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Ronald J. Yengich; Bradley P. Rich; Attorneys for Defendant-Appellant;
Robert Hansen; Attorney for Plaintiff-Respondent;

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No. 16832

ELOY PAUL LOPEZ, :

Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

AN APPEAL BY THE DEFENDANT, ELOY PAUL
LOPEZ, FROM THE CONVICTION AND JUDGMENT
OF MURDER IN THE SECOND DEGREE, IN THE
DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT IN AND FOR THE COUNTY OF SALT
LAKE, STATE OF UTAH, THE HONORABLE
BRYANT H. CROFT, JUDGE, PRESIDING

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FILED

JUL 7 1980

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
ELOY PAUL LOPEZ, : 16532
Defendant-Appellant. :
----- : -----

STATEMENT OF THE NATURE OF THE CASE

The appellant was tried and convicted of the crime of Murder in the Second Degree, in violation of Utah Code Ann. § 76-5-203(b) and (c) (1953), as amended, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The trial court entered a judgment of guilty of Murder in the Second Degree, and subsequently committed the appellant to the Utah State Prison for the term provided by law, five years to life.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the judgment of guilty as rendered by the lower court.

STATEMENT OF FACTS

On November 10, 1977, appellant went to the Drift Inn Bar in Lark, Utah, where he drank a few beers and some liquor (R.264,270,292,350,489). Approximately 20 to 30 minutes later, Lynn Oliver arrived at the bar (R.491), and engaged appellant in conversation (R.494). Eventually, they discussed a fight appellant had been involved in two weeks earlier (R.496). An argument ensued which evolved into a fight (R.289-290,321,356,496-499). They wrestled around, threw punches at each other, and each ended up on top of the other at one time or another (R.290-291,500). They were then thrown out the back door by the bartender (R.266, 499-501).

The fight continued outside, several observers peering periodically through the back window of the bar (R.293,312,324,338,358). One of the observers, Kim Horrocks, went outside to the parking lot when the fight was ongoing (R.360,379,381). She immediately observed the victim, Lynn Oliver, falling (R.361,381-382), but was distracted momentarily by a hissing noise (R.361). Upon returning her attention to the fight, she observed Oliver lying on the ground (R.361), and then watched appellant walk over to Oliver and kick him in the head (R.363,383). Appellant then stepped back and again kicked Oliver in the head

(R.364,368). Appellant was wearing work boots equipped with a steel toe at the time he kicked the victim (R.392-393,487,515). The victim went into convulsions. Blood was coming out of the front of his head and he was gasping for air (R.297-298). Appellant then began to administer mouth-to-mouth resuscitation (R.297). The victim was then taken inside the bar to await arrival of the paramedics.

When the paramedics arrived, Oliver was comatose and was having a difficult time breathing (R.402). He was transported to a hospital where he was treated for brain damage by Dr. John Sanders (R.279-286,461-469). The treatment was unsuccessful. The victim had ceased to breathe on his own and was thus placed on a respirator (R.282). Two EEG's were performed to evaluate brain activity (R.283,462). The results showed no brain activity, and that the victim was neurologically dead (R.458-460, 462-465). Subsequently, the life support machines were turned off and the patient expired (R.464-465).

Testimony at trial revealed that although several people viewed many stages of the fight, Kim Horrocks was the only person who viewed Oliver getting kicked in the head (R.294-297,326,330,339-340,3590366,367-380). She further testified that appellant had told her prior to the fight that he was "looking for trouble" (R.352-353). During

the course of the fight, Ms. Horricks heard Oliver tell appellant that he did not want to fight, but just wanted to be friends (R.357,378). Ms. Horrocks also stated that it was the appellant who was "pressing" the fight the entire time and that he grabbed the victim by the shirt and dragged him out the back door to finish the fight (R.378,379). Once outside in the back parking lot, the victim appeared to be the one always retreating (R.359,379).

Several witnesses testified regarding the appellant's mood and condition prior to the fight as well as the victim's physical condition following the fight. Anthony Vasquez stated that appellant and the victim were drinking but not drunk prior to the fight, although appellant seemed to have a "slight buzz" on (R.334). He also stated that following the fight he observed a cut which looked like a little hole on the right side of the victim's head (R.328) as well as "little holes" on the fore side of his head (R.340). Candido Abeyta testified that he observed scratches on the victim's face following the fight (R.299). Ms. Horrocks stated that the appellant, prior to the fight, was on his way to being drunk and did not appear to be in a good mood (R.385,372).

Officer Curtis Nielsen of the Salt Lake County Sheriff's Office testified that when he arrived on the scene the victim's face was quite bloody (R.389). He also stated that he found no dents or blood stains on an automobile located near the fight (R.391).

The paramedics testified that upon their arrival at the Drift Inn Bar, they observed the victim in a comatose condition (R.402), having a difficult time breathing (R.402), and having sustained a number of abrasions and contusions to the face and head (R.408). There was also blood and dust on the victim's face (R.415). Penton Quinn, the paramedic who initially treated the victim, testified that he observed an indentation, which looked to him like a footprint or tip of a boot, in the right side of the victim's head (R.403-404). He also stated that he told another paramedic that it looked to him as though the victim had been kicked (R.404). It was brought out on redirect examination of Mr. Quinn that these observations by him (Quinn) were made prior to his having been informed that the victim had indeed been kicked in the head (R.410).

A treating physician, Dr. John Sanders, testified that his observation of the victim revealed certain characteristics which denoted severe injury to the victim's

brain stem (R.279). This damage was responsible for the failure of the victim to breathe properly, since the respiration center is located in the brain stem (R.282-283). The failure of the brain stem and its components to function properly was caused by undue and increased pressure, bruising, or a combination of both (R.282-283). Dr. Sanders also stated that the victim had sustained a basal skull fracture (R.280). This was diagnosed due to the presence of blood coming out of the victim's left ear (R.280). It was his supposition that the victim had sustained head trauma, which in turn was responsible for the victim's neurological status (R.280).

Dr. Hebertson, a neurologist who specializes in reading EEGs, testified that he read two EEGs performed on the victim and it was his synopsis that there was no evidence of "on-going cerebral electrical cortical activity, i.e., the higher centers of the brain were not producing nor reflecting any signs of electrical activity (R.458). This information was given to Dr. Sanders, who stated at trial that it was his medical opinion that the victim's brain was dead and that the patient had no chance for a neurological recovery (R.458,463). The victim was then taken off the respirator due to the fact that he demonstrated no spontaneous brain functions and nothing could be done to repair those functions (R.464-465).

