2006

State of Utah v. Randall Brown : Brief of Appellant

Utah Court of Appeals

Brock Belnap; Washington County Attorney; Counsel for Appellee.
Margaret P. Lindsay; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee vs. GARY WELCH BROWN, Defendant / Appellant	:	Case No. 20060969-CA

BRIEF OF APPELLANT

APPEAL FROM THE FIFTH DISTRICT, WASHINGTON COUNTY
STATE OF UTAH, FROM MISDEMEANOR CONVICTIONS OF SEXUAL BATTERY
AND INTOXICATION, BEFORE THE HONORABLE G. RAND BEACHAM

BROCK BELNAP
Washington County Attorney
178 North 200 East
St. George, Utah 84770

Counsel for Appellee

MARGARET P. LINDSAY (6766)
99 East Center Street
P.O. Box 1895
Orem, Utah 84059-1895
Telephone: (801) 764-5824

Counsel for Appellant

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in allowing hypothetical testimony when said evidence was irrelevant, and where any probative value was outweighed by its prejudicial effect. This issue is reviewed under an abuse of discretion standard. *State v. Decorso*, 1999 UT 57, ¶ 16, 993 P.2d 837. This issue was preserved in an oral objection made during trial (R. 66: 142-44).

CONTROLLING STATUTORY PROVISIONS

All relevant statutory provisions are set forth in the Addenda of the Appellant's Brief.

STATEMENT OF THE CASE

A. Nature of the Case

Gary Brown appeals from the judgment, sentence and commitment of the Honorable G. Rand Beacham after he was convicted by a jury of sexual battery, a class A misdemeanor, and intoxication, a class C misdemeanor.

B. Trial Court Proceedings and Disposition

Gary Brown was charged by Information filed in Fifth District Court on March 6, 2006 with sexual battery, a class A misdemeanor, and intoxication, a class C misdemeanor (R. 1-2).

On September 15, 2006 Brown filed a motion to dismiss the intoxication charge for lack of sufficient evidence, and to exclude the testimony of the arresting officer pursuant to Rules 401-403 of the Utah Rules of Evidence (R. 30-31).

On September 18, 2006 a jury trial was conducted and Brown was found guilty on both charges (R. 49, 50-52). At the end of trial, Brown was sentenced to supervised probation for 24 months and ordered to pay a fine of $750.00, and given credit for time served in jail (R. 50-52). The written order was filed on September 25, 2006 (R. 52-54).

On September 25, 2006 a notice of appeal was filed in Fifth District Court (R. 50).

STATEMENT OF RELEVANT FACTS

A. Testimony of Teresa Reynolds

On March 4, 2006 Teresa Reynolds was working at a Laundromat on Bluff Street in Washington County owned by her family (R. 66: 126-27, 134). She and her husband had been taking turns doing the cleaning (R. 66: 134). When she arrived at the Laundromat Gary Brown was there (R. 66: 128). She had seen him there every Saturday (R. 66: 137). While she was cleaning the washing machines, Brown asked her about how far along she was in her pregnancy and she replied "eight months" (R. 66: 128, 136). He told her about having a friend who is pregnant with twins (R. 66: 128-29).

They continued to talk as she moved into the middle of the room (R. 66: 129-30). He followed her and she testified that he "grabs my wrists and pulls me forward. And I try to back away for a minute. And he pulls me forward" (R. 66: 130). She tried to back away because she "felt a little nervous and I could smell he was intoxicated" (R. 128: 130). Brown objected to her characterization of intoxication and the trial court sustained the objection (Id.). Reynolds then clarified that "He was stumbling a little bit. And you could smell on him really bad. And his eyes looked a little glossy also. So, that's the only thing I can say" (R. 66: 130-31). She also indicated that she could smell alcohol as she came into the Laundromat (R. 66: 131).

After he pulled her in by the wrists Brown told her, "Mexicans make this place really dirty, huh?" (R. 66: 131). She agreed and then anxiously started to walk into the bathroom with her rag and garbage bag (R. 66: 132). Brown followed her in and stated, "You are really pretty" (R. 66: 132). She thanked him and walked out of the bathroom.

