo. Ct. App. 2006), the Missouri Court of Appeals likewise held that "[i]dentifications of weapons need not be unequivocal. . . . To warrant the admission in evidence of an instrument or weapon . . . a prima facie showing of identity and connection with the crime is necessary and sufficient; clear, certain, and positive proof is not required." *Id.* at 288 (internal quotation

marks and citation omitted). Thus, “[a] weapon does not have to be tied ballistically to the crime to be admissible.” *People v. Prast*, 319 N.W.2d 627, 636 (Mich. Ct. App. 1982).

The decision in *Commonwealth v. Oliver*, 674 A.2d 287 (Pa. Super. Ct. 1996), is particularly instructive given the facts at issue here. The victim in *Oliver* was beaten to death with a pipe in 1986, but Oliver and his conspirator were not arrested for the crime until 1993. *Id.* at 289-90. Following the arrests, Oliver’s conspirator began cooperating with the police and led them to a “forested area” “two-tenths of a mile from the murder scene” where the police found a pipe resembling the one used in the attack “30 feet off the [right hand side of the] road and 16 feet into the woods.” *Id.* at 291 (alteration in original). Even though the pipe could not be scientifically tied to either the murder or to the defendant, and even though the pipe had been discovered in a forested area eight years after the commission of the crime, the appellate court still held that there was enough evidence to allow the weapon to be submitted to the jury. *Id.* at 291-92. According to the court, “[t]here is no requirement that the item sought to be introduced into evidence is the actual weapon used in the attack.” *Id.* at 291. Instead, “[t]he only burden is to justify, from the circumstances of the finding, ‘an inference of the likelihood of its having been used.’” *Id.* (quoting *Commonwealth v. Brown*, 359 A.2d 393, 397 (Pa. 1976)). The court therefore rejected Oliver’s Rule 403 challenge because (1) the pipe “was consistent” with the conspirator’s description of the pipe used in the attack, and (2) the pipe had been located in “the approximate area” where the crime had occurred. *Id.*

Though various courts have differed somewhat regarding the precise formulation of the rule, they have nevertheless consistently held that precise physical proof linking a

weapon to a crime is not required in order to support the weapon's admission. *See, e.g., Mims v. State*, 591 So.2d 120, 124 (Ala. Crim. App. 1991) (allowing admission of a gun “[w]here there is sufficient evidence to justify a reasonable inference that items were used by the accused in the commission of the crime charged”); *Holloway v. State*, 296 S.E.2d 744, 746 (Ga. Ct. App. 1982) (“Where, as here, the victim of a crime identifies a weapon as similar to that used in the commission of the crime, the weapon is admissible whether or not it is the identical weapon”) (internal quotation marks and citation omitted); *State v. Loa*, 926 P.2d 1258, 1273 (Haw. 1996) (“Evidence is admissible if the court, in the exercise of its wide discretion in such matters, decides that sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.” (internal quotation marks and citation omitted)); *State v. Olson*, 436 N.W.2d 817, 820 (Minn. Ct. App. 1989) (“An object is admissible into evidence if it tends to connect the defendant to the crime.”); *State v. Grooms*, 540 S.E.2d 713, 727 (N.C. 2000) (rejecting a defendant’s Rule 403 challenge to a weapon that was located near the victim’s body and which matched the type of wound inflicted on the victim); *State v. Provost*, 352 So.2d 661, 664 (La. 1977) (“For the admission of demonstrative evidence, it suffices if the foundation laid establishes that it is more probable than not that the object is the one connected with the case.”); *State v. Kenny*, 818 P.2d 420, 425 (N.M. Ct. App. 1991) (allowing admission of a gun because the victim had testified that the gun “was similar” to the gun held by the assailant and because the caliber of the proffered gun matched that of the crime weapon); *State v. Evans*, 742 A.2d 715, 720 (R.I. 1999) (“When a handgun is offered into evidence it is relevant and admissible as long as there is a probability that it was connected to the crime charged.”).

