1990

Utah v. Terry L. Hay : Brief of Appellee

Utah Supreme Court

R. Paul Van Dam; attorney general; Marion Decker; assistant attorney general; attorney for respondent.
Manny Garcia; attorney for appellant.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 900457
v.	:	
TERRY L. HAY,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

THIS IS AN APPEAL FROM A CONVICTION OF CRIMINAL HOMICIDE, MURDER IN THE SECOND DEGREE, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-203 (AMENDED 1991), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL R. MURPHY, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
MARIAN DECKER (5688)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

MANNY GARCIA
431 South 300 East #101
Salt Lake City, Utah 84111

Attorney for Appellant

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236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

MANNY GARCIA
431 South 300 East #101
Salt Lake City, Utah 84111

Attorney for Appellant

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of criminal homicide, murder in the second degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (amended 1991).[1]

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2(3)(i) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

The following issues are presented on appeal:

1. Did the trial court abuse its discretion in denying defendant's motion for a mistrial based on ineffective assistance of trial counsel, allegedly resulting from trial counsel's failure to introduce the victim's knife into evidence?

When raised on appeal after trial court proceedings on the issue, the question of trial counsel effectiveness is a mixed

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[1] Although section 76-5-203 has since been amended to delete the "second degree" classification (this level of criminal homicide is now simply called "murder"), the State will refer to the offense as "murder in the second degree," in accord with the language of the statute in effect at the time of defendant's prosecution.

one of law and fact. Strickland v. Washington, 466 U.S. 668, 697-98 (1984) (review following habeas corpus proceeding); State v. Templin, 805 P.2d 182, 186 (Utah 1990) (reviewing denial of new trial motion). Defendant must show both that counsel's performance was deficient and that such deficiency was prejudicial to defendant. Templin, 805 P.2d at 186.

2. Did the trial court abuse its discretion in denying defendant's motion for a mistrial based on prosecutorial misconduct?

This issue has not been properly preserved for review. State v. Johnson, 774 P.2d 1141, 1145 (Utah 1989); State v. Cobb, 774 P.2d 1123, 1126 (Utah 1989) (grounds for an objection must be specifically and distinctly stated in the trial court before this Court will review such claim on appeal).

3. Did trial counsel's failure to object to allegedly gruesome evidence constitute ineffective assistance of counsel?

Where first raised on appeal, the question of effectiveness of trial counsel is one of law, in that only the record of the original trial is examined. State v. Humphries, 818 P.2d 1027, 1029 (Utah 1991). Defendant must show both that counsel's performance was deficient and that such deficiency was prejudicial to defendant. State v. Templin, 805 P.2d 182, 186 (Utah 1990).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes, or rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with criminal homicide, murder in the second degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1990), including a firearm enhancement under Utah Code Ann. § 76-3-203 (1990) (R. 6-7).

Following a four day jury trial defendant was convicted as charged (R. 167).

The trial court sentenced defendant to a term of five years to life in the young adult facility at the Utah State Prison, which sentence was to run concurrent with an additional one year, firearm enhancement term (R. 223).

STATEMENT OF THE FACTS

A. Victim's Body Discovered

Responding to a tip from some rabbit hunters on December 31, 1989, Detective Scott Carter, of the Utah County Sheriff's Office, investigated the discovery of a "skeletonized body" in a remote area near Utah Lake (Transcript of Jury Trial, July 10, 1990 [T1.] 22). The corpse was discovered lying on top of a sleeping bag, on top of a wood board, dressed in "biker shorts," Levi's and a single black cowboy boot on the left foot (T1. 25-27). A sock containing the remains of the right foot was

located on top of the torso, near the shoulders (Transcript of Jury Trial, July 13, 1990 [T4.] at 534).

B. Autopsy Indicates Homicide

Dr. Sharon Schnittker, an assistant director for the Utah State Medical Examiner, autopsied the unidentified corpse on January 1, 1990 (Transcript of Jury Trial, July 11, 1990 [T2.] at 201). Dr. Schnittker recovered two bullets from within the skull cap and observed two entrance wounds slightly to the right of the middle back of the skull (T2. 202). From the beveling of the entrance wounds, Dr. Schnittker was able to determine the bullet trajectories were "slightly from right to left . . . and slightly downward toward [the] feet" (T2. 206). Dr. Schnittker further determined "that the muzzle of the gun held by the shooter [came] from the back of the decedent, pointing toward the front of the decedent, so [that the bullets entered] the back of the head" (T2. 208). Based on these estimations, and the positioning of the entrance wounds (within five/eighths of an inch of each other), Dr. Schnittker determined that at the time the shots were fired the victim's head was "lying on the ground, or in some way in a fixed position" (T2. 219). Thus, it was "most likely [that] the victim was lying down and the shooter standing over the victim[,]" and the victim's head was either "face down completely, or turned slightly to the right" (T2. 220).

Additionally, Dr. Schnittker discovered a separate fracture, unconnected to the bullet wounds, on the right side of the skull, along the upper eyebrow ridge or zygoma, and the

temporal and parietal skull area which appeared to have been caused by a severe, blunt force trauma (T2. 211-213). She was unable to determine whether the skull fracture occurred before or after death (T2. 242).

Based on her autopsy findings, Dr. Schnittker concluded that the death was a homicide, caused by the two gunshots to the victim's head (T2. 223).

C. **Victim Identified as Missing Person, Lony Crosby**

The corpse was subsequently identified as that of 18 year old Lony Crosby, who had been reported as missing since August 2, 1989, when he failed to return with defendant from a camping trip the two had taken to Wales, Utah (T1. 4, Transcript of Jury Trial, July 12, 1990 [T3.] at 324).

Lony's grandparents, Arlene and John Crosby, last saw Lony alive when he and defendant visited their Wales farm in late July 1989. The morning of August, 1, 1989, Lony's grandfather took defendant and Lony over to a neighbor's property to work on a fence (T2. 255). They returned to the Crosby home around 11:30 a.m. for lunch (T2. 256). After lunch, defendant and Lony packed their bags and prepared to go further up the mountain to hunt, leaving the Crosby home at approximately 12:30 p.m. (T1. 244). Lony's grandfather observed that both boys had knives (T2. 260). Later that afternoon, at approximately 1:30 p.m., Lony's grandfather heard two rapid gun shots fired from the mountains west of his home (T2. 257). Approximately one hour later, defendant returned to the Crosby home, alone (T2. 245, 258-59).

When Lony's grandmother asked him where Lony was, defendant said that he was up in Wales Canyon, "getting their dinner" (T2. 246). Defendant then went inside the Crosby's trailer and collected the rest of his things (T2. 247). When Lony's grandmother asked him how he intended to get back up the mountain with all of his stuff, defendant told her that Lony was going to meet him halfway (T2. 247). Defendant then took off toward the mountain (T2. 247). Neither Mr. or Mrs. Crosby saw defendant or Lony again (T2. 247).