Deputy State Medical Examiner, Terry H. Rich, testified that he was the pathologist who performed the autopsy on the victim (R.419-420), that he observed multiple abrasions on the head and face of the victim (R.421), and observed two fractures of the skull and a significant subdural hemorrhage underneath the skull between the bone on top of the brain tissue (R.424-426). He also observed areas of contusion of the skull along the frontal lobes and temporal lobes along the base (R.426). The autopsy also revealed that there was extensive hemorrhage on the brain stem, which would have caused cessation of the respiratory and heart centers, causing death (R.426). Dr. Rich traced the cause of death to the trauma which caused the fractures of the skull, and stated that the trauma which caused the skull to fracture also caused a swelling of the brain. This swelling, coupled with subdural hemorrhage, caused pressure inside of the cranial vault which causes a pinching down of the spinal cord and midbrain ponds. The brain stem area could also have been pushed down to the spinal canal, causing a lack of oxygen and a secondary hemorrhage. This lack of oxygen then caused a cessation of the life function (R.427).

Dr. Rich further stated that the force or trauma which caused the fractures came from two separate directions

(R.427-428), and that the nature of the injuries and the forces causing them were consistent with the victim having been kicked twice by a boot; once from the left side of his head, and once on his forehead (R.427-429).

At trial, the appellant admitted he became involved in an argument with Oliver concerning a fight appellant had had two weeks earlier with a Don Waltz (R.496). He admitted a fight ensued with Oliver, but claimed he could not remember many of the details of the argument or fight due to alleged intoxication (R.496). However, he denied ever kicking Oliver in the head (R.519). When asked whether or not he saw the victim's head hit anything as he was falling during the fight, appellant responded, "I don't know what he hit" (R.523). He did admit wearing safety boots with a steel toe on the night in question (R.515).

On direct examination, appellant was questioned by his counsel about the fight which he had been involved in two weeks prior to November 10, 1977 (R.492,496). On cross-examination, the appellant described some of the details of that fight (R.516-519). He stated that Donny Waltz fell to the ground. When asked if he had any recollection of having kicked Waltz in the head on that occasion, appellant responded negatively (R.518-519).

The prosecution on rebuttal offered the testimony of Janice Ortega, a bartender at the Drift Inn Bar (R.553). She testified that the day after the Oliver fight she went to the hospital to check on the victim. Upon returning, she stopped at the Drift Inn Bar. The appellant was present (R.554). She informed Merle Watson that "they didn't think that Lynn [Oliver] was going to make it" (R.555). At that time the appellant responded, "Well, what if he does? All I'm going to get is a year in jail for manslaughter" (R.555).

Ms. Ortega was also questioned about appellant's earlier fight with Donny Waltz. She testified that on that night she was tending bar, witnessed the fight, and saw appellant kick Donny Waltz in the head (R.555-557). Appellant's counsel then pursued more details of the fight on cross-examination (R.558-564).

Finally, Merle Watson, also a bartender at the Drift Inn (R.260), testified that three or four days following the fatal incident, he heard appellant "bragging about killing a man (victim) with his own hands" (R.268).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR IN ADMITTING EVIDENCE OF ACTS OTHER THAN THE ONE FOR WHICH APPELLANT WAS TRIED.

The appellant testified in his own behalf that the death of the victim, Lynn Oliver, occurred as a result

of the fight between the two men, and that the fight arose out of an argument over a previous fight that had occurred two weeks earlier between the appellant and another individual named "Donny" (R.492). Some of the details of the earlier fight were brought out on direct examination by appellant's counsel:

Q. Had you met Donny before?

A. Yes.

Q. Where had you met him?

A. In the Drift Inn about maybe two weeks before that.

Q. Under what circumstances did you meet Donny on that occasion?

A. Well, I walked into the bar with my brother of mine and a friend of mine named Dan, and apparently it was Dan's girlfriend. I was standing there and he pulled a knife out on me. I said, "What are you doing that for? I don't even know you." And then that is when Lynn [victim of the case at bar] took the knife away from him.

Q. After Lynn took the knife away from him, then what happened?

A. I walked over by the pool tables of the Drift Inn and he wanted to fight. So we had a fight at the Drift Inn, Donny and I, but that was over right away. And Lynn took him home and we left. (R.492).

On cross-examination, the prosecutor sought to develop the details of the earlier fight:

Q. Mr. Yengich [counsel for appellant] has talked to you about a fight you had with one Donny Waltz. I believe you said you didn't know Donny very well but you had been in a fight a couple of weeks before this even at the Drift Inn?

A. Yes, sir.

Q. Who was there when you had that fight with him?

A. My brother Louis. I think Roy Ortega was

- Q. Any other person?
- A. Lynn Oliver was there. Dan Wadsworth was there from West Jordan, and that is all I can recall.
- Q. Had you been drinking that night?
- A. Yes.
- Q. Do you remember what you were drinking?
- A. Yes.
- Q. What?
- A. Beer.
- Q. Very much?
- A. No.
- Q. Your claim was that Donny pulled a knife on you?
- A. Yes, sir.
- Q. And Lynn took the knife away from him?
- A. Yes, sir.
- Q. Would you describe for me again what kind of a fight you had with him after the knife had been taken away from him?
- A. A fist fight.
- Q. Describe it for me. Kind of a blow-for-blow?
- A. It was only--not even maybe three or four blows.
- Q. Who hit whom?
- A. Pardon?
- Q. Did you hit him?
- A. Yes, sir.
- Q. How many times?
- A. Once.
- Q. Did he hit you?
- A. Yes.
- Q. How many times?
- A. I don't know. Maybe once or twice. I tried to hit him still. I hit the steel pole and broke my hand.
- Q. Did either one of you ever go to the ground?
- A. Yes.
- Q. Did either one of you fall to the ground?
- A. Yes.
- Q. Which one?
- A. Donny did.
- Q. What did you do?
- A. What did I do when he was on the ground? Just let him get up.
- Q. Do you have any recollection of having kicked him in the head?

A. No, sir.

Mr. Yengich: I object and ask that be stricken. I ask that we move for a mistrial. Counsel has asked a question like that and there is no good faith repetition.

The Court: The answer is no and the answer may remain, and the motion is denied.

Q. (By Mr. VanDam): Your testimony is you did not kick him at all; is that what I heard?

A. Yes.

Mr. Yengich: The question was asked and answered.

The Court: Cross-examination.

The Witness: Yes.

Q. (By Mr. VanDam): You did not kick him?

A. I did not kick him.

Q. Or attempt to kick him?

A. No, sir. (R.516-519).

In rebuttal, the prosecution called Janice Ortega, a bartender at the Drift Inn, who testified over appellant's objection, that on the earlier occasion of the fight between appellant and "Donny" she had observed the appellant kick "Donny" while he lay on the ground:

Q. On that date, did you have occasion to see a man by the name of Donny Waltz?

A. Yes.

Q. Did you see a man named Eloy Lopez?

A. Yes.

Q. What were you doing that night?

A. I was working that night.

Q. Did you see a fight that night in the bar?

A. Yes.

Q. Will you describe that fight, please?

Mr. Yengich: Objection to any description of the fight as not relevant to the issue before the Court. We are talking about an altercation on the 10th of November.

The Court: Well, which fight are you talking about?