Brown tried "to pull me forward again a little bit—not pulling me forward, but whisper something. And, at that point, I turned out. And I felt him grab my butt, so I just left" (R. 66: 132, 138). She went outside and called her husband about what happened, and he instructed her to call the police because she was shaken up and crying (R. 66: 133).

She called the police and her husband called his father, who was a policeman (R. 66: 133). Her father-in-law came, took a report and arrested Brown (R. 66: 133).

Initially there was another woman present but she left before Reynolds' contact with Brown (R. 66: 134-35, 137). Reynolds was sixteen years old on the date of the incident (R. 66: 138).

B. Testimony of Officer Shawn Carter

Shawn Carter is employed by the St. George Police Department (R. 66: 140). On March 4, 2006 he received a dispatch to respond to the Laundromat on a complaint by Teresa Reynolds (Id.). When he arrived, he spoke first with Reynolds (R. 66: 140). She was upset and her eyes were red like she had been crying, and her demeanor was she was "shaken" (R. 66: 140).

After taking her statement, he made contact with Brown (R. 66: 140). Immediately he noticed a strong odor of alcohol on Brown (R. 66: 141). Brown also matched the description given to him by Reynolds (Id.). In addition, to the odor of alcohol, Carter testified that Brown had unsteady balance, walked slow, and swayed as he stood (R. 66: 141). His eyes were also red and bloodshot (Id.). His responses to questions were also slow and "seemed like he was trying to comprehend or understand what I was saying" (R. 66: 151). Carter asked if he'd been drinking and Brown informed

him that he had "consumed a 42-ounce Tall Boy within the last hour" (R. 66: 141). A "Tall Boy" is basically a big can of beer (R. 66: 144). Brown also told him he'd had a conversation with "a pregnant white female" that lasted about "a minute" (R. 66: 177). Brown "emphatically" denied touching Reynolds' butt at all (R. 66: 178).

Carter did not perform field sobriety tests on Brown (R. 66: 141, 144-45). Carter didn't believe that other tests were necessary because Brown was "so intoxicated [that] he needed to immediately be handcuffed for his safety and for mine" (R. 66: 153).

However, Carter testified that in the past when he'd given intoxilyzer tests to individuals with the characteristics he'd seen in Brown, they tested positive for alcohol consumption "every time" (R. 66: 142, 144). Brown objected to this testimony as being irrelevant and more prejudicial than probative: "The State is trying to show that the officer has experienced in this type of investigation that he's seen these clues before and has confirmed that type of thing as a strong indicator of intoxication as has been shown by confirmation as he's done so" (R. 66: 143). The trial court allowed the testimony and stated, "I'm not sure how relevant it is, though, to the particular charge against this particular person. It may give some background for the officer's opinion, however. And so, so long as it's done to suggest the officer's background and experience, I would allow him to give that as part of an expert opinion. If it's to suggest that anything directly measurement-wise toward Mr. Brown, of course, that would be inappropriate" (R. 66: 143).

Carter arrested Brown and transported him to Purgatory Correctional Facility (R. 66: 145). At the jail they have an intoxilyzer machine that was available for Carter to use, but he did not administer the test to Brown (R. 66: 145-46).

C. Motion for Directed Verdict

Brown moved for a directed verdict of dismissal of both charges for lack of sufficient evidence (R. 66: 154). He argued that "some evidence other than the opinion of an officer who had at his disposal [other tests such as an intoxilyzer]. We are in this case to allow him to testify to that, allowing him to make a legal conclusion and factual conclusion without any independent evidence for the jury to consider, we would ask that the court apply that standard [found in Utah Code Annotated § 41-6a part 5 dealing with driving under the influence], which is the only standard in the code giving us a definition of those things to this as a definition of being under the influence of alcohol and argue that the evidentiary burden has not been met and that count two should be dismissed" (R. 66: 154-55).

The trial court denied the motion finding that the observations of the officer and witness are facts for "the jury to weigh to determine the credibility of the witnesses and to determine whether they understand those facts to establish the elements of the offense" (R. 66: 157).