When defendant returned to Salt Lake City on August 1, 1989, the first person he visited was Lony's girlfriend, Jennifer Bratt, whom defendant had also dated (T2. 270). He arrived at Jennifer's house between 9:00 and 10:00 p.m. (T2. 270). When Jennifer asked him where Lony was, defendant told her that Lony had hit him over the head with a rock and left, taking the gun and their knives (T2. 270). Jennifer, who saw no sign of injury, reached to feel the bump on defendant's head, but he would not let her touch it (T2. 271). Defendant speculated that Lony had gone to Reno to be with his ex-girlfriend (T2. 271).

Jennifer saw defendant again the next day at school and again asked where Lony was (T2. 272). Defendant told her that he had talked to Lony and that Lony had hitchhiked to Reno (T2. 272). Jennifer and defendant remained good friends and began to date seriously on September 17, 1990 (T2. 273). Almost every day defendant told Jennifer that he loved her (T2. 273). Although they talked about Lony often, and defendant told Jennifer that

Lony had called him about four times, he never told her where Lony was (T2. 274).[2]

The second person defendant talked to upon his return to Salt Lake was his friend, Travis Pearce (T3. 401). Defendant walked into Travis's yard early on the morning of August 2, 1989 (T3. 401). When Travis asked defendant where Lony was, defendant told him that he had been camping with Lony and that while he was sleeping, Lony stole $30 and a .22 rifle from him, and left (T3. 402). Defendant speculated that Lony had run away to Wisconsin and said that he (defendant) was on his way to talk to Lony's mother (T3. 402). Over the next few months, Travis often

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[2] Prior to traveling to Wales with Lony, defendant had told Jennifer that he didn't like the way Lony treated her, and that she was crazy to go back to him (T2. 309). Defendant also sent her flowers and asked Jennifer not to go back to Lony (T2. 309).

Additionally, at trial, defendant denied developing a romantic interest in Jennifer until approximately one month after the homicide (T3. 439, 467). However, when asked by the prosecutor, defendant admitted it was possible he had written Jennifer a letter before the homicide in which he declared:

> I wish I could only tell you how much I love you. I have always waited for the right girl, and I found her. But I tried to tell you you're the one, you're the one. It's so hard to say it to you because you're so sweet and heartful [sic]. . . . Well, better stop and let you do your school work. Remember I'll always love you no matter what. I just wish I could see you every day, but someday soon I'll be back and hopefully, we'll be . . . able to go out for a little bit. I'll always wait for you and I hope you'll do the same. Well, got to go. P.S.: Don't tell nobody, please. I love you more than words could say. Love you, Slick. Love, Terry.

(T3. 495-96).

inquired if defendant had heard from Lony and defendant replied that he had talked to Lony on the phone and that Lony was in Reno (T3. 403).

Lois Crosby, Lony's mother, talked to defendant later on the morning of August 2, 1989 (T3. 318). When Mrs. Crosby asked where her son was, defendant said he didn't know (T3. 319). Defendant told her that while they were camping, Lony started acting strangely and talking about thumbing to Wisconsin (T3. 320). Mrs. Crosby asked why her son would go to Wisconsin and defendant said he didn't know, but promised that he would find him (T3. 320, 334). Mrs. Crosby observed that defendant was a little nervous, but mostly tired and sunburned (T3. 320).

Defendant called Mrs. Crosby at approximately 2:30 p.m. and said that Lony had been seen in Mapleton, Utah, the night before in a big white truck, and that he had been saying good-bye to the people he knew there (T3. 320-21).

Defendant stopped by the Crosby home again around 5:30 p.m. (T3. 321). He "was smoking a lot of cigarettes, being shaky, kind of moving up and down out of his chair, crying, just very, very -- kind of fell apart deal [sic]" (T3. 321). Defendant told Mrs. Crosby that he "took a nap, and when he woke up Lony was gone. He just -- poof -- disappeared" (T3. 321). Lony's father similarly observed that defendant was visibly shaken (T3. 337). "He would stand up and sit down a lot, moved [sic] his hands across the table and was chain smoking" (T3. 337). Mrs. Crosby asked whether they had gotten into a fight and

defendant said they had, but she observed no signs of injury on him (T3. 322).

After talking to defendant on the evening of August 2, 1989, Lony's father contacted Paul Relch, a Deputy Salt Lake County Sheriff (T3. 338). Officer Relch interviewed defendant that same night at the Crosby residence (T3. 340). Defendant told Officer Relch that it was approximately 6:00 p.m. when he and Lony got up the mountain and that he took a nap (T3. 342). When he awakened at approximately 7:15 p.m., defendant claimed that Lony was gone (T3. 342). Additionally, defendant told the officer that he and Lony had been friends for a long time and that they had had no problems on the trip (T3. 342).

Officer Relch spoke with defendant again approximately one-half hour later at defendant's home (T3. 342). Defendant first stuck by his original story (T3. 343). However, when Officer Relch informed defendant that he didn't think his story made sense, defendant broke down and became very emotional (T3. 343). With tears in his eyes, defendant told Officer Relch that he had promised Lony "not to tell, . . . and didn't want to break his promise to Lony, . . . not to tell where [Lony] was or what he was doing" (T3. 343). Defendant then told the officer that Lony had run away to Nevada where he was going to get a job (T3. 344). Defendant also told Officer Relch that they had stolen a truck to return from Wales, and that he had last seen Lony when he dropped him off at the Draper exit on I-15, at approximately 12200 South (T3. 344).

Over the course of the next several months, defendant continued to represent that he was in touch with Lony and that Lony was well. Mrs. Crosby called defendant approximately two or three times a day to see if had heard from Lony (T3. 323, 332). Defendant told her that Lony had called him twice and was doing fine, and that he had asked Lony to call her (T3. 323). However, defendant never told Mrs. Crosby where her son was (T3. 323). Although defendant agreed to assist the Crosbys in a search of the Wales area, he failed to show up at the time of the search, which was conducted two weeks after Lony's disappearance (T3. 324).

A mutual friend of defendant and Lony, Kendall Davis, was present on one occasion when Mrs. Crosby telephoned (T3. 388-89). Kendall observed how upset the call made defendant and felt badly for him (T3. 392). Defendant said, "If somebody would call them, or something like that, to -- you know, just let them know that you talked to him, because they trust you. They believe you" (T3. 388-89). Although he had not talked to Lony since his disappearance, Kendall subsequently made such a call on defendant's behalf (T3. 389).

Detective Peter Godfrey of the Salt Lake County Sheriff's Office interviewed defendant as part of his investigation of Lony's disappearance (T3. 406, 408). Defendant repeated essentially the same story he had told Officer Relch and Lony's family and friends about Lony going to Reno (T3. 406-09). Detective Godfrey contacted several motels in Reno, but found no

record of Lony (T3. 408). Additionally, defendant told Detective Godfrey that he dropped the stolen truck off at 4500 South and then contacted the authorities as to its location (T3. 410).