The district court below entered specific findings supporting a reasonable inference that this gun was used by defendant on November 11, 2005. The district court noted that the gun: (1) “match[ed] the description given by several witnesses”; (2) “was found in the area where the [d]efendant would have had access to dispose of it”; and (3) “was found in a condition indicative of the fact that it had been outside for quite a long time.” R. 96. The court also noted that the gun was found “underneath the bushes” “on the West side of the property near where the Defendant would have run on November 11, 2005,” R. 94, thus indicating that the gun had been deliberately hidden.

It may theoretically be possible that some other unidentified person also had the need to hide a chrome semiautomatic pistol under the bushes by the Hostess Bakery Plant in Ogden during the 2005-06 winter, and it may also be theoretically possible that this unidentified person’s gun matched the specific type, size, and color of the gun that was pointed at Officer Hammond and Brian Pierce. Contrary to defendant’s assertions, however, the abstract possibility that some other person placed this gun under the bushes does not negate the very realistic probability that this was instead the gun that defendant pointed at Officer Ken Hammond and Brian Pierce.

Defendant commits two fundamental legal errors in asserting otherwise. First, defendant’s claim that Rule 403 generally prevents the admission of weak evidence improperly confuses the concepts of weight and admissibility. In *State v. Smith*, 728 P.2d 1014 (Utah 1986), the Utah Supreme Court held that questions regarding “the persuasiveness of evidence” go to “weight, not . . . admissibility.” *Id.* at 1016. In *State v. Colwell*, 2000 UT 8, 994 P.2d 177, the court similarly held that “[i]t is . . . the responsibility of

the jury to evaluate the evidence and give its own weight to the evidence in rendering its verdict.” *Id.* at ¶42; *see also Depew v. Sullivan*, 2003 UT App 152, ¶42, 71 P.3d 601 (“[I]f [a party] wishes to discredit the testimony, or if he wishes the jury to give little weight to it—two notions that are separate issues from the admissibility of the testimony—he is, of course, welcome to invite an expert witness of his own to contradict” the witness.).

This rule has been consistently applied by other courts that have considered challenges to the admissibility of weapons. The Alabama Court of Criminal Appeals, for example, affirmed a lower court’s decision to admit a revolver by holding that “[t]he lack of positive identification goes to the weight of the evidence, rather than to its admissibility. Ultimately, connexity of physical evidence is a factual matter for determination by the jury.” *Mims*, 591 So.2d at 124 (quoting *State v. Nelson*, 259 So.2d 46, 51-52 (La. 1972)); *see also Aiken*, 647 A.2d at 1231-32 (“the lack of positive identification affects only the weight of the evidence” (internal quotation marks and citation omitted)); *Olson*, 436 N.W.2d at 820 (“The lack of an absolute connection between the object introduced into evidence and the alleged crime does not affect the admissibility of the challenged evidence, but only its weight.”); *Miller*, 208 S.W.3d at 288 (“Less than absolute identifications of real evidence speak to the weight of the evidence, not admissibility.”); *Provost*, 352 So.2d at 665; *Commonwealth v. Moore*, 567 A.2d 701, 706 (Pa. Super. Ct. 1989). In this case, the district court rejected defendant’s motion based on its conclusion that issues of “weight and credibility [are] for the jury to decide.” R. 96. That conclusion was correct.

Second, defendant is also incorrect in asserting that a weapon should generally be excluded based on the passage of time between the crime and the discovery of the weapon.

“Remoteness goes to the weight, not the admissibility, of evidence.” *Olympus Hills Shopping Ctr., Ltd. v. Smith’s Food & Drug Ctrs., Inc.*, 889 P.2d 445, 455 n.10 (Utah Ct. App. 1994).