D. Testimony of Gary Brown

Gary Brown admitted to being in the Laundromat on the day in question (R. 66: 161). He had been there before and had run into Reynolds on occasion (R. 66: 162). He testified that was sitting in a chair (R. 66: 162). While there he had a conversation with a

lady who was taking clothes out of a dryer and folding them on a table (R. 66: 163-64). While he was sitting Reynolds walked in and began cleaning (R. 66: 164). Brown doesn't "really remember" speaking to her "other than just a nod hello or kind of recognizing who she was, because she was walking around cleaning up" (R. 66: 164). He was doing a word search (R. 66: 164-65). He made small talk, "kind of hi, and how's it going, kind of thing" with Reynolds (R. 66: 168).

Brown denied intentionally touching Reynolds in the way she described (R. 66: 165). He denied grabbing her butt intentionally or accidentally (R. 66: 165). He testified that he "didn't get that close to her to be able to do that" (R. 66: 165). He was "just sitting there in the chair until my mom came by" to bring him laundry and lunch (R. 66: 165, 162). He didn't know that Reynolds had been outside and was confused when the officers "barged" into the Laundromat and told him he was under arrest for "pinch[ing] a woman on the rump" and "public intox" (R. 66: 166, 171-72, 74). When the officers came in the room he stood (R. 66: 167).

Brown remembers there were security cameras in the Laundromat and that you can see yourself on the screen when you walk around (R. 66: 166). He believes that the camera would have picked up where he was in the Laundromat (R. 66: 167).

Brown testified that to his knowledge Tall Boy's are 22 ounces and not 42 ounces (R. 66: 168). He indicated that he doesn't drink beer because it "doesn't agree" with him, and he denied being intoxicated when the police came to arrest him (R. 66: 168, 173). He told the officer he had consumed alcohol the previous night but denied drinking that day (R. 66: 173-74).

SUMMARY OF THE ARGUMENT

Brown asserts that the trial court erred in allowing testimony that was irrelevant, and whose probative value—if any—was substantially outweighed by its prejudicial effect.

ARGUMENT

I. The Trial Court Erred In Allowing Evidence that was Irrelevant, and whose Probative Value—if any—was Substantially Outweighed by its Prejudicial Effect

Brown was convicted of sexual battery, a class A misdemeanor, and public intoxication, a class C misdemeanor. Teresa Reynolds testified that Brown had grabbed her by the wrist and pulled her to him, and that subsequently he grabbed her butt (R. 66: 130, 132, 138). She also testified that he was stumbling slightly, smelled of alcohol, and had glossy eyes (R. 66: 130-31). Brown admitted to drinking the previous night but denied being intoxicated at the time (R. 66: 173-74). He also denied intentionally or accidentally grabbing Reynolds' butt, or to touching her in the way she described (R. 66: 165).

Officer Shawn Carter, the arresting officer, testified that he noticed a strong odor of alcohol on Brown, that Brown had unsteady balance, walked slow, and swayed as he stood, and that his eyes were also red and bloodshot (R: 66: 141). Carter also testified that Brown's responses to questions were also slow and "seemed like he was trying to comprehend or understand what I was saying" (R. 66: 151). Carter asked if he'd been drinking and Brown informed him that he had consumed a Tall Boy within the last hour

(R. 66: 141). Carter did not perform field sobriety tests on Brown (R. 66: 141, 144-45). Carter didn't believe that other tests were necessary because Brown was "so intoxicated [that] he needed to immediately be handcuffed for his safety and for mine" (R. 66: 153). Carter also did not administer an intoxilyzer test to Brown at the jail although a machine was available (R. 66: 145-46).

During his testimony the State asked, "Have you ever done any type of intoxilyzer tests on other individuals when you have seen these characteristics?" (R. 66: 142). Carter replied, "Yes" (Id.). The State then asked, "When you have done that, what have the results of those intoxilyzers been?" (Id.).

Brown objected to this question under rules 402 and 403 of the Utah Rules of Evidence (R. 66: 142). Namely that such testimony is irrelevant, and alternatively that any probative value is outweighed by its potential for prejudice: "The State is trying to show that the officer has experienced in this type of investigation that he's seen these clues before and has confirmed that type of thing as a strong indicator of intoxication as has been shown by confirmation as he's done so" (R. 66: 143).