C. Defendant Suspected

After reviewing police reports surrounding Lony's disappearance, Detective Carter began to suspect defendant in the homicide and brought him in for questioning on January 2, 1990 (T1. 28-29). Defendant said he had known Lony for about 10 years and that he and Lony had gone camping in Wales, Utah in late July 1989 (T1. 32). They stayed at Lony's grandparent's trailer where they performed odd jobs and went rabbit hunting (T1. 32). Defendant told the detective that he and Lony stole a truck for their return trip to Salt Lake City on August 1, 1992 (T1. 33). According to defendant, they exited I-15 at 90th South and Lony, who had "family problems," said he didn't want to go home, so defendant left him there, near an empty field (T1. 33). When Detective Carter informed defendant that his story was inconsistent with other facts he had uncovered, defendant "slid down in his chair[,] sobbed," and confessed that he was responsible for Lony's death (T1. 35).

1. Defendant Claims the Homicide Occurred in Murray, Utah

Defendant told Detective Carter that after he and Lony returned from Wales, they decided to camp out in an empty field near Lony's parents home in Murray, Utah (T1. 35). They set up a camp with their sleeping bags and were sitting around talking when they got into an argument over Jennifer (T1. 37). Defendant

claimed that Lony confronted him with the fact that defendant had slept with Jennifer and then came at him with a knife (T1. 37). Defendant reached for his rifle, pointed it at Lony, and it discharged (T1. 37). When asked for more details, defendant said he could not remember "the exact way" the shooting occurred or where the bullets hit Lony; however, he did recall that Lony was about 10 feet away at the time (T1. 37-38). He further recalled that after the gun went off, Lony fell to the ground (T1. 38).

According to defendant, he then fled to his parent's house to get his father's truck (T1. 39). He parked the truck approximately 75 feet away from Lony's house and then pulled Lony's body on a sleeping bag to the truck where he lifted it into the back (T1. 40). Defendant used the wood racks off the side of the truck to cover the body (T1. 40). Defendant then drove to Utah County where he dumped Lony's body near Utah Lake (T1. 41).

Following defendant's explanation for the homicide, Detective Carter turned him over to Murray City Detective, Jeff Anderson, for further questioning (T1. 48-49). Detective Anderson interviewed defendant in the early morning hours of January 3, 1990 (T1. 69-70). At that time, defendant appeared alert and responsive, but somewhat quiet and depressed (T1. 71). Defendant told Detective Anderson that he and Lony had driven a four wheel ATV as far as Mapleton, Utah, and then hitchhiked the rest of the way to Wales (T1. 71). He said they returned from Wales in a truck on either July 31, 1989, or August 1, 1989 (T1.

72). According to defendant, he parked the truck on 4500 South, by the Jordan Queen, and left Lony there while he went over to Jennifer's house to let her know they were back (T1. 72-73). When defendant returned to the truck, he and Lony gathered their belongings and walked to a field near the Crosby home located at approximately 4850 South, 400 West, just north of the Galleria (T1. 73).

Defendant claimed that he and Lony put their sleeping bags down, talked about getting some beer and eventually walked to a nearby Circle K where they stole a case of beer off of a delivery truck (T1. 74). After they had each drunk 11 cans of beer, defendant said he and Lony began to talk about Jennifer, and Lony got "extremely violent and upset" (T1. 75). Lony started "yelling and screaming," and "grabbed" a knife from his backpack (T1. 75-76). Defendant claimed that Lony started coming towards him, making verbal threats and swinging his knife within two feet of him (T1. 76-77). Defendant grabbed his rifle, a .22 caliber semi-automatic and held it at his hip with the barrel pointed upwards (T1. 77, 188-89). Defendant claimed the rifle discharged because his fingers were shaking (T1. 77, 188-89). According to defendant, Lony swung the knife, stumbled and spun before he fired (T1. 192). After the shooting, defendant noted that Lony had fallen to the ground motionless (T1. 79). Defendant called Lony's name, but received no response (T1. 79). Scared and frightened, defendant said he wanted to hide Lony's body, and to run away from it (T1. 143). Defendant claimed that

the rifle was loaded because they had been rabbit hunting (T1. 194).

Additionally, defendant told Detective Anderson that after dumping Lony's body near Utah Lake he returned to Murray and threw Lony's backpack and the knife Lony had threatened him with in a nearby creek (T1. 81). He described Lony's knife as having a 12 inch long fixed blade with a black and red handle (T1. 81). Defendant subsequently took Murray City detectives to the field where he claimed the homicide occurred and, while the officers videotaped the scene, attempted to demonstrate what had happened (T1. 84)

2. Evidence that the Homicide Occurred in Wales, Utah

At the request of Detective Anderson, Arlene Crosby searched the area near her Wales, Utah home, where she believed Lony and defendant had camped (T2. 248). During that search she found a cowboy boot, in a bush, 2-3 feet off the ground (T2. 249-50).

Detective Anderson traveled to Wales to investigate the boot on January 9, 1990 (T1. 84-85). The back of the boot, which was similar to the boot found with Lony's body, had been opened from the heel up, with a smooth edge (T1. 102-03, T2. 154-55). As part of his investigation, Detective Anderson also searched the foothills west of the Crosby residence where he found two .22 casings and a knife (T1. 84-85, 88). He also observed a shallow hole, covered with broken branches (T1. 92).

D. Defendant's Story

At trial, for the first time, defendant admitted that the homicide had actually occurred in Wales, Utah (T3. 446). Defendant claimed that he told Detectives Carter and Anderson that the shooting occurred in Murray because he "didn't want to be around them (the officers)," and because "that's where we both lived. I just didn't want to believe it, so I just, you know, thought of something and said it" (T3. 466).

1. Defendant Claims He Acted in Self defense

According to defendant's trial testimony, he and Lony headed up Wales canyon after having lunch with Lony's grandparents on August 1, 1989 (T3. 441). They took sleeping bags, backpacks, defendant's gun and their knives (T3. 441). They each had two knives, one they kept in their individual pockets and one they kept in their individual backpacks (T3. 441). According to defendant they intended to use his gun to shoot some rabbits for dinner (T3. 442).