“The fact that a considerable length of time elapsed after the crime before the weapon or instrument was found . . . goes to the probative force but not the admissibility of the evidence.” *Miller*, 208 S.W.3d at 288 (internal quotation marks and citation omitted). “As the interval of time between the possession of the instrument of crime and the criminal event lengthens, the probative value of the evidence may become more tenuous, but that consideration is one for the jury to resolve in evaluating the weight of the evidence; the competency of the evidence is not affected.” *Commonwealth v. Clark*, 421 A.2d 374, 375-77 (Pa. Super. Ct. 1980); *see also Mayfield v. State*, 588 So.2d 215, 217-18 (Ala. Crim. App. 1991); *People v. Taylor*, 804 P.2d 196, 201-02 (Colo. Ct. App. 1990); *Holliday v. State*, 389 So.2d 679, 681 (Fla. Dist. Ct. App. 1980); *State v. Fenton*, 620 P.2d 813, 821 (Kan. 1980); *State v. Smith*, 32 S.W.3d 532, 554 (Mo. 2000); *State v. Murillo*, 509 S.E.2d 752, 763 (N.C. 1998); *Oliver*, 674 A.2d at 292; *Thompson v. State*, 59 S.W.3d 802, 808 (Tex. App. 2001); *Walker v. Commonwealth*, 515 S.E.2d 565, 573-74 (Va. 1999); *State v. McIntosh*, 534 S.E.2d 757, 768 (W.Va. 2000).

Had defendant in this case not pleaded guilty and instead gone to trial, he would have had every opportunity to discuss the perceived flaws in the State’s evidence with the jury. He could have pointed to the lack of fingerprints, to the 172-day gap, and to the fact that the bushes where the gun had been buried were accessible to the public. The State, in turn, would have noted that the gun matched the description given by a civilian who saw the gun from a distance of four feet, that it also matched the description given by a trained police officer who saw the gun from a distance of approximately fifteen yards, that it was found

buried alongside the very path where defendant had run while fleeing from police, and that it was discovered in a condition indicative of having sat outside throughout the winter. As with all other pieces of evidence, the jury would have been entirely free to give this piece of evidence whatever weight it deemed appropriate. Contrary to defendant's assertions, however, the gun was sufficiently connected to this crime to have had clear probative value for purposes of Rule 403.

- b. Although defendant may have been prejudiced by the admission of this gun, this prejudice would have resulted from the gun's probative weight, not from a tendency to appeal to an improper basis for conviction.

Under the second prong of the Rule 403 balancing, evidence can be excluded where the probative value "is substantially outweighed" by the danger of "unfair prejudice." Contrary to defendant's assertion, the admission of this gun would not have been unfairly prejudicial under Rule 403.

It "would be difficult to conceive of a trial at which the prosecution's evidence was not prejudicial to the defendant." *Moore*, 567 A.2d at 706. Rule 403 is only implicated "when the evidence is so prejudicial that it sweeps the jury beyond a rational consideration of guilt or innocence of the crime on trial." *Id.* (internal quotation marks and citation omitted). Thus, while "[v]irtually all evidence is prejudicial—if the truth be told, that is almost always why the proponent seeks to introduce it— . . . it is only *unfair* prejudice against which the law protects." *United States v. Barrow*, 448 F.3d 37, 43 (1st Cir. 2006) (internal quotation marks and citation omitted) (emphasis in original), *cert denied*, 127 S.Ct. 176 (2006).

The question before this Court is whether the prejudice that defendant would have suffered would have qualified as "unfair prejudice." In *State v. Maurer*, 770 P.2d 981 (Utah

1989), the Utah Supreme Court held that unfair prejudice within the context of Rule 403 “means an undue tendency to suggest decision on an improper basis.” *Id.* at 984 (internal quotation marks and citation omitted). In general, evidence is deemed to be directed at an “improper basis” when it has an undue tendency to “cause the jury to base its decision on something other than the established propositions of the case.” *State v. Lindgren*, 910 P.2d 1268, 1272 (Utah Ct. App. 1996) (internal quotation marks and citation omitted). Such evidence “commonly, though not necessarily” appeals to such “emotion[s]” as “bias, sympathy, hatred, contempt, retribution or horror.” *Maurer*, 770 P.2d at 984. Rule 403 is therefore an “inclusionary rule,” and “presumes the admission of all relevant evidence except where the evidence has an unusual propensity to unfairly prejudice, inflame, or mislead the jury.” *State v. Ramirez*, 924 P.2d 366, 369 (Utah Ct. App. 1996) (internal quotation marks and citations omitted); *see also Mangrum & Benson on Utah Evidence* at 123 (stating that Rule 403 “favors admissibility”).