- fight which Mr. Lopez said he did not use his fist. That is the one.
- The Court: We will let her answer some questions concerning the fight that she can testify to that was about two weeks before.
- Mr. Yengich: Your Honor, we will object to their characterization of the fight. He knows the date; we would suggest to the Court that characterization was only meant to inflame the jury, and it was improper, and ask the jury to be admonished about that.
- The Court: I don't think his question was improper or intended to do anything of the kind. It has been described, the people, the two men had a fight a couple of weeks before. That is what he is asking her.
- Q. (By Mr. Marson): Can you describe that right, Janice?
- A. I didn't see what happened to start it. I was at the other end of the bar.
- Q. Describe it from the point you saw it. What did you see?
- A. I seen Donny fall down and I did see Eloy [appellant] kick him. Donny had his arms up around his head.
- Mr. Yengich: Object. It is only prejudicial. It is in violation of Rule 45 of Utah rules of evidence. There is no necessity of proving something like this for any issue under the rules of evidence in the State of Utah. We would object and ask it be stricken. There is no purpose for any issue under the rules of evidence in the State of Utah. We would object and ask it be stricken. There is no purpose for it.
- The Court: The motion to strike is denied.
- Q. (By Mr. Marson): You saw him kick him?
- A. Yes.
- The Court: That is what she testified to. . .
- Q. (By Mr. Marson): What did you see?
- A. I seen Donny laying down and Eloy was kicking him. . . . (R.555-557).

Appellant claims in his brief that the prosecutor introduced "evidence of another criminal act in order to discredit the appellant generally as well as to impeach appellant's testimony that he did not kick Lynn Oliver on the occasion of which the instant charge arose" (Appellant's Brief, pp. 5-6, 8-9). He further alleges that "the purpose of introducing the details of the incident was to mislead the jury to the conclusion that appellant was an evil or bad person, one who is quarrelsome and likely to resort to deadly weapons without justification" (Appellant's Brief, p. 13) (emphasis added).

Appellant argues that receipt of evidence regarding the earlier fight was a violation of Rules 55 and 47 of the Utah Rules of Evidence, and that the trial court abused its discretion in failing to exclude such evidence, thereby violating Rule 45, U.R.E.

Respondent submits that cross-examination and rebuttal evidence regarding the prior fight was proper and justifiably received by the trial court pursuant to the following theories:

A

SAID EVIDENCE WAS WITHIN THE
RULES AND SCOPE OF PROPER CROSS-
EXAMINATION.

Evidence of the earlier fight was initially introduced on direct examination by appellant's counsel (R. 492).

On cross-examination counsel for the State merely pursued the details of the fight such as "who hit who," what kind of a fight was involved (R.516-519), and whether appellant kicked Waltz in the head during the fight (R.518-519).

The rules of cross-examination are clearly set forth in this state. Utah Code Ann. § 77-44-5 (1953), as amended, states in relevant part:

If a defendant offers himself as a witness, he may be cross-examined by the counsel for the state the same as any other witness.

The Section of the former Code (Section 5015, Comp. Laws 1907) verbatim in relevant part to Section 77-44-5 was commented upon by this Court in State v. Vance, 38 Utah 1, 110 Pac. 434 (1910):

. . . section 5015 in express terms provides that the accused, if he becomes a witness, must be treated on cross-examination the same as any other witness. In view of the provisions of these sections, the test the court must keep in mind is: Would the particular question be proper cross-examination if the same were propounded to any other witness who had testified to the same facts that the accused has testified to? If the question would be proper cross-examination if asked of any other witness it would likewise be if propounded to one on trial for a criminal offense, or vice versa. The rule is that as to whether the accused has made certain admissions, or has made statements of material facts against himself and everything which may contradict,

modify, explain, or make clearer, limit or enlarge the meaning of the statements made by him while testifying with respect to any subject of which he has testified, may be inquired into on cross-examination. The inquiry must, however, be limited to the subject-matter gone into by the witness in his testimony in chief. . . Where the accused, as a witness, denies that he committed or was connected with the commission of the criminal act or acts constituting the offense for which he is being tried, the cross-examination ordinarily must be permitted to extend to the whole range of facts which in some way are related to the transaction constituting the offense. . . .

110 P.2d at 445 (emphasis added).

Several later cases have reaffirmed this principle holding that areas which an accused opens up for questioning on direct examination are subject to further inquiry on cross-examination. State v. Schieving, 535 P.2d 1232 (Utah 1975); State v. Studham, 572 P.2d 700 (Utah 1977). In the Schieving case, the defendant was found guilty of mishandling of public monies. At trial, evidence of shortages of money within defendant's department other than those for which he was standing trial were admitted by the trial court over defendant's objection. On appeal, his conviction was affirmed and his claim of error regarding admission of such evidence was dismissed:

In this case evidence of another shortage within the defendant's department was not prejudicial, and this is especially true in view of the fact that defendant testified as to the other shortage, and it was his testimony that introduced the subject into

In Studham, the defendant was convicted of rape. One of his grounds of appeal alleged error in allowing cross-examination on a court order prohibiting the defendant from visiting the prosecutrix. In affirming the conviction, this Court stated:

To the defendant's claim of error in allowing cross-examination on a court order prohibiting defendant from visiting the prosecutrix, the state makes two effective rejoinders: First, that the subject was opened up by defendant's own counsel on direct examination and thus could properly be probed on cross-examination. Second, that the testimony was relevant to inquire about the background and relationship between the parties, relied upon by the defendant himself as bearing upon the critical issue, of whether there was consent, or forcible rape.

572 P.2d at 703 (emphasis added).

In State v. Mora, 558 P.2d 1335 (Utah 1977), this Court upheld allowing the prosecution on cross-examination to question the defendant concerning prior offenses, where the defendant chose on direct examination to show through his testimony that he was not a man of violence. On direct examination defendant was asked not only whether or not he had been convicted of a felony but the date and type of felony. He was also asked whether or not a weapon was used in the commission thereof. On cross-examination the prosecutor pursued areas of inquiry tending to refute the inference from defendant's

direct examination testimony that he was not a man of violence. The Court upheld such a line of cross-examination:

Inasmuch as the defendant had chosen to elicit evidence to show that he was not a man of violence, that matter became a legitimate subject of inquiry and refutation. Wherefore, the questions asked by the prosecutor seem reasonably calculated to bring out facts which might tend to contradict or weaken the effect of the defendant's assertion.

558 P.2d at 1336.

Earlier in its opinion, the Court stated the applicable rule of law as it now stands in Utah:

When a defendant offers himself as a witness, he may properly be subjected to the tests of credibility, by questioning him in the same manner and to the same extent as any other witness, as to any matter which would tend to contradict, weaken, or modify the effect of his direct examination.