When they arrived at the campsite, defendant claimed that he went looking for food while Lony dug a fire pit (T3. 442). When defendant returned to the campsite, he and Lony began to talk about Jennifer (T3. 443). According to defendant, Lony said something about wishing Jennifer were there for "sexual purposes," and he (defendant) just "chuckled" (T3. 443-444). Defendant further claimed that they were "just sitting there" when "Lony jumped and said[,] 'I can't believe you did it'" (T3. 443). Defendant "looked at him, [and] told him, . . . 'Well, you

know, it's over, you know. Forget about it, it's past tense'"[3] (T3. 443). Lony then "got in his bag and grabbed a knife," and "said that he wanted to kill [him]" (T3. 443, 446). Defendant claimed that he picked up his gun "just to scare [Lony] off and frighten him and make him stop" (T3. 445). Defendant said Lony "swung the knife once," then he "went into a spin, into a fall, . . . and the next thing you know, the gun goes off" (T3. 446). Defendant claimed his hands were "shaking" as he held the gun and that he "didn't know what to do" (T3. 447). He estimated that Lony was two feet away at the time he shot him, but he didn't "pay attention" to Lony's position when he fell (T3. 447). Additionally, he claimed to remember firing only one shot (T3. 448).

After the shooting, defendant observed that "Lony was laying [sic] down on the ground and [defendant] hollered at him once and [Lony] didn't move" (T3. 448). Defendant "picked up the bottom of the sleeping bag and drug [sic] it over to Lony, and dug this [sic] hole" (T3. 448). He then "moved [Lony's body] over to that [sic] hole, . . . and kicked dirt over it," because he "didn't want to see it" (T3. 448). Although defendant claimed that Lony dug the pit to cook their dinner, it was approximately five feet long, three feet wide and one foot deep (T3. 484).

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[3] Defendant believed Lony was referring to the fact that he had slept with Jennifer (T3. 436-438). Although defendant never talked to Lony about the fact that he had slept with Jennifer (T3. 438), defendant was aware that Jennifer had told Lony about the incident (T3. 436-437).

Defendant claimed that he "didn't pay no attention" to where he shot Lony (T3. 483), and never looked to see where the bullets were in Lony's body (T3. 448). Additionally, even though Lony wore his hair closely shaved (T3. 484), and fell on his stomach after the shooting (T3. 483), defendant claimed he never observed the bullet wounds in the back of Lony's head (T3. 483-84). Nor did he notice any blood (T3. 504).

After dumping Lony's body in the pit, defendant gathered up their camping gear and "threw" the knife and "some other things" as he ran down the hill (T3. 449). Defendant did not recall talking to Lony's grandmother, but admitted that it could have happened (T3. 450). He did recall stealing a truck and driving to Salt Lake City where he arrived shortly before dark (T3. 451). Defendant hid Lony's things in a barn behind Lony's house where he spent the night (T3. 452).

2. Defendant Refuses to Believe that Lony is Dead

Defendant explained that he had lied to Lony's family and friends about Lony's whereabouts because "[he] didn't want to believe that Lony was dead" (T3. 454). Rather, he wanted to believe "that Lony did leave [sic], [that] he went to Reno or someplace. I wanted to believe that he was still alive" (T3. 456). In the months following the homicide and before the discovery of Lony's remains, defendant claimed that he never thought about the shooting, rather "[he] just thought Lony was out of town, [that] he went to Reno" (T3. 464).

Defendant said he returned to the scene of the shooting approximately six weeks later, in the middle of the night, "to prove to [himself] that it didn't happen" (T3. 457). He described seeing the sleeping bag, picking it up and carrying it down to his father's truck (T3. 458, 491). Although Lony's decomposed body was resting on top of the sleeping bag, defendant did not acknowledge looking at or otherwise noticing its decomposed state (T3. 458-59, 488, 491, 504). Rather, he persisted in his belief that the shooting had not occurred (T3. 458). Defendant further claimed that he "[didn't know] and "didn't pay no attention" to whether Lony's right foot came off when he attempted to move the body to Utah Lake (T3. 489).

Although the homicide occurred in Sanpete County, defendant was prosecuted in Salt Lake County, based on his representations, prior to trial, that the homicide had occurred in Murray, Utah (T1. 6).

Other evidence will be discussed as it is pertinent to specific points.

SUMMARY OF ARGUMENT

Defendant was not denied the effective assistance of trial counsel. Although trial counsel's conduct was arguably deficient in failing to introduce the victim's knife during trial, defendant's theory of self defense was adequately presented to the jury. Additionally, the victim's knife was ultimately presented to the jury during their deliberations, along with defendant's theory of its importance as corroborative

of his version of the homicide. Thus, defendant has failed to demonstrate any unfair prejudice.

As for defendant's assertion that the prosecutor concealed and withheld the victim's knife in violation of due process, it is complete speculation, devoid of record support and should be rejected. Moreover, the issue has not been properly preserved for review.

Finally, defendant was not denied the effective assistance of trial counsel when counsel failed to object to allegedly improper cross-examination by the prosecutor. Although the trial court had previously cautioned the parties to avoid the gruesome aspects of defendant's movement of the victim's corpse, it became necessary for the prosecutor to confront defendant with the arguably gruesome realities of his actions when defendant alleged that he did not believe the victim was dead, even after having moved the decomposing corpse from the homicide scene to Utah Lake. Moreover, even without the arguably gruesome testimony, the jury had substantial evidence from which to infer that defendant was not credible, and that his version of events was inconsistent with the physical evidence.

ARGUMENT

POINT I

DEFENDANT HAS NOT DEMONSTRATED THAT TRIAL COUNSEL'S FAILURE TO INTRODUCE THE VICTIM'S KNIFE INTO EVIDENCE DURING TRIAL DEPRIVED HIM OF THE EFFECTIVE ASSISTANCE OF COUNSEL; NOR HAS HE ESTABLISHED ANY PROSECUTORIAL MISCONDUCT

A. Effective Assistance of Trial Counsel

Defendant alleges that he was denied the effective assistance of counsel because trial counsel did not offer the victim's knife into evidence during trial (Br. of App. at 10-13). Apparently, trial counsel was operating under the assumption that the victim's knife had not been discovered and was therefore unavailable (Transcript of Jury Trial, July 13, 1990 [T4.] at 576). However, after the jury was excused to deliberate, trial counsel observed the victim's knife in the prosecutor's briefcase and brought the matter to the attention of the trial court with a motion for a mistrial (T4. 592). In so moving, trial counsel acknowledged that she may have been apprised of the knife's existence through discovery (T4. 592-93). If so, trial counsel indicated that she was

> simply rais[ing] the issue for appeal purposes on the grounds of ineffective assistance of counsel, because in [her] obvious haste to prepare for the trial . . . [she] did not catch the fact that that knife existed, which would [have corroborated her] client's story.

(T4. 593). Trial counsel further clarified that she was "not alleging that [the State] hid [the knife] from [her]" (T4. 594).

In considering trial counsel's motion, the court suggested that the parties stipulate to the knife's admission (T4. 597). Trial counsel urged the court to grant her mistrial motion, but acknowledged that if the court had determined to deny the motion, she preferred that the matter be cured by stipulation (T4. 597). The court indicated that it would not grant the motion for mistrial "unless there's [sic] good ground for it, [a]nd if there's [sic] a way to cure things, there's [sic] not good ground for a mistrial" (T4. 598).