The trial court allowed the testimony and stated, "I'm not sure how relevant it is, though, to the particular charge against this particular person. It may give some background for the officer's opinion, however. And so, so long as it's done to suggest the officer's background and experience, I would allow him to give that as part of an expert opinion. If it's to suggest that anything directly measurement-wise toward Mr. Brown, of course, that would be inappropriate" (R. 66: 143).

Carter then answered the question and testified that in the past when he'd given intoxilyzer tests to individuals with the characteristics he'd seen in Brown, they tested positive for alcohol consumption "every time" (R. 66: 142, 144).

Brown asserts that the trial court abused its discretion in allowing the officer to render an expert opinion that every time in the past when he'd administered intoxilyzer tests to individuals with the characteristics he's seen in Brown they had tested positive for alcohol consumption. Brown asserts that this testimony was improper for two fundamental reasons:

One, evidence that other people with similar characteristics had tested positive for alcohol consumption is irrelevant. Rule 401 of the Utah Rules of Evidence defines relevant evidence as: "[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The fact that other people who had red eyes, poor balance, an odor of alcohol, and were slow to respond to questions were found to be intoxicated or had consumed alcohol does not make it any more or less probable that Brown was intoxicated at the time in question. There are a myriad of reasons including exhaustion, allergies or illness, crying that a person may have red or bloodshot eyes. Similarly there are a myriad of reasons other than alcohol intoxication why an individual may have poor balance or slow response times to questions. Moreover, the fact that the officer smelled an odor of alcohol on Brown does not necessarily equate to intoxication as an individual can consume alcohol or be around alcohol without necessarily being intoxicated. Unless the evidence "tends to prove some fact *material* to the crime

charged" it is irrelevant. *Decorso*, 1999 UT 57 at ¶ 22 (emphasis in original) (Under Rule 402 other crimes evidence is irrelevant and should be excluded unless it tends to prove some fact that is material to the crime charged other than the defendant's propensity to commit crime).

In *State v. Colwell*, 2000 UT 8, 994 P.2d 177, the defense sought to admit testimony from an officer as to whether he had knowledge of people pulling guns on officers in an attempt to commit suicide. The trial court excluded the evidence on the basis that it was too remote to the case and therefore irrelevant. 2000 UT 8 at ¶ 25. The Utah Supreme Court affirmed the trial court's exclusion because whether the officer had knowledge of "officer-assisted suicide" is "not relevant to the defendant's state of mind at the time of the offense... [and] does not shed light on the defendant's intent or state of mind at the time of the offense. *Colwell*, 2000 UT 8 at ¶ 28. In this case the fact that in the past others have tested positive for alcohol consumption does not shed light on whether Brown was intoxicated. Accordingly, because it has no probative value as to any material fact, it is irrelevant; and the trial court erred in allowing the testimony of the officer.

Two, even if Officer Carter's testimony has any relevance to a material fact, its probative value is far outweighed by the danger of unfair prejudice. Rule 403 of the Utah Rules of Evidence states: "Although 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...."

In this case, the trial court acknowledged that the testimony had little if any relevance "to the particular charge against this particular person" (R. 66: 143). The trial court also acknowledge that it would be improper "to suggest that anything directly measurement-wise toward Mr. Brown" (R. 66: 143). However, that is precisely what happened. The jury was essentially told that Brown must have been intoxicated because "every time" in the past Carter had tested similarly situated individuals, they had tested positive for alcohol consumption.

"To ascertain the probative value of proffered evidence, the trial court... must necessarily measure the strength of the evidence and its ability to make the existence of the evidence of a consequential fact either more or less probable." *State v. Williams*, 773 P.2d 1368, 1371 (Utah 1989). As argued above, Carter's testimony as to the intoxilyzer test results of other individuals has little, if any, probative value as to whether Brown was intoxicated.

Moreover, the trial court acknowledged that any suggestion that the testimony implicated anything directly towards Brown would be improper. However, the question and answer itself connected Brown with these unnamed individuals who had been given intoxilyzer tests. The question was whether Carter had performed objective tests as to alcohol consumption on individuals who had the same characteristics as Brown and whether they tested positive for alcohol consumption, and the answer was "every time."