558 P.2d at 1336.

The record in the present case clearly indicates that appellant, through his counsel, opened up the issue on direct examination regarding the fight between himself and Donny Waltz (R.492). The subsequent questions propounded on cross-examination by counsel for the state regarding details of the fight, including whether or not during the fight appellant kicked Donny Waltz in the head, were well within the boundaries of proper cross-examination. The questions asked by the prosecutor were directly related to the issue of the fight brought

out on direct examination.

Finally, it is a long-standing rule of this Court that matters of cross-examination and the extent thereof rest largely within the discretion of the trial judge. This Court will reverse only if an abuse of that discretion is shown. State v. Starks, 581 P.2d 1015 (Utah 1978); State v. Curtis, 542 P.2d 744 (Utah 1975); State v. Anderson, 27 Utah 2d 276, 495 P.2d 804 (1972). Even if an error is made in limiting or extending the bounds of cross-examination, it is not to be reversed unless it is also shown to be prejudicial. State v. Starks, surpa; State v. Maestas, 564 P.2d 1386 (Utah 1977).

Respondent submits that the cross-examination was proper as it related to the subject matter introduced on direct examination. Furthermore, no abuse of discretion on the part of the trial judge has been shown.

B

SAID EVIDENCE WAS ADMISSIBLE TO
PROVE A MATERIAL FACT PURSUANT TO
RULE 55 OF THE UTAH RULES OF
EVIDENCE.

Rules 55 of the Utah Rules of Evidence states:

Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil

wrong on another specified occasion but, subject to Rules 45 and 48 such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity." (Emphasis added.)

Appellant asserts that admission of evidence of specific details of the fight between appellant and Don Waltz particularly testimony relating to the appellant kicking Watz in the head, is violative of Rule 55, as it did not fall within any of the exceptions mentioned and was introduced to not only inflame the jury, but to show that appellant had a propensity to commit this type of crime.

Respondent submits that such evidence was admissible to prove (1) a material fact other than those mentioned in the exceptions under Rule 55; (2) modus operandi.

Case law in Utah clearly states that generally speaking, evidence of other crimes is not admissible if its sole purpose is to disgrace the defendant as a person of evil character with a propensity to commit crime and thus likely to have committed the crime charged.

State v. Johnson, 25 Utah 2d 160, 478 P.2d 491 (1970).

There are numerous cases, however, which have made

exception to that general rule. Such exception has been made based upon one of the exceptions listed in Rule 55 or at times based upon other reasons relevant to the issue being tried. State v. Daniels, 584 P.2d 880 (Utah 1978) (evidence relevant to explain the circumstances surrounding the instant crime is admissible for that purpose, though it tends to connect defendant with another crime); State v. Brown, 577 P.2d 135 (Utah 1978) (evidence of commission of other crimes admissible to prove knowledge, intent, and modus operandi); State v. Cauble, 563 P.2d 775 (Utah 1977) (evidence of other crimes admitted to show intent); State v. Underwood, 25 Utah 2d 234, 479 P.2d 794 (1971) (evidence of commission of other crimes is relevant where it is an integral part of competent, relevant evidence of the crime charged); see also State v. Baran, 25 Utah 2d 16, 474 P.2d 728 (1970); and State v. Scott, 175 P.2d 1016 (Utah 1947).

Respondent submits that evidence of details of the earlier fight, adduced on cross-examination and rebuttal testimony, were relevant to prove a "material fact" under Rule 55. Appellant had denied kicking the victim, Lynn Oliver, in the case at bar. The crux of the State's case regarding the second degree murder charge revolved around the issue as to whether appellant kicked the victim in the head. There was one eyewitness who testified that she

witnessed appellant kick the deceased twice in the head with his steel-toe boot (R.363-364,368,383,392-393,487, 515). Appellant denied ever having kicked the deceased, though he could offer no explanation as to how the victim got in the state he was in (comatose) following the fight. Thus, the issue was whether the victim was kicked in the head by the appellant. In other words, was appellant lying or was the eyewitness, Kim Horrocks, lying. Such a determination was crucial to the outcome and disposition of the case. Any relevant testimony which would tend to help the jury decide this material fact would be helpful.

When appellant on direct examination introduced the issue of the earlier fight it then became relevant on cross-examination to ascertain whether appellant's modus operandi in that particular fight was to kick his opponent in the head. When he denied having kicked Waltz in the head, the prosecution then presented an eyewitness (Janis Ortega) on rebuttal examination who testified that she did in fact witness the appellant kick Waltz in the head (R.556-557). The issue then becomes two fold: (1) if appellant would lie about kicking someone in the head in one fight (assuming the state's witnesses were believed

by the jury),¹ would he not lie about kicking the deceased in the head in the case at bar. Such a determination is of course, as previously mentioned, crucial to a resolution of the charge of second degree murder in this case; (2) is it the modus operandi of the appellant to kick with his feet when involved in fights?

Certainly evidence of kicking in the prior fight is admissible as an exception to prove modus operandi under Rule 55. State v. Brown, 577 P.2d at 136. In Brown, the defendant was convicted of theft and selling a motor vehicle with altered vehicle identification. Rebuttal evidence of a prior, unrelated offense involving theft and sale of a stolen auto and an attempt to conceal those crimes by replacing parts of the stolen automobile bearing vehicle identification numbers with parts from a wrecked auto purchased by defendant, was admitted as being relevant to show similar facts revealing modus operandi.

-
- 1 (a) That this Court views the evidence and all reasonable inferences which may be drawn therefrom in the light most favorable to the jury's verdict, see State v. Helm, 563 P.2d 794 (Utah 1977); State v. Jones, 554 P.2d 1321 (Utah 1976); State v. Sinclair, 15 Utah 2d 162, 389 P.2d 465 (1964). (b) As to the assumption that the jury believed those aspects of the evidence which support their verdict and survey the record on appeal in that light, see State v. Harless, 23 Utah 2d 128, 459 P.2d 210 (1969); State v. Howard, 544 P.2d 466 (Utah 1975).

Returning to the argument regarding the admissibility of the kicking incident on rebuttal in order to prove a "material fact" under Rule 55,² respondent calls the attention of the Court to recent case law involving similar factual contexts.

In State v. Green, 578 P.2d 512 (Utah 1978), defendant was convicted of selling narcotic drugs. He denied that he had seen the undercover agent who allegedly purchased drugs from him on the date charged. On cross-examination the defendant stated that he had not seen the undercover agent since August 2 (the crime for which he was tried occurred August 3). On rebuttal, over defendant's objection, the undercover agent described a sale made to her by defendant on August 2. She also testified that the defendant had often sold her drugs in the past. The conviction was upheld and the prior sale was ruled to have been properly admitted:

. . . if evidence serves some legitimate purpose as to proof of the crime, or in bearing on the credibility of evidence, the fact that it may show the commission of another crime will not render it admissible.

2 See Note at end of Rule 55, Rules of Evidence - As Adopted by the Supreme Court of Utah, which states: "The generally accepted rule prohibits evidence of another crime or civil wrong as proof that a person committed a crime or civil wrong on a specified occasion. The things set forth above [absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge, or identity] are only exceptions and not exceptions."