The parties ultimately came up with a stipulation in which each party briefly stated the knife's "significance" to their individual theories of the case (T4. 600-01). Prior to the court reading the stipulation to the deliberating jurors, trial counsel again expressed her concern that "it would have been a lot more effective if [she] could have asked [defendant] to identify [the knife], if [she] could have argued and gone on and on about the credibility, just to that extent" (T4. 602). The court responded that

> [n]o one is entitled to a perfect trial. Everyone is entitled to a fair trial. And in fact the way this has occurred may have been much more effective for your client than any other way. The jury is going to look upon it as something they never expected, either manna from heaven or elsewhere, and I think it could well be more effective in your behalf because of the stipulation of the parties and my consideration of it.

(T4. 602). The court then read the following stipulation to the jurors:

> Members of the jury, we're going to do something a little bit out of the ordinary. I'm going to, at this time, receive Exhibits 42 and 43. 43 is a knife; 42 is a map of the area of search [sic], or the area that we have been talking about in Sanpete County, with a designation of 42 on the map, with a red "X" in the lower left-hand side of the map indicating where the knife, Exhibit 43, was found.
>
> There was a knife in existence and neither party established foundation for its admissibility into evidence during the trial proper. Both parties have agreed, however, that the knife should be admitted at this time for consideration by the jury in its deliberations. It's a knife with a black handle trimmed in red, found in late August or early September 1989, and marked as Exhibit 43-S by a member of the Sanpete Search and Rescue organization, and found, as I indicated, at a place designated by the red "X" on the diagram, which is Exhibit 42-S.
>
> The State claims the following from this evidence: This knife was located 121 feet south of where the cut boot was located. State contends this knife was probably used to cut said boot.
>
> The defendant claims the following from this evidence: That is, the knife matches [defendant's] description of the knife used by Lony Crosby. The knife was located south of the campsite where Lony Crosby was shot. [Defendant] testified that he threw the knife to the south.

(T4. 603-04) (a complete copy of the pertinent transcript pages is contained in Addendum A). On appeal defendant alleges that the trial court's "cure" was an inadequate "remedy" and that he was unfairly prejudiced as a result (Br. of App. at 12).

1. Defendant's Burden to Establish Prejudice

A defendant who raises a claim of ineffective assistance of counsel must show both that counsel rendered a

deficient performance in some demonstrable manner and that a reasonable probability exists that but for counsel's deficient performance, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Carter, 776 P.2d 886, 893 (Utah 1989); State v. Frame, 723 P.2d 401, 405 (Utah 1986). A "[d]efendant must prove that specific, identified acts or omissions fall outside the wide range of professionally competent assistance. The claim may not be speculative, but must be a demonstrative reality[.]" Frame, 723 P.2d at 405. And, the deficient performance must be so prejudicial as to "undermine confidence in the reliability of the verdict." Ibid. If defendant fails to satisfy his burden of showing that he was unfairly prejudiced as a result of the alleged deficiency, this Court need not determine whether counsel's performance in not introducing Lony's knife during the course of trial was deficient. State v. Verde, 770 P.2d 116, 119 (Utah 1989).

2. Defendant Was Not Prejudiced by Trial Counsel's Performance

Instead of making the required, specific showing of prejudice, defendant simply asserts, in conclusory fashion, that if trial counsel had introduced the knife into evidence, "he could have developed a sounder theory" of self defense, and "enhanced [his] credibility[.]" (Br. of App. 11). Defendant levels these allegations with no discussion of the defense actually presented by trial counsel, and does not articulate how it was prejudicial beyond his speculative, unsupported assertion

that trial counsel's failure to introduce the knife "compromised his defense" (Br. of App. 13).

In an analogous case, the Utah Court of Appeals recently recognized that a "failure to make a motion for discovery does not constitute per se ineffective assistance" where a review of the record demonstrates that counsel "investigated the case through methods other than by a formal discovery motion." State v. Vigil, 197 Utah Adv. Rep. 18, 19 (Utah App. October 7, 1992). Similarly, trial counsel's failure to introduce the victim's knife into evidence during the course of trial should not constitute per se ineffective assistance because a review of the record demonstrates that trial counsel adequately presented defendant's theory of self defense to the jury.

In addition to defendant's testimony that he shot in self defense (T4. 445-47), trial counsel introduced the testimony of pathologist Edwin Sweeney, to the effect that the entrance wounds on Lony's skull were not consistent with an execution type killing, and that it was possible the wounds occurred while Lony was "stepping forward and turning" (T4. 525-26). In her cross-examination of assistant medical examiner, Sharon Schnittker, trial counsel similarly established that while it was "most likely" that Lony's head was stationary at the time of the shooting, Dr. Schnittker could not say so with "absolute certainty" (T2. 227). Further, in her cross-examination of Jennifer Bratt, trial counsel established that Lony was

"extremely jealous" of Jennifer's relationship with defendant (T2. 291), and that Lony had told Jennifer that he would "kill" defendant "some day" (T2. 292).

Additionally, trial counsel used the fact that Lony's knife was not in evidence to enhance defendant's credibility. Specifically, the State introduced a knife found near the scene of the shooting, but which did not match defendant's description of the knife Lony had allegedly threatened him with (T1. 88-91). During her examination of defendant, trial counsel asked, "If you were making up a lie, wouldn't it be easier just to say that you took the knife with you?" (T3. 506). Defendant responded affirmatively and also indicated that he did not know whether the police had found the knife that he had described (T3. 506). During her closing argument, trial counsel made the most of the missing knife, asking the jury to consider that if it was true defendant had lied about "crucial elements of what happened, why didn't he lie and say that, yes, [the knife introduced by the prosecutor] was [Lony's] knife?" (T4. 576).

Finally, and perhaps most significantly, Lony's knife was ultimately presented to the jury, along with defendant's theory of its importance as corroborative of his version of the homicide (T4. 604, see Addendum A).

In light of the foregoing, defendant's speculations on appeal are simply insufficient to establish that the trial court's cure was inadequate to remedy the minor, if any, prejudice he suffered as a result of trial counsel's alleged

deficiency. Frame, 723 P.2d at 405. He has not shown how the evidence amassed on either side might have been so altered by an error of trial counsel that "the entire evidentiary picture" would have been affected. Strickland, 466 U.S. at 696.

B. The Prosecutor's Conduct was Appropriate

As for defendant's assertion that the prosecutor concealed and withheld Lony's knife in violation of due process (Br. of App. at 13-18), it is complete speculation, devoid of record support and should be rejected. See Koulis v. Standard Oil Co., 746 P.2d 1182, 1184 (Utah App. 1987) ("'This Court need not, and will not, consider any facts not properly cited to, or supported by, the record.'" (quoting Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142, 144 (Utah 1978)); Utah R. App. P. 24 (e). See also State v. Bingham, 684 P.2d 43, 46 (Utah 1984) ("This Court will not rule on matters outside the trial court record."). Moreover, the issue has not been properly preserved for review. State v. Johnson, 774 P.2d 1141, 1145 (Utah 1989); State v. Cobb, 774 P.2d 1123, 1126 (Utah 1989) (grounds for an objection must be specifically and distinctly stated in the trial court before this Court will review such claim on appeal). As noted in Part A, supra, trial counsel clarified that she was *not* alleging that the State "hid" the knife from her: "To that extent I take responsibility" (T4. 594). Thus, the State declines to address, and the Court should not consider, defendant's assertion that the State was obligated to introduce

the knife into evidence, or otherwise bring it to trial counsel's attention (Br. of App. at 15).