Contrary to defendant’s assertions, the gun in question would not have “tempt[ed]” the jury to base its ruling on “something other than the established propositions of the case.” Aplt. Br. 13. Instead, the gun goes to the central question at issue: whether defendant actually possessed a chrome semiautomatic handgun and pointed it at Officer Hammond and Brian Pierce. Nothing about this gun speaks to bias, or hatred, or horror, or to any of the other emotion-laden examples of impermissible prejudice under Rule 403. Nothing about this gun directs the jury toward an irrational conclusion that is removed from the elements of this crime. While this gun may very well have had a prejudicial effect on this case, the prejudicial effect would have been based on the fact that the gun was linked to the

circumstances and location of the crime and that it matched the stories of the two victims. This type of corroborative, probative evidence is simply not barred by Rule 403.

Defendant additionally asserts that he would have been unfairly prejudiced by being forced to cross-examine the State's witnesses regarding the gun. Aplt. Br. 14-15. Defendant would apparently have this Court adopt a rule allowing for the exclusion of evidence if any party feels the need to challenge it at trial. This argument is at odds with the basic structure of the American judicial system, however, which regards cross-examination and adversarial testing as optimal means for uncovering truth. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 61 (2004); *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990) (referring to "adversarial testing" as "the norm of Anglo-American criminal proceedings"). Rather than preventing juries from deciding hard factual questions, the American system explicitly trusts juries to do exactly that. Rule 403 does not purport to alter the structure of this system, and defendant's argument to the contrary should be rejected.

In prosecuting a defendant, "the government is perfectly free to introduce weak, as well as strong, evidence." *United States v. Maravilla*, 907 F.2d 216, 222 (1st Cir. 1990). "Under our system . . . a party offers his evidence not *en masse*, but item by item. An item of evidence . . . need not prove conclusively the proposition for which it is offered. . . . A brick is not a wall." *Id.* (internal quotation marks and citation omitted). As in *Maravilla*, "[n]o one claimed that this particular piece of evidence *proved* guilt. It was merely one piece of evidence among many." *Id.* The district court therefore did not err in ruling that the gun could be submitted to the jury.

- c. Even if the district court abused its discretion in admitting the gun, the error was harmless.

Defendant claims that “the prosecutors would be unable to convict” him without the gun. Aplt. Br. 15. This Court should reject that argument and instead hold that even if the district court did abuse its discretion in admitting the gun, this error was harmless.

An error is deemed harmless if the error “is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings.” *State v. Evans*, 2001 UT 22, ¶20, 20 P.3d 888. With regard to evidentiary questions, “[e]ven if the evidence was erroneously admitted, that fact alone is insufficient to set aside a verdict unless it has had a substantial influence in bringing about the verdict.” *State v. Bluff*, 2002 UT 66, ¶47, 52 P.3d 1210 (internal quotation marks and citation omitted).

It is well-established that eyewitness testimony alone can be sufficient to convict a defendant of even serious crimes such as murder. *See, e.g., State v. Dunn*, 850 P.2d 1201, 1213 (Utah 1993) (holding that testimony of witnesses “is legally sufficient, standing alone, to support a conviction”); *State v. Lafferty*, 749 P.2d 1239, 1261 (Utah 1988) (noting that defendant’s “commission of violent acts at the jail was proven by undisputed eyewitness testimony which we conclude was sufficient to prove his guilty beyond a reasonable doubt”); *State v. Stewart*, 729 P.2d 610, 612 (Utah 1986) (holding that even “[w]ithout more, the eyewitness testimony of observing inmates [was] sufficient to support” a conviction).

In *State v. Madrigal*, 721 N.E.2d 52 (Ohio 2000), the Ohio Supreme Court considered a case like this one where a defendant was convicted of having used a gun during the commission of a crime. *Id.* at 63-65. The district court had allowed the prosecution to introduce a gun as evidence, even though no witness was able to “definitively say it was the

gun used” in the crime. *Id.* at 64. On appeal, the defendant argued that the court had erred by admitting the evidence. *Id.* After rejecting the defendant’s suppression argument, the Ohio Supreme Court noted that the conviction would still have been proper even if the gun had been suppressed because eyewitnesses had testified to having seen the defendant with a gun. *Id.*

As in *Madrigal*, defendant’s conviction here was supported by testimony from multiple witnesses. Specifically, Brian Pierce observed defendant point a gun at him from a distance of “four feet,” while Officer Hammond observed defendant point a gun at him from a distance of approximately fifteen yards. R. 92-93. Given this testimony, it was not necessary for the State to locate the gun that defendant had used in order to obtain a conviction. Instead, as in *Madrigal*, the State could have properly prosecuted and convicted defendant based on nothing more than the eyewitness testimony of his two victims. In fact, the State originally intended to do just that, and a trial was scheduled several months prior to the gun ever being located. R. 49-50.