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Although it is true that one accused of crime is clothed with a number of protections; including . . . the right not to give evidence against himself, if he chooses to waive the latter right, and offers himself as a witness, he then becomes subject to being treated the same way as any other witness. This includes cross-examination on any matter which would tend to contradict, explain or cast doubt upon the credibility of his testimony. Furthermore, any testimony or evidence which is purposed to those same objectives may be introduced in rebuttal.

In analyzing the defendant's contention of error in the light of those rules, it will be seen that the testimony of Ms. Gierz [undercover policewoman], of which the defendant complains, was in legitimate refutation of his statements wherein he denied ever having sold drugs, or of having seen her after August 1st, and his statement that he had not left his home from the evening of August 2 until after August 3. . . .

578 P.2d at 514 (emphasis added).

The analogy between the Green case and the case at bar is readily apparent, i.e., that in the present case the defendant denied having kicked Waltz in the head.³ This was rebutted by the state's witness who said she saw the appellant kick Waltz. Such was that factual case in Green, except the denial there involved selling drugs on a prior occasion as well as being in the presence or seeing

³ In both the Green case as well as in the case at bar, the defendants-appellants denied complicity (or relevant facts regarding the complicity, i.e., kicking people in the head during fights) in the crimes for which they were being tried as well as prior crimes or bad acts.

the undercover agent on an occasion other than the one for which the defendant was on trial. In both cases, of course, the determination as to who to believe was for the jury.

In State v. Jarrell, 608 P.2d 218 (Utah 1980), defendant was convicted of attempted criminal homicide. On direct examination, he was asked questions concerning his "quasi-military" activities in Southeast Asia for purposes of showing his physical powers, and, thus, that the "inept" assault on the victim was committed by someone other than the defendant. On cross-examination, the State was permitted to question the defendant regarding his involvement in quasi-military activities in Africa, specifically, if he had taken part in a kidnapping and if he had killed people while in Africa. This was objected to by defendant, but overruled by the trial court. The Utah Supreme Court upheld the conviction, sustaining the ruling of the trial judge:

Broad discretion is allowed in cross-examination of a defendant who has opened up an area of direct examination.

608 P.2d at 228.

Thus, evidence of the kicking of Waltz on cross-examination was admissible under the ruling in State v. Jarrell, supra; and the ruling in State v. Green, supra, enables evidence of the kicking brought out on rebuttal to be admissible. Such evidence was not offered, as appellant submits, for the purpose of "attempting to show that appellant

to prove a material fact under Rule 55, that fact being whether appellant was lying when he denied kicking the victim of this case in the head. The second fact to be proved was modus operandi, whether or not this was the method (kicking) appellant used when engaging in fights.

Appellant claims that the evidence of the kicking on the prior occasion was inflammatory. Assuming, arguendo, that the evidence was inflammatory, this would not render it inadmissible due to the fact that it was relevant and competent. State v. Danker, 599 P.2d 518 (Utah 1979). The reason for such admissibility was stated in Danker:

The reason . . . is that the jury is entitled to know the truth of the situation in order to arrive at a just verdict; and notwithstanding the prerogative of the court to exclude evidence, he should only do so if he thinks it will cause the processes of justice to go awry. . . .

599 P.2d at 519-520.

Furthermore, the evidence was admitted in proper fairness to the State. The appellant absolutely denied kicking anyone, be it the deceased victim or Waltz. It would be manifestly unfair to allow the appellant to claim non-complicity as a defense without allowing the State to present available evidence to the contrary. Such

reasoning, which respondent submits should be followed in the present case, was very adequately stated in State v. Hansen, 588 P.2d 164, 167 (Utah 1978):

It is within the prerogative of the legislature to enact rules of evidence; and it is the duty of the courts to give them effect. If that is to be done in this case, the State should not be permitted to proceed in its case in which to introduce evidence of past offenses or misconduct of the defendant. However, that is the extent of the proper application of that statute. It [Rule 55] cannot be invoked to thwart the processes of justice by preventing the presentation of any competent evidence to meet any material issue raised in the case. The prosecution (i.e., the public it represents) is also entitled to fairness and justice.

It would be manifestly unfair to permit the defendant to raise [an] issue . . . , then prevent the prosecution from presenting any available evidence to the contrary. Consequently, when it becomes apparent from the evidence that the defendant is relying upon [a] defense. . . , the carrying out of the fundamental purpose of the trial, that of ascertaining the truth, makes it both logical and necessary that the State be allowed to present any evidence in impeachment or rebuttal which would show the defendant's disposition to commit the crime charged. This is in accordance with the law as correctly stated in Rule 55, [U.R.E.]; and the fact that this may include prior acts of crime or misconduct would not render such evidence inadmissible. (Emphasis added.)

Thus, respondent submits that evidence adduced on cross-examination and rebuttal regarding appellant kicking Waltz in the head during their fight was properly admitted to prove a material fact under Rule 55, as well as to prove modus operandi pursuant to the same rule.

C

SAID EVIDENCE WAS PROPER TO
IMPEACH APPELLANT'S TESTIMONY
REGARDING A RELEVANT AND MATERIAL
FACT.

Respondent submits that evidence of the kicking of Don Waltz by appellant was properly admitted for purposes of impeaching appellant's testimony regarding a relevant and material fact.

As discussed in Point I-B, supra, a material fact was whether or not appellant kicked the deceased victim of the present case in the head. Crucial to that determination was whether the jury believed appellant, who denied the kicking, or whether they believed Kim Horrocks, who witnessed the fight and testified that she did in fact witness the appellant kick the victim--twice. Evidence of a prior fight in which appellant was also involved was brought out on direct examination of the appellant. Prior inquiry by the prosecutor on cross-examination regarding details of the fight led to a question of whether appellant used the same modus operandi in the Waltz fight as he allegedly used in the fatal fight with Lynn Oliver. Once again denying such a modus operandi, appellant's credibility regarding whether he did in fact use his feet in the Waltz fight became an important issue in this respect: if appellant would lie regarding use of his feet to kick

regarding the same issue for which he is standing trial? To attack the denial by appellant regarding the Waltz incident, a rebuttal eyewitness was presented by the State not to show that appellant had a propensity to commit crimes by kicking people in the head (although as shown supra in Point I-B, such evidence was admissible to show modus operandi), but to show that he (appellant) was lying regarding such a modus operandi in the Waltz case, a fortiori, the jury could now decide whether or not he was lying in the present case regarding the same modus operandi.

This Court has ruled that cross-examination affecting the accuracy or credibility of a witness's (defendant or otherwise) testimony is admissible even though it may show commission of another crime. State v. Green, supra, at 578 P.2d 513-519; State v. Mason, 530 P.2d 795, 797 (Utah 1975).