Brown's testimony was that he had not consumed alcohol since the previous night but that he had slept at a friend's house and was unkept. Reynolds testimony was that he was stumbling slightly, smelled of alcohol and had glossy eyes. Carter's personal

observations were similar to Reynolds. In addition, Carter testified that Brown admitted to drinking a Tall Boy an hour previous while Brown denied drinking beer or a Tall Boy. None of the testimony against Brown had the objective effect of the jury hearing that every individual displaying characteristics observed in Brown had tested positive on an intoxilyzer test. Carter could have given Brown a test. A machine was available at the jail for that purpose. He chose not to administer the test to Brown. The question to Carter by the State was nothing more than an attempt to correct that deficiency by bringing in hypothetical third persons into the equation.

This testimony, allowed by the trial court over the objection of Brown, was not relevant, and its probative value—if any—was substantially outweighed by the prejudice suffered by Brown as a result. Instead of the jury judging the credibility of Brown's statements versus those by Carter and Reynolds, this testimony created an inference in the minds of the jurors that an objective test of alcohol consumption/intoxication had been made in this case because if "every time" intoxilyzer tests were administered to others with similar characteristics they tested positive, then Brown, too, must have had the same result. Moreover, this testimony mislead the jury, and confused the jury, into believing that the issue was not whether Brown was intoxicated, but whether he would test positive for alcohol consumption. "Intoxication" is not clearly defined in the Utah Code, and testing positive for alcohol consumption does not necessarily equate to intoxication.

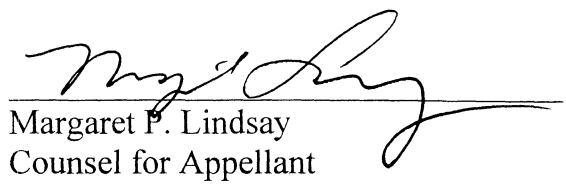
Accordingly, Brown asserts that the trial court erred in admitting testimony by Carter concerning unnamed third parties' results on intoxilyzer tests because said

evidence was irrelevant, and any probative value was substantially outweighed by prejudice to Brown, and that it needless mislead and confused the jury.

CONCLUSION AND PRECISE RELIEF SOUGHT

Brown asks that this Court reverse his convictions and remand the matter to Fifth District Court.

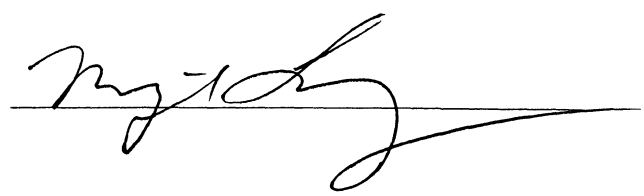
RESPECTFULLY SUBMITTED this 15th day of November, 2007.



Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to Brock Belnap, Washington County Attorney, 178 North 200 East, St. George, Utah 84770 on the 15th day of November, 2007.



ADDENDA

Rule 302. Applicability of federal law in civil actions and proceedings.

In civil actions and proceedings the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law

Advisory Committee Note — The text of this rule is taken from Rule 302 Uniform Rules of Evidence 1974 Presumptions in criminal cases are not treated in this rule See Utah Code Annotated Section 76-1-502 1953 or any subsequent revision of that section

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "relevant evidence."

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence

Advisory Committee Note — This rule is the federal rule verbatim and is comparable in substance to Rule 1(2) Utah Rules of Evidence (1971 but the former rule defined relevant evidence as that having a tendency to prove or disprove the existence of any material fact Avoiding the use of the term material fact accords with the application given to former Rule 1(2) by the Utah Supreme Court State v Peterson 560 P2d 1387 Utah 1977

NOTES TO DECISIONS

Burden of proof
Demonstrative evidence
—Photographs
Discovery
Effect of remoteness
Relationship to crime charged
Relevance
Victim's testimony on defense theory
Cited

Burden of proof

The defendant failed to meet his burden to lay the necessary two part foundation of relevance to admit evidence of the witness's health history offered for the purpose of attacking the witness's credibility because he did not show that the witness's mental health disorder impaired the witness's ability to accurately perceive recall and relate events nor did defendant offer evidence that the disability was contemporaneous with the witness's observations or testimony State v Stewart 925 P2d 598 Utah Ct App 1996)