POINT II

DEFENDANT HAS NOT DEMONSTRATED THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO ALLEGED IMPROPER EVIDENCE DEPRIVED HIM OF THE EFFECTIVE ASSISTANCE OF COUNSEL

Prior to trial, defendant filed a motion in limine to "[e]xclude [e]vidence . . . regarding [his] transportation of the victim's corpse" (R. 62, 255, Transcript of final pretrial hearing, July 2, 1990, [PT.] at 14). Defendant argued that the evidence was neither relevant nor probative of his state of mind at the time of the homicide, and that even if it was relevant, the danger of unfair prejudice substantially outweighed any probative value (R. 255-56, PT. 14-15).

Finding that the evidence was relevant "to the issue of credibility," the trial court denied defendant's motion, "insofar as it depends on relevance[.]" (R. 260, PT. 19). In addressing the balancing test of rule 403, Utah Rules of Evidence, the Court inquired what the nature of defendant's concerns were:

> Is the only inflammatory portion that you're claiming, . . . is, that the act happened, and that he, [defendant], moved the body? Is that the only inflammatory thing you are claiming, or is it in [sic] your concern about evidence [sic] about how he moved the body and the condition of the body at the time, and its decayed state? What is it you're concerned about?

(R. 261, PT. 20). Trial counsel responded that they were only "concerned about him having moved the body[,]" and "that the

State [could] avoid that issue and have plenty of evidence to proceed on" (R. 261, PT. 20).

The trial court then ruled as follows:

> All right. I have previously determined that the evidence in question is relevant. And given the fact that what this case is going to be about is self defense, the credibility of [defendant] is highly relevant. Rule 403 requires that in order for evidence to be excluded, the probative value must be substantial, and I emphasize substantially outweighed by the danger of unfair prejudice and other things.
>
> However, in this case the unfair prejudice is the only factor that's being raised. I'm not persuaded at this time that the probative value is substantially -- and again I emphasize substantially -- outweighed by the danger of unfair prejudice.
>
> If we were to get into the issue of some gruesome aspects of the movement of the body, my ruling would be otherwise. But what we have here is merely a question of whether or not the body was moved, and if so, was it moved by [defendant].
>
> And what did [defendant] -- and what did [defendant] say about that on prior occasions. Because that's the limited issue, the motion is denied.

(R. 262-63, PT. 21-22) (complete copies of trial counsel's motion and the parties' argument thereon are contained in Addendum B).

A. Defendant's Allegation of Deficient Performance

On appeal, defendant asserts that trial counsel was ineffective in failing to object to gruesome evidence allegedly admitted in violation of the court's ruling (Br. of App. at 18-20). Specifically, defendant complains that trial counsel should

have objected to certain portions of the prosecutor's cross-examination of defendant concerning his movement of Lony's body:

> Q. By this point you're up there in the middle of the night and you have got Lony's body, which has been decomposing for a month and a half; is that correct?
>
> A. Yes.
>
> Q. That's a terrible sight?
>
> A. I didn't look.
>
> Q. You didn't look? Did you notice anything about it?
>
> A. Just sleeping bag and dirt.
>
> Q. Well, there was a terrible smell, wasn't there?
>
> A. Yes.
>
> Q. And it was in awful condition, wasn't it?
>
> A. Yes.
>
> Q. To a point where it would almost be falling apart at various limbs and that type of thing, correct?
>
> A. Yes, it could have been.
>
> Q. Something might break apart?
>
> A. Probably could have, yes.
>
> . . .
>
> Q. When you pulled him out, his foot broke apart, didn't it?
>
> A. I don't know?
>
> Q. You don't remember?
>
> A. No, sir.

Q. If his foot broke apart, you would be sitting there holding the boot in your hand, correct?

A. I didn't pay no attention.

Q. You didn't pay no attention if you had his foot in your hand?

A. No.

Q. At that point it's possible, isn't it, that you wouldn't want to put your hand in that boot, correct?

A. Yes, that would be.

Q. And so the likely thing to do may be to take a knife, cut the back of the boot open and take his foot out of the back by the sock, correct?

A. No, sir.

Q. That wouldn't be the likely thing to do?

A. I don't know. I wouldn't do it.

Q. Okay. If you were to do that, then, you could lay the foot down on top of him and throw the boot away; is that correct?

A. No, sir.

. . .

Q. Is it your testimony, then, that you actually picked up a decomposing body that had been there six weeks and carried it 100 yards down a hill covered with dirt?

A. Yes, sir.

. . .

Q. So you drive him up to the area west of Utah Lake and you grab hold of this -- not this particular one but one of these on that other sideboard [sic] -- and pull him right out of the truck, correct.

A. Yes.

Q. And everything that was there on top of him came with it. Basically, the sleeping bag and cans and trash and gloves and those things were just basically junk in the back of your dad's pickup, correct?

A. Yes.

Q. It all just came sliding out and landed on the ground. And what's the height of a pickup, maybe two and a half, three feet? Then you jump back in the truck and take off; is that right?

A. Yes. Yes, sir.

(T3. 488-493) (a complete copy of the pertinent transcript pages is contained in Addendum C).

Additionally, defendant claims it was ineffective for trial counsel to stipulate to the following statement read by the prosecutor: "It's stipulated that when the remains of Lony Crosby were located that his sock was found located on top of his torso near the shoulders. Inside that sock were the remains of his right foot" (T4. 534).

Although the trial court cautioned the parties to avoid the "gruesome aspects of the movement of the body" (R. 263, PT. 22, see Addendum B), it is not at all clear that the trial court would have sustained an objection to the prosecutor's cross-examination of defendant on that subject, had such an objection been made. As recognized by the trial court, defendant's credibility was a crucial issue at trial (R. 262, PT. 21, see Addendum B). The apparent purpose of the prosecutor's cross-examination was to refute defendant's suggestion that he had not lied concerning Lony's whereabouts after the homicide because he

did not believe that Lony was dead (T3. 449, 454-58, 464), and that he persisted in that belief even after he moved Lony's decomposing corpse from the homicide scene to Utah Lake (T3. 472-73, 484-486). In order to demonstrate defendant's lack of credibility concerning his refusal to believe that the homicide had even occurred, it was both necessary and proper for the prosecutor to confront defendant with the arguably gruesome realities entailed in moving Lony's decomposing corpse. Nonetheless, as noted in Point I, supra, if defendant fails to satisfy his burden of showing that he was unfairly prejudiced by the alleged deficiency on the part of trial counsel, this Court need not determine whether counsel's performance was in fact deficient. State v. Verde, 770 P.2d 116, 119 (Utah 1989).