The question is whether rebuttal evidence is admissible for the purpose of attacking the appellant's credibility. This Court answered that question affirmatively in State v. Mitchell, 571 P.2d 1351 (Utah 1977). In that case, the defendant was convicted of aggravated robbery. The prosecution's evidence showed that the defendant and his companion, armed with guns, charged into a home, terrorized the occupants and took cash from the victim, Barbara Harris. The defense presented evidence that no weapons were used, no cash taken, and that what actually occurred was two

bag of narcotics (heroin). On the witness stand, the victim Barbara Harris testified that the defendant carried a gun when he entered the premises. The defendant vigorously denied this. Harris also testified on cross-examination by defendant's counsel that she had never lied under oath and that she had not lied at the preliminary hearing, where she denied she had ever sold heroin (defendant had claimed she sold him a "bad bag" of heroin on the date in question, thus precipitating his theft of another bag). Defense counsel called Darryle Riddle as a rebuttal witness, who testified that he had worked as an undercover policeman during September and November of 1975 and that part of his duties included undercover narcotics purchases. Upon stating that he knew the prosecution's witness, Ms. Harris, the prosecution requested to voir dire the witness outside the presence of the jury.

The prosecution determined that on June 20, 1975, the day of the crime for which defendant was now being tried, Riddle was not engaged by the police. A proffer of Riddle's testimony was offered by defense counsel for the record, viz., he (Riddle) would testify that he had purchased heroin from Ms. Harris at her residence on September 29 and October 2 and 3 of 1975.

Defense counsel asserted that he was entitled to impeach her statements that she had never sold heroin, pointing

occurred, but there was a theft of heroin. The prosecution witness insisted there was no heroin. Defense counsel therefore urged that in order to receive a fair trial, defendant was entitled to present evidence that Ms. Harris had, in fact, lied.

On appeal, the State relied upon the rule that answers of a witness upon cross-examination on any irrelevant or collateral matter are conclusive and binding, and the witness may not be contradicted or impeached upon an immaterial or collateral matter of issue.

The Utah Supreme Court in its opinion spoke to the issue regarding whether or not something is a collateral matter or issue, stating that "facts which would be independently probable are not collateral." Within this category the Court placed facts "which are relevant to the issues" and "facts independently provable to impeach or disqualify a witness, whether or not introduced to contradict him." The Court also elaborated on a third type of fact, declaring that it should have been admitted as evidence:

Finally, a third kind of fact must be considered. Suppose a witness has told a story of a transaction crucial to the controversy. To prove him wrong in some trivial detail of time, place, or circumstance is "collateral." But to prove untrue some facts recited by the witness that if he were really there and saw what he claims to have seen, he could not have been mistaken about, is a convincing kind of impeachment that the courts must make place for, although the contradiction evidence is otherwise inadmissible because it is collateral under the

is to pull out the linchpin of the story. So we may recognize this third type of allowable contradiction, namely, the contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true.

The proffered testimony of witness Riddle was not impeachment of witness, Harris, on a collateral issue. There were two versions as to what occurred at the Harris' residence. According to the prosecution two armed robbers charged into the home, terrorized the occupants, and took cash from victims Harris and Bradley. Narcotics were not present or involved. According to the defense, no weapons were involved, no cash was taken, two dissatisfied customers stole a bag of narcotics as a culmination of an argument over the quality of the goods purchased. Whether Harris, in fact, distributed narcotics from her residence was, indeed, a relevant issue in the case, which defendant was entitled to prove for a purpose independent of impeaching Harris' testimony; thus, it was not a collateral issue.

571 P.2d at 1355 (emphasis added).

Respondent submits that the rebuttal evidence in the case at bar was precisely the type of facts and evidence which the Court referred to in Mitchell. The facts are practically identical, excepting the types of felonies involved. In the present case the question as to whether appellant kicked another person in the head during a fight other than the one on which he is standing trial would normally be a collateral matter. Such is not the case, however. Appellant denied kicking the deceased victim of the crime for which he is on trial. A witness (Kim Horrocks) was offered prior to such denial testifying that she saw otherwise. Appellant voluntarily brings up on direct examination the fact that he had been involved in another fight

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he denies having kicked that person in the head during the fight. Certainly such a denial by appellant under the rule in Mitchell, can be impeached on rebuttal by one who was present on that occasion and saw otherwise. To rule contrary would be, as stated supra, in State v. Hansen, to "thwart the process of justice by preventing the presentation of any competent evidence to meet any material issue raised. . . . The material issue being, in the present case, whether appellant lied when he denied kicking the victim and/or Don Waltz, when there were eyewitnesses on both occasions who testified otherwise.

Respondent thus submits that the rebuttal and cross-examination evidence was properly received in evidence for the purpose of attacking appellant's credibility concerning a material issue,⁴ that issue being whether appellant kicked an individual (Oliver or Waltz) in the head and whether his denial of such was credible.

D

SAID EVIDENCE WAS PROPERLY RECEIVED
BECAUSE ITS PROBATIVE VALUE WAS NOT
SUBSTANTIALLY OUTWEIGHED BY ANY DANGER
OF UNDUE PREJUDICE TO THE APPELLANT.

Pursuant to Rule 45, U.R.E., a trial judge ". . . may in his discretion exclude evidence if he finds that

4 See also Utah Code Ann. § 78-24-1 (1953), as amended, which reads in relevant part: ". . . in every case the credibility of the witness may be drawn in question . . . by contradictory evidence, and the jury are the judges of his credibility." (Emphasis added.)

its probative value is substantially outweighed by the risk that its admission will . . . (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury. . . ." (Emphasis added.)

Respondent has heretofore explained the probative effect of admitting evidence of appellant kicking Don Waltz. That probative effect must be balanced against any possible prejudicial effect on appellant. Such prejudicial effects could include showing a propensity for appellant to commit a certain type of crime, inflammation of the jury, or misleading a jury to a conclusion that appellant was an evil or bad person. Such a balancing process regarding evidence must be done by the trial judge, Rule 45, U.R.E., and his determination thereon should not be disturbed by this Court on appeal unless there is a showing of clear abuse of that discretion. State v. Gibson, 565 P.2d 783, 786-787 (Utah 1977); State v. Pierre, 572 P.2d 1338; rehearing denied; State v. Andrews, 576 P.2d 857 (Utah 1977).

Respondent submits that not only has appellant failed to show a clear abuse of discretion on the part of the trial judge regarding the evidence in question, but has also failed to show any substantial danger of undue prejudice required under Rule 45. Nor has he shown that any such alleged prejudice would substantially outweigh the already demonstrated probative value. Therefore, this Court should

POINT II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER.

Appellant alleges that the trial court improperly refused to grant his tendered instruction on manslaughter as a lesser included offense under three alternative theories (R.90).⁵ The trial court did submit an instruction on the lesser included offense of manslaughter on alternative theory A pursuant to Section 76-5-205(a), but refused to submit alternative theories B and C of manslaughter, as proposed by appellant.