In a prosecution for rape it was not error to exclude testimony of defendant's expert on Japanese cultural values since its only relevance was to the credibility of the victim not any elements of the crime and defendant did not lay a proper foundation for its admission State v Finlayson 956 P2d 283 (Utah Ct App 1998)

Demonstrative evidence

—Photographs

In a murder trial six color photographs of the victim lying on the ground were relevant as they corresponded to the testimony of witnesses whose credibility was in question State v Callihan 2002 UT 87 57 P3d 220

Discovery

Defendant stipulation that she would not use a vehicle valuation comparison at trial removed any need plaintiff might have had for information useful to impeach that document The information sought was therefore irrelevant and undiscoverable Major v Hills 1999 UT 44 980 P2d 683

Effect of remoteness.

Remoteness usually goes to the weight of the evidence and not its admissibility Terry v Zions Coop Mercantile Inst 605 P2d 314 (Utah 1979) overruled on other grounds McFarland v Skaggs Cos Inc 678 P2d 298 Utah 1984)

Relationship to crime charged

Evidence of nicknames chants and dances by defendant and his friends which was not remote in either time or place and provided background for the rape charged was admissible State v Boyd 2001 UT 30 25 P3d 985

Relevance

In a prosecution of defendant on four counts of aggravated sexual abuse of a child the trial court did not abuse its discretion in admitting a police detectives testimony that defendant made inquiries about a deal in context defendant's inquiries were relevant to defendant's denial of the allegations of sexual abuse and his consciousness of the allegations substance State v Smedley 2003 UT App 79 469 Utah Adv Rep 41 67 P3d 1005

In action challenging public status of a road adjacent to plaintiffs property the relevance of

right-of-way agreements between the owners and two oil companies, proffered to show that use of the road was permissive, was not demonstrated because the agreements appeared only to give the oil companies a right to come upon the property to maintain a pipe, while other uses of the road had been established. Chapman v. Uintah County, 2003 UT App 383, 486 Utah Adv. Rep 45, 81 P.3d 761, cert denied, 90 P.3d 1041 (Utah 2004).

Victim's testimony on defense theory.

In a prosecution for attempted aggravated murder arising from an incident in which the defendant, while a passenger in an automobile, thrust a gun at a police officer after the vehicle was stopped for a traffic violation, the court properly excluded testimony as to whether the officer had ever heard of people pulling guns on police officers in an attempt to commit suicide, as any such knowledge by the police officer was not relevant to the defendant's state of mind at the time of the incident and as the defendant was allowed to present his theory of "officer assisted suicide" by other means State v Colwell, 2000 UT 8, 994 P.2d 177

Cited in State v. Gray, 717 P.2d 1313 (Utah 1986); State v. Nickles, 728 P.2d 123 (Utah 1986); Meyers v Salt Lake City Corp , 747 P.2d 1058 (Utah Ct App 1988); Fisher ex rel Fisher v. Trapp, 748 P.2d 204 (Utah Ct. App 1988); Belden v Dalbo, Inc., 752 P.2d 1317 (Utah Ct. App. 1988); State v. Worthen, 765 P.2d 839 (Utah 1988); State v. Maurer, 770 P.2d 981 (Utah 1989); State, In re R.D.S., 777 P.2d 532 (Utah Ct App 1989) Whitehead v American Motors Sales Corp., 801 P.2d 920 (Utah 1990); State v. Pascual, 804 P.2d 553 (Utah Ct. App. 1991); State v. Larsen, 828 P.2d 487 (Utah Ct. App. 1992); State v 633 E. 640 N., 942 P.2d 925 (Utah 1997), State v Nelson-Waggoner, 2000 UT 59, 6 P.3d 1120.

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983, 1985 Utah L. Rev. 63, 78.

United States v. Downing: Novel Scientific Evidence and the Rejection of *Frye*, 1986 Utah L. Rev. 839.

A.L.R. — Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 A.L.R.5th 371.

Admissibility of evidence in homicide case that victim was threatened by one other than defendant, 11 A.L.R.5th 831.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Advisory Committee Note. — The text of this rule is Rule 402, Uniform Rules of Evidence (1974) except that prior to the word "statute" the words "Constitution of the United States" have been added.