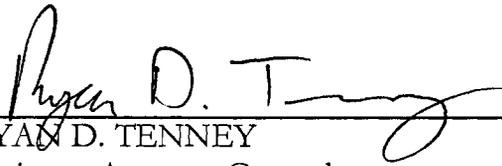
Thus, even if the district court had erred in admitting the gun, this Court should nevertheless hold that this error was harmless and affirm the conviction.

CONCLUSION

The gun in question was linked to defendant by multiple witnesses who saw him carrying it, as well as by the location and conditions surrounding the gun’s discovery. For the foregoing reasons, this Court should affirm.

Respectfully submitted on March 13, 2007.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

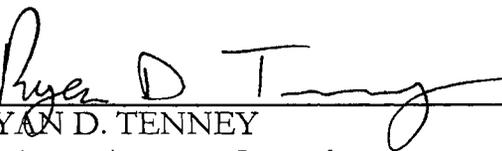


RYAN D. TENNEY
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2007, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Christopher Simon Castillo, by causing them to be delivered by first class mail to his counsel of record as follows:

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SECOND JUDICIAL DISTRICT COURT

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH, OGDEN DEPARTMENT

<p>STATE OF UTAH, Plaintiff, vs. CHRISTOPHER CASTILLO Defendant.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE COURT</p> <p>Case No. 051905870</p> <p>Judge ROGER S. DUTSON</p>
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On July 31, 2006, this matter came before the Court for a hearing on Defendant's Motion to Suppress evidence of a firearm found near the location the Defendant had disposed of it several months previously. Jim Retallick represented the Defendant. Branden Miles represented the State. After receiving a memorandum from the Defendant and hearing oral arguments from both parties, the Court ruled from the bench. The Court makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On November 11, 2005, Officer Ken Hammond of the Ogden City Police Department responded to the area of 2600 Lincoln on a report from a citizen of a man, wearing black pants and a black hoodie, pointing a silver or chrome gun at another man.

2. The witness reported seeing the man put the object he believed was a gun into the right, front pocket of his hoodie.
3. Officer Hammond responded to the area and as he approached the area he noticed a man matching that description walking on the sidewalk.
4. The man was also wearing black gloves.
5. The man was eventually identified as the Defendant Christopher Simon Castillo.
6. When the Defendant noticed Officer Hammond, he immediately began running and turned the corner around a fence and some bushes to run through a grassy area adjoining the 2nd District Court's parking lot.
7. Officer Hammond accelerated his vehicle, stopped it on the sidewalk, exited his vehicle and began to chase the Defendant.
8. Officer Hammond was running approximately fifteen yards behind the Defendant yelling "stop police" repeatedly.
9. Officer Hammond also yelled "show me your hands!"
10. The Defendant continued to run when he began to tug on the right-front side of his hoodie.
11. The Defendant pulled out a "shiny, chrome handled, fully framed, full size, semiautomatic handgun" from his pocket and pointed it at Officer Hammond.
12. Officer Hammond continued to chase the man, but the man cut between two semi trailers into the Hostess Bakery parking lot that adjoins the 2nd District Court's parking lot to the South.
13. Officer Hammond yelled at the Defendant to drop the gun several times.