B. Defendant Has Not Shown How He was Prejudiced by Trial Counsel's Performance

As in Point I of his brief, defendant again fails to make the required, specific showing of prejudice. State v. Frame, 723 P.2d 401, 405 (Utah 1986). Rather, defendant asserts, in conclusory fashion, that trial counsel's failure to object to allegedly improper questioning by the prosecutor "unfairly prejudic[ed] and inflamed the jury" (Br. of App. at 19). Defendant does not articulate how trial counsel's failure to object was prejudicial beyond his speculative and unsupported assertions that "[t]he only purpose the State had for eliciting [the evidence] was to appeal to, and arouse the jury's sense of horror," and "that the evidence was highly inflammatory in the eyes of the jury" (Br. of App. 20). Defendant's assertion of

prejudice fails to demonstrate that trial counsel's alleged deficiency so affected "the entire evidentiary picture" as to result in a different outcome. Strickland v. Washington, 466 U.S. 668, 696 (1984).

As noted previously, defendant's credibility was a crucial issue at trial (R. 262, PT. 21, see Addendum B). Accordingly, the State presented overwhelming evidence of the lies defendant told to Lony's family, friends, and to law enforcement officers concerning Lony's whereabouts after the homicide (T1. 33, T2. 246-47, 270-72, T3. 320-23, 342-44, 406-09, 402-03). Additionally, even after admitting that he was responsible for Lony's death, defendant lied to investigating officers about where the homicide took place (T1. 35-40, 71-79, 81-84, 188-92). Further, the physical evidence does not support defendant's allegations of self defense (T2. 202-42). In light of the foregoing, introduction of arguably gruesome testimony concerning the realities entailed in moving Lony's decomposing corpse would not have affected the jury's verdict. Even without evidence of defendant's lack of credibility concerning the specific details of how he moved the corpse, the jury had substantial evidence from which to infer that defendant was not credible, and that his version of events was inconsistent with the physical evidence. Thus, defendant's allegation of prejudice is speculative and merely revisits witness credibility issues properly resolved at trial. As such, his argument does not merit appellate relief.

CONCLUSION

Based on the foregoing arguments, defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of December, 1992.

R. PAUL VAN DAM
Attorney General

Marian Decker
MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Manny Garcia, attorney for appellant, 431 South 300 East, #101 Salt Lake City, Utah 84111, this 21st day of December, 1992.

Marian Decker

ADDENDA

ADDENDUM A

verdict of guilty, to make a finding as to firearms, if that is what the Court is making reference to.

THE COURT: Fine. Then we'll be in informal recess. Counsel, you can leave the courthouse as long as you're within ten minutes and can be reached by telephone and we have those telephone numbers. All right, we'll be in recess.

[Whereupon, court was in recess pending the return of the jury.]

THE COURT: The State of Utah versus Terry Hay. Defendant is present, along with his counsel. Prosecution is present. It is 2:40. The jury has been deliberating about an hour. I was notified by a knock on the door that counsel for the defendant wanted to have the benefit of the record for a motion. Go ahead. MS. PALACIOS: Your Honor, we would have a motion for mistrial, if I may state what occurred.

After the jury was excused I discovered that Mr. Behrens had in his briefcase the knife with the black handle and the red trim that was described by the defendant during the course of his testimony.

THE COURT: Just a minute. Do you want to unshackle the defendant?

TRANSPORTATION OFFICER: Fine.

MS. PALACIOS: I was advised that this was

provided to me in the police reports. Quite frankly, I can't dispute that at this point whether or not they were in the police reports. If they were in the police reports, then I believe that I would simply raise the issue for appeal purposes on the grounds of ineffective assistance of counsel, because in my obvious haste to prepare for the trial -- I was sick for three days, and prepared over the weekend -- I did not catch the fact that that knife existed, which would corroborate my client's story.

However, I do base the grounds on the motion for mistrial on prosecutorial misconduct. There was a black knife that was entered into evidence, evidence to which I objected as being irrelevant because it was not the knife that was described by Mr. Hay. The Court allowed it in since it was found in the area. I think that the prosecutor, having had access to that knife in his briefcase and knowing that he had that knife, while it may have been one thing to introduce that knife and leave it up to me to do my job, I think it's quite another thing to introduce another knife that he knew was not the knife described, and was not relevant in the case.

I think it has the effect of misleading the jury, and I think it would have corroborated Mr. Hay's

version that he had thrown the knife from that area and that Mr. Crosby indeed had a knife, which was critical to his self-defense. Otherwise, if there had not been a knife offered, then maybe the knife would have been in the bag or some other place.

Those are the grounds upon which we make the motion.

THE COURT: You stated all the reasons that you believe constitute the significance of not having the knife?

MS. PALACIOS: I'm sorry?

THE COURT: Have you stated all the reasons you believe have any significance for the motion based on your not having access to the knife?

MS. PALACIOS: I want to make it clear that the knife -- I'm not alleging that they hid it from me. To that extent I take responsibility. As I said, I think that I was ineffective not to do it. My concern is that in raising and bringing in the knife, that was irrelevant and knowing it was irrelevant, because they had the knife in the briefcase, misled the jury. Had they introduced the proper knife, or that knife, or both knives, because that was everything that they found there, for the jury to fairly consider. The existence of the knife corroborates what Mr. Hay has said, and that is that he

was attacked, the attacker fell, the knife fell, he picked it up and threw it. And I think to that extent we're arguing self-defense and where his credibility is at issue.

In other words, there are things that he said happened that they say didn't and to have something like this is especially critical.

Mr. Scowcroft points out that we did not know that the knife existed. However, as I was -- I can't remember where it was in the record. I can't remember if it was in the reports. They have represented to me that it was. I did not get the knife. I wasn't shown the knife, and I missed out on that part. However, again, I just get back to the fact that this other knife was introduced, which it clearly didn't have any relevance.

THE COURT: Have you stated every reason now for the significance of your motion?

MS. PALACIOS: I hope I have, Your Honor. Again, this is afterward. I think it's really hard at this juncture to tell what other possibilities or arguments I might have been able to make with respect to that knife, but misleading the jury --

THE COURT: Well, I'm doing a lot of assuming. I don't know what the purpose of putting that knife in was. If that knife -- I don't know if it was to try to

see if Terry would lie and say that was the knife and then you say, "We have got the real knife," and say you have lied about that. I don't know what purpose that could have served. And I think that I would have a much stronger argument to make to the jury regarding that if I could have shown that there was a knife that was tossed, as Mr. Hay said there was. And I think -- I hope that's everything.