Compiler's Notes. — The Utah rule also adds the words "or the Constitution of the state of Utah" to Rule 402, Uniform Rules of Evidence (1974).

NOTES TO DECISIONS

Discretion of court.
Effect of remoteness.
Harmless error.
Irrelevant evidence.
Other crimes.
Probability evidence.
Relevance.
Scientific evidence.
Standard of review.
Cited.

Discretion of court.

The trial court is given considerable discretion in deciding whether or not evidence submitted is relevant. Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976).

While relevant evidence is generally admissible, a trial court has broad discretion to determine whether proffered evidence is relevant, and the appellate court will find error in a relevancy ruling only if the trial court has abused its discretion. State v. Harrison, 805 P.2d 769 (Utah Ct. App.), cert. denied, 817 P.2d 327 (Utah 1991).

In a personal injury action, the trial court did not abuse its discretion in admitting evidence of plaintiff's prior injuries because they were relevant to the issues of causation and damages. Ortiz v. Geneva Rock Prods., Inc., 939 P.2d 1213 (Utah Ct. App. 1997).

Effect of remoteness.

Remoteness usually goes to the weight of the evidence and not its admissibility. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979), overruled on other grounds, McFarland v. Skaggs Cos., Inc., 678 P.2d 298 (Utah 1984).

Harmless error.

Even if the admission of testimony regarding

UT App 244 9 P3d 769 Campbell v State Farm Mut Auto Ins Co 2001 UT 89 432 Utah Adv Rep 44 65 P3d 1134 rev d on other grounds, 538 U S 408 123 S Ct 1513 155 L Ed 2d 585 (2003) State v Bradley, 2002 UT App 348 57 P3d 1139, State v Holbert 2002 UT App 364 58 P3d 877 State v Houskeeper 2002 UT 118 462 Utah Adv Rep 24 62 P3d 444

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Utah Law Review. — *United States v Downing* Novel Scientific Evidence and the Rejection of *Frye*, 1986 Utah L Rev 839

Note, Establishing Paternity Through HLA Testing Utah Standards for Admissibility, 1988 Utah L Rev 717

The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions The Utah Example, 1993 Utah L Rev 751

Note Utah Rule of Evidence 403 and Gruesome Photographs Is a Picture Worth Anything in Utah?, 1996 Utah L Rev 1131

A.L.R. — Admissibility of voice stress evaluation test results or of statements made during test, 47 A L R 4th 1202

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 A L R 4th 1049

Products liability admissibility of evidence of absence of other accidents, 51 A L R 4th 1186

Thermographic tests admissibility of test results in personal injury suits 56 A L R 4th 1105

Criminal law dog scent discrimination line ups, 63 A L R 4th 143

Products liability admissibility of experimental or test evidence to disprove defect in motor vehicle 64 A L R 4th 125

Admissibility, in criminal cases of evidence of electrophoresis of dried evidentiary bloodstains, 66 A L R 4th 588

Admissibility, in prosecution for sex related offense, of results of tests on semen or seminal fluids, 75 A L R 4th 897

Admissibility of hypnotically refreshed or enhanced testimony, 77 A L R 4th 927

Admissibility of DNA identification evidence, 84 A L R 4th 313

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 A L R 5th 672

Admissibility of results of presumptive tests indicating presence of blood on object 82 A L R 5th 67

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although 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.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403 See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise" See also Smith v Estelle, 445 F Supp 647 (N D Tex 1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process) See the following Utah cases to the same effect Terry v Zions Coop Mercantile Inst , 605 P 2d 314 (Utah 1979), State v Johns, 615 P 2d 1260 (Utah 1980), Reiser v Lohner, 641 P 2d 93 (Utah 1982)

Cross-References. — Admissibility of evidence, Rules of Civil Procedure, Rule 43(a)

NOTES TO DECISIONS

Balancing test
Bias
Blood-soaked clothing
Childhood sexual experiences
Child witness
Circumstantial evidence
Confusion of issues
Credibility of witness
Cumulative evidence
Determination of admissibility
Disability benefits
Expert testimony
Extent of damages
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Harmless error
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—Specificity
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—Balancing test