The State alleged the following alternative theories of Second Degree Murder pursuant to Utah Code Ann. § 76-5-203(b) and (c) (1953), as amended, which were submitted to the jury:

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- 5 Appellant's theories were offered pursuant to Utah Code Ann. § 76-5-205 (1953), as amended. The alternative theories were that appellant caused the death of Lynn Oliver under one of the following circumstances:
- A. That the appellant recklessly caused the death of Lynn Oliver.
 - B. That the appellant caused the death of Lynn Oliver under the influence of extreme mental or emotional disturbance for which there is no reasonable explanation or excuse; or
 - C. That the appellant caused the death of Lynn Oliver under circumstances where appellant reasonably believed the circumstances provided a moral or legal justification or extenuation for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.

. . . (b) intending to cause serious bodily injury to Lynn Oliver, he [appellant] committed an act clearly dangerous to human life that caused the death of Lynn Oliver

or

. . . (c) acting under circumstances evidencing a depraved indifference to human life, he recklessly engaged in conduct which created a great risk of death to Lynn Oliver and thereby caused the death of Lynn Oliver.

Appellant's argument centers around the contention that all of his theories of the case regarding manslaughter should have been submitted to the jury for their consideration.

Respondent contends that the instruction on manslaughter given by the trial court was proper as well as sufficient, and the only justifiable instruction which could have been given based upon the evidence adduced at trial (R.158), and that there was insufficient evidence on which to submit appellant's B and C theories on Manslaughter to the jury.

Appellant cites several cases in support of his allegations. Respondent submits, respectfully, that the law in toto has not properly been stated by appellant regarding the evidence necessary for submission of lesser included instructions and theories in Utah.

This Court has enumerated many times the long-standing rule of law regarding submission of instructions of a defendant's theory of a case, including submission of lesser

. . . when parties so request, they are entitled to instructions on their theory of the case, including the submission of lesser included offenses. However, this is true only where there is some reasonable basis in the evidence to justify the giving of such instructions. . . .

State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890, 891 (1971) (emphasis added). See also State v. Close, 28 Utah 2d 144, 499 P.2d 287, 288 (1972) (evidence must show some reasonable basis on which to base defendant's instructions); State v. Gillian, 23 Utah 2d 372, 463 P.2d 811, 812 (1970) (defendant entitled to have his theory of case submitted if any reasonable view of evidence would support such a verdict thereon); State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947) (defendant entitled to have jury instructed on his theory if there is any substantial evidence to justify giving such an instruction thereon).

Though the law is clear that one standing accused of a criminal charge is entitled to have his theory of the case presented to the jury via instructions, such is not an absolute right and will only be enforced where there is a certain quantum of evidence available on which to base such instructions:

It is a basic legal premise that a defendant in a criminal case is entitled to have his theory of the case presented to the jury. However, the right is not absolute, and a defense theory must be supported by a certain quantum of evidence before an instruction as to an included offense need be given. . . .

State v. Hendricks, 596 P.2d 633, 634 (Utah 1979). See

The "certain quantum of evidence" referred to by this Court in Hendricks seems to be one of a "reasonable doubt" standard. State v. Dock, 585 P.2d 56 (Utah 1978); State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969). In both Dock and Castillo, the defense offered theories of self-defense and requested instructions thereon. In both cases the trial court refused to instruct the jury on the defendant's theories. In Dock the only testimony offered was that of defendant himself when he declared that "he was afraid" and thus acted accordingly by attacking a prison guard. In Castillo, the Court described defendant's theory of self-defense as "all theory and no evidence, all shadow and no substance." The Court elaborated on the standard to be used when evaluating a defense request for instruction on a defense theory:

If the defendant's evidence, although in material conflict with the State's proof, be such that the jury may entertain a reasonable doubt as to whether or not he acted in self-defense, he is entitled to have the jury instructed fully and clearly on the law of self-defense. Conversely, if all reasonable men must conclude that the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether a defendant accused of a crime acted in self-defense, tendered instructions thereon are properly refused.

457 P.2d at 620 (emphasis added).

Respondent submits that such reasoning regarding the "reasonable doubt" standard in Castillo should be applied to the present case. If so done, there is no evidence other than

appellant's allegations on appeal to support his theories. A look at the record and the evidence as well as inferences contained therein reveals no reasonable basis which would support a conviction of manslaughter based upon appellant's B and C theories (Section 76-5-205(b) and (c)).

Appellant's theory under Section 76-5-205(b) that he caused the death of Lynn Oliver under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse is strictly theory. There is absolutely no evidence of such in the record. On the contrary, testimony by eyewitnesses to the fight testified that appellant, prior to the fight, seemed to be kidding with everybody (R.301-302), appeared to be in a good mood (R.302, 333, 490), was buying everybody drinks (R.301), and was himself drinking but was not drunk (R.301-302,334). The appellant offered testimony that he was mad and drunk on the night of November 10, 1977, but such is the only evidence remotely associated with any altering of appellant's mental state (R.529).

Nor is there sufficiently reasonable evidence to support a finding of a verdict of guilty of manslaughter

6 The standard of review of this Court is to "survey the whole evidence and the inferences naturally to be deduced therefrom to see whether there is any reasonable basis therein which would support a conviction of the lesser offenses. . . ." State v. Harris, 26 Utah 2d 365, 489 P.2d 1008, 1011 (1971).

pursuant to Section 76-5-205(c), whereby appellant claims that he "caused the death of Lynn Oliver under circumstances where appellant reasonably believed the circumstances provided a moral or legal justification or extenuation for his conduct," though such conduct is not legally justifiable or excusable under the existing circumstances. Appellant would have this Court believe that Lynn Oliver's death was "just" the result of an old bar-room brawl which got out of hand--"just" a "mutual combative fisticuffs" where the participants were "acting under the influence." Yet strangely enough, no one (with the exception of Kim Horrocks), and especially appellant, seem to "remember" anything about the fight or the circumstances surrounding it or what was said, etc. (R.488, 491,493,496,497,500,501,502,503,507,508,510). Appellant could not remember what was said during the fight (R.500), could not remember where he was fighting in the parking lot (R.503), could not remember why he fought with Lynn Oliver (R.507), could not remember what caused Lynn Oliver to fall (R.508), etc. In short, appellant did not remember many of the relevant aspects of that fatal night of November 10, 1977.

Yet now on appeal he is asking this Court to rule that the trial judge should have instructed the jury to consider his theories of manslaughter of which he can offer

no recorded evidence. Case and statutory law⁷ is replete that exclusion of lesser included offense instructions as well as theories thereon are to be excluded where there is no evidence to reduce the offense to the lesser grade.

State v. Bender, 581 P.2d 1019 (Utah 1978); State v. Bell, 563 P.2d 187 (Utah 1977); State v. Dougherty, 550 P.2d 175 (Utah 1976); State v. Ferguson, 279 Pac. 55 (Utah 1929).