14. Officer Hammond continued to chase the Defendant where the Defendant pointed the gun at Officer Hammond a couple more times before disappearing between a couple more trailers.
15. Due to the numerous areas the Defendant could hide and ambush him, Officer Hammond slowed his chase and took cover.
16. An employee of the Bakery was in the parking lot named Brian Pierce.
17. Mr. Pierce reported that while he was chasing the Defendant in the parking earlier, he observed the Defendant with the gun and the Defendant pointed the gun at him from four feet away.
18. The Defendant told Mr. Pierce to back off.
19. Apparently, the Defendant made two loops from the outside of the bakery plant on Lincoln, to the courthouse parking lot, through the bakery plant, and then back out to Lincoln which is when Officer Hammond first observed the Defendant and chased him back into the bakery parking lot.
20. It was during this first trip through the bakery lot that the Defendant threatened Mr. Pierce.
21. Mr. Pierce described the gun as "chrome pistol."
22. Officer Hammond had radioed that he was in pursuit of a man with a gun and other police officers were converging on the area to set up a perimeter.
23. Officer Hammond lost sight of the Defendant for approximately fifteen (15) seconds before he heard on his radio that another officer had the Defendant at gun point.

24. Officer Hammond ran over to the other side of the trailers and across the parking lot further South where he observed the Defendant laying on the ground in a prone position.
25. Officer Hammond ran up and handcuffed the Defendant.
26. The Defendant's person was searched, but the handgun Officer Hammond, the citizen, and several bakery plant employees observed was not located on the Defendant.
27. Several members of the police, Crime Scene Unit, and bakery plant employees began checking the area in an attempt to find the gun.
28. There were approximately seven or eight people looking for about an hour and the gun was not located.
29. Areas inside and under the truck and trailers, the bushes, and under trees were searched with a rake, but the gun was not located at that time.
30. The Defendant was arrested and charged with Aggravated Assault, a third degree felony and Avoiding Apprehension, a class A misdemeanor.
31. On May 2, 2006, an employee of the bakery plant was cleaning some tall bushes on the West side of the property near where the Defendant would have run on November 11, 2005.
32. As the employee was raking some leaves underneath the bushes he discovered a very dirty, but silver Lorcin .380 semiautomatic handgun.
33. The cleaning employee picked up the gun in a shovel and took it to a plant manager.

34. The plant manager, concerned about having a possible loaded firearm in the plant, proceeded to unload the gun.
35. The plant manager stated the gun appeared as if it had been outside all winter and was very muddy and fouled with dirt.
36. The manager used a screw driver to pry the magazine from the gun and unloaded all the ammunition.
37. The manager then called the police and turned the gun, the magazine, and several bullets over to Officer David Gentry from the Ogden City Police Department.
38. Officer Gentry took the firearm and placed it into evidence.
39. The firearm's serial number had been filed off.
40. Crime Scene Technician Brandi Child was able to restore the number and tried to fingerprint the surface of the gun.
41. There were no fingerprints discovered on the gun and the gun was not reported stolen.

CONCLUSIONS OF LAW

1. The Defendant requests this Court to exclude evidence of the gun at trial because he claims the prejudice of admitting the gun as evidence will outweigh any probative value it may have.
2. The Defendant's claimed prejudice is based on what he perceives is the tenuous connection between the gun and him because there were no prints found or other physical evidence linking him to the gun.
3. The Defendant's claim that the relevance of this gun is "too remote to trust that a

jury will not get caught up in the emotions of the charged offenses” is without merit because the physical specimen of the gun is just one piece of physical evidence that does not change the facts and allegations against the Defendant that he claims are improperly prejudicial.

4. The gun, found almost six months after the original offense, is relevant evidence because it matches the description given by several witnesses, it was found in the area where the Defendant would have had access to dispose of it, and it was found in a condition indicative of the fact that it had been outside for quite a long time.
5. The Defendant’s objections to the relevance of the gun are a matter of weight and credibility for the jury to decide.
6. The Defendant would have ample opportunity at trial to raise all of the issues he wants to raise about the possibility that this gun was not the actual gun used or the claim that he had a gun at all.

ORDER

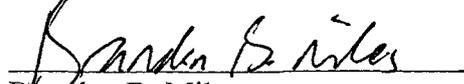
The Defendant's Motion to Suppress is Denied.

DATED this 7 day of ~~August~~ ^{September} 2006.



ROGERS S. DUTSON
DISTRICT COURT JUDGE

Prepared by:



Branden B. Miles

APPROVED AS TO FORM:



James Retallick