Pursuant to Section 77-33-6, the jury could have found appellant guilty of manslaughter based upon appellant's "A" theory (Section 76-5-205(a)); that is, that appellant did recklessly cause the death of Lynn Oliver. This is assuming, arguendo, that the jury would have found such a theory to be well founded evidentially, which obviously it did not do choosing instead to believe the evidence which supports the state's theory, thereby convicting appellant of the higher crime of Second Degree Murder.

Appellant cites State v. Dougherty, supra, and concludes that his factual situation is within the scope

7 Utah Code Ann. § 77-33-6 (1953), as amended, states: "The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense."

of the guidelines set forth therein.⁸ He reasons that any reasonable theory based upon any evidence, however slight, upon which he could be convicted of the lesser offense warrants giving of the instruction.

Appellant does not come within the guidelines set forth in the first situation described in Dougherty as he has not produced evidence which would absolve him from guilt of the second degree murder charge. The second situation in Dougherty is not applicable to appellant because having denied kicking Oliver in the head, and not

⁸ The three situations of which the Utah Supreme Court spoke regarding the giving of lesser included instructions are:

First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree, but would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory.

Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for any intermediate verdict; or where the elements of the offenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.

Third, is an intermediate situation. One where the elements of the greater offense include all the elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser offense. In such a situation instructions on the lesser included offense may be given, because all elements of the lesser offense have been proved. However, such an instruction may properly be refused if the prosecution has met its burden of proof on the greater offense, and there is no possibility of needing to reduce the greater offense.

knowing how or why the victim died, if he was believed by the jury, he would be guilty of criminal negligence at the most, probably guilty of nothing at all. This is so because if the jury believed the appellant's version of the details of the fight (of which he remembers very little), then Kim Horrocks the only living eyewitness to the kicking incident other than appellant, would have to be disbelieved by the jury. Thus a death occurs, but no one can explain how it occurred, if Ms. Horrocks is not believed and appellant believed. The third situation does not give credence to appellant's contention, as the prosecution met its burden of proof on the greater offense.⁹

Finally, in support of the view that the prosecution met its burden of proof on the greater offense, once Lynn Oliver was on the ground, the "mutual combativeness" ended the moment appellant used his boot to kick Lynn Oliver in the head. At that moment, appellant brought his actions and demonstrated the intent necessary to propel his actions into the category of Second Degree Murder.

Respondent thus respectfully submits that the trial judge was within his discretion in refusing to give the appellant's B and C theories regarding manslaughter. The jury

⁹ See also Section 76-1-402(4), which states: The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

chose not to convict appellant on the theory of manslaughter that was offered. Certainly it has not and cannot be now shown that the giving of the instruction on appellant's B and C manslaughter theories would have produced a different result in the trial. State v. Bell, *supra*. The trial court's ruling should therefore be upheld.

POINT III

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING CREDIBILITY OF THE WITNESSES AND THE WEIGHT TO BE GIVEN THEIR TESTIMONY.

Appellant alleges that the trial judge, in Court's Instruction 3 (R.146), failed to instruct the jury that a witness's testimony may be impeached and the credibility of the witness thus affected by ". . . his character for honesty or veracity or their opposites." His reasoning is that the effect of such an alleged omission left the jury with no standard to determine the purpose or weight of such evidence.

Respondent submits that the instruction which the trial court gave (R.146), covers the material points raised by appellant affecting credibility. The instruction given by the court is an omnibus instruction regarding credibility of witnesses and the weight to be accorded their testimony. See State v. Ballew, 532 P.2d 407, 411 (Montana 1975).

In a recent case, State v. Walker, 24 Wash.App. 78, 599 P.2d 533, 536 (1979), the defendant-appellant alleged that the trial court erred in refusing to give a cautionary instruction as to the credibility of a paid informant. The Court of Appeals

of Washington sustained the ruling of the trial judge, holding that the standard instruction on weight and credibility to be given the witness was sufficient.

The instruction given by the trial court in the present case sufficiently instructed the jurors as to how they were to judge witness credibility:

. . . You may . . . consider . . . in accordance with your honest convictions, what weight and credibility you should give to the testimony of each witness, measured by reason and common sense and the rules set forth in these instructions. . . .

(R.146).

It is to be noted that appellant's concern regarding the testimony of John Watson concerning Kim Horrocks' reputation in the community for truth and veracity is not well founded, since Watson was not allowed to testify regarding such (see Point IV, infra).

There was therefore, no error committed by the trial judge regarding giving of the instructions or credibility of witnesses.

POINT IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW DEFENSE WITNESS JOHN WATSON TO GIVE HIS OPINION REGARDING THE CHARACTER OF KIM HORROCKS FOR TRUTH OR VERACITY.

Appellant offered the testimony of John Watson regarding Ms. Horrocks' character for purposes of impeaching her testimony. The Court refused to allow such testimony

due to a lack of proper foundation. The colloquy in question occurred as follows:

- Q. Have you had occasion to discuss with people or to her about discussions concerning Kim Horrocks' reputation for truthfulness in the community of Lark?
- A. (Watson): What was that?
- Q. Have you had discussions with people in Lark or heard discussions with people in Lark about Kim Horrock's reputation for truth?
- A. Talk had over her, no.
- Q. Whether or not she is a truthful person?
- A. No.

* * *

(Colloquy between the court and counsel)
The Witness. (Watson): I have never been asked about it, you know, never no discussion about it.

Underhill's Criminal Evidence (Fifth Ed. 1956), at Section 195 states the mode of proving the general reputation which the accused possesses:

. . . general reputation which the accused possesses and enjoys among his acquaintances, may be shown by the testimony of such persons only. The witness is not competent unless it is first shown that he knows such reputation, which must be that which is current in the neighborhood where he and the accused reside. If witness does not know where accused lived, he is incompetent. The witness cannot give an opinion which is merely the result of observing the disposition and conduct of the defendant. What is required of him is his knowledge of the existing general reputation which he has obtained by hearing the comments of others on the accused while he lived among those who knew him, and not his own exclusive personal knowledge. The qualification of character witnesses is largely within the discretion of the trial court.

It is apparent that Watson was not competent as a witness to testify regarding Ms. Horrock's reputation for truth or veracity in the community of Lark as he had not talked with people in the same community in which she lived concerning her reputation; thus he had no way of knowing what her reputation consisted of.

The trial court made the proper ruling regarding the testimony; thus, it should not be interfered with by this Court.

CONCLUSION

The jury returned a verdict of guilty of Murder in the Second Degree. That verdict should not be interfered with unless there is evidence of prejudice which has occurred in a substantial manner. State v. Pierre, 572 P.2d 1338; rehearing denied State v. Andrews, 576 P.2d 857 (Utah 1977). Appellant has alleged several errors in the proceedings regarding evidentiary matters and instructions. Respondent submits that no error has been shown by appellant, or in the alternative that any such error does not raise a reasonable probability or likelihood that there would have been a result more favorable to appellant. Respondent, therefore, urges affirmation of the judgment of the trial court.

Respectfully submitted,

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