THE COURT: Mr. Behrens?

MR. BEHRENS: We had a knife, a black knife with a red handle here in evidence. It was being held in the Murray Police Department evidence room. I did not have -- oh, let me back up.

My understanding is that that knife was found down in that area during one of the searches in August or September and given to the Sanpete County Sheriff's Department.

My understanding from Det. Anderson was that he received it from the Sanpete County Sheriff's Department. I didn't think I could lay a foundation as to where that knife was found without having somebody who found it here in court to testify. I didn't think that I could get it in through Det. Anderson simply because he was given that knife by someone else.

I don't have it in front of me. I know that

knife is referred to in at least one or two police reports, and I'm sure we displayed this in discovery.

I admitted the other knife because I knew there was evidence and testimony indicating that both Terry and Lony had taken two knives apiece up there, and I didn't want to be -- when I had Det. Anderson on the stand, I didn't want to be hiding a knife that I knew I could get in through him. That's what I had him testify to, the shells and the knife that were found there.

If I thought I could have gotten it in -- and maybe you would have let me -- in hindsight, I'm sure I would have admitted it through him then, but he couldn't testify as to where it was found, because he did not find it.

THE COURT: Why don't we have a stipulation and bring the jury back in and mark it and tell them? You can't have it both ways. You either want it in or want it out, and I don't think there's been anything corrupted in their deliberations. We can send it to them now with a stipulation.

MS. PALACIOS: I'm not trying to have things both ways, Judge. Let me -- I actually think that the motion for mistrial ought to be granted. However, if the Court is going to deny my motion, then I would prefer that the matter be cured in that manner.

THE COURT: Well, I won't grant the motion for mistrial unless there's good ground for it. And if there's a way to cure things, there's not good ground for a mistrial.

MR. MACDOUGALL: There are a couple of problems with trying to cure it. If we're bringing the jury back in, they're being given another piece of evidence which obviously has significance. The other side is arguing to the jury what the significance of that is. I don't suppose we can get into the business of telling the jury which side had the knife and which side is producing the knife.

THE COURT: No.

MR. MACDOUGALL: It's looking as though somebody was hiding something from the jury without any explanation. I kind of have a concern about trying to give them a piece of evidence that unintentionally may cut either way or no way without any input as to how this all came about.

MS. PALACIOS: That's my concern.

THE COURT: Wait a minute. We need to take out of this picture for now any reflection upon any of us as to why it didn't come in, because the purpose now is to cure things. We can clean up any perceived damage to the system that the system has, except something they should

have had, and I'm not suggesting that did occur. That's not what I'm worried about at this time.

What I am worried about at this time is, assuming there's a problem, we have an opportunity to rectify it, and I think we ought to take that opportunity. One way of doing it is for each of you to think for 15 minutes or so about how you would use such evidence if it came in, and then to have you write out what you believe the significance of it is. And then if we could have a stipulation as to what it is, who found it, or at least what agency found it, approximately when and where, and then to just have counsel, in a very dispassionate way, read to the jury their statement that everybody has seen before as to what significance that particular counsel believes should be attributed to the knife, which will give you the opportunity to indicate to Ms. Palacios that it's a point of consistency.

What do you believe?

MR. MACDOUGALL: It bothers me there's still the inference that somebody was hiding something from the jury, and that's not the case. If I were sitting on that jury, I would think that the State hid that knife from us, and now it's come up and it's now being offered to us and we're being told that there's a piece of evidence that was being concealed from us."

And that, I don't think, they're entitled to draw that inference from what occurred. I'm certain that there's no real way to purge that at this point. I guess we can talk it over and see if there's any way to talk it over.

MS. PALACIOS: I'm willing to talk it over and try to cure it.

THE COURT: We need to do that. I see your point on that. You're saying it's not a matter of ego, it's a matter that they'll take sanctions in their verdict against the State for what they perceive is the State's hiding of evidence.

All right. Figure it out. I want to cure this. We'll be in recess. I'll expect to hear from you in five or six minutes.

[Whereupon, court continued in recess at 2:50 to 3:25 p.m.]

THE COURT: Defendant is present, counsel are present. This is State of Utah versus Terry Hay. Defendant is present, along with his counsel, counsel for the prosecution is here, the jury is not. We're back on the record to see if we have a solution to the problem.

MR. BEHRENS: I think we do. I think it's agreeable to the parties that the Court will read a statement to the jury which has been typed up here and

then the State and defense have also typed up what they have entitled State's Statement of Significance and Defense Statement of Significance and would ask the Court to read that to the jury.

Contained in the explanation to the jury is a description of the knife, and we have marked it as State's Exhibit 43. We have also marked a diagram, which is marked as State's Exhibit 42, on which there's a red "X" and that's described as the location where the knife was found in the instructions to the jury.

THE COURT: There's distances marked on that photographic exhibit?

MR. BEHRENS: There are, Your Honor.

THE COURT: All right. And can you recall that exhibit corresponds, at least generally, to the two written ones that are already in evidence, if they want to compare them?

MR. BEHRENS: It does. As a matter of fact, the one might have made this particular exhibit.

THE COURT: Okay.

MS. PALACIOS: That's the agreement we have come to with respect to that.

THE COURT: All right. And assuming, without conceding, Mr. Behrens, that there was a problem raised by the motion, is it your belief this rectifies it?

MR. BEHRENS: I believe it does, Your Honor.

THE COURT: Ms. Palacios?

MS. PALACIOS: Well, Your Honor, to be quite frank, I don't think it does, but given the opportunity to attempt to cure it, since the Court is not inclined to grant my motion, I'm not going to pass up the opportunity.

THE COURT: All right. What is it that you don't think it cures?

MS. PALACIOS: Well, I just think that it would have been a lot more effective if I could have asked Terry to identify it, if I could have argued and gone on and on about the credibility, just to that extent.

THE COURT: Well, let me tell you. No one is entitled to a perfect trial. Everyone is entitled to a fair trial. And in fact the way this has occurred may have been much more effective for your client than any other way. The jury is going to look upon it as something they never expected, either manna from heaven or elsewhere, and I think it could well be more effective in your behalf because of the stipulation of the parties and my consideration of it.

Court denies the motion for a new trial. I'm going to bring the jury in at this time and proceed as indicated.

[Whereupon, the jury returned to the courtroom.]

THE COURT: The record should indicate that the jury is now present.

Members of the jury, we're going to do something a little bit out of the ordinary. I'm going to, at this time, receive Exhibits 42 and 43. 43 is a knife; 42 is a map of the area of search, or the area that we have been talking about in Sanpete County, with a designation of 42 on the map, with a red "X" in the lower left-hand side of the map indicating where the knife, Exhibit 43, was found.

There was a knife in existence and neither party established foundation for its admissibility into evidence during the trial proper. Both parties have agreed, however, that the knife should be admitted at this time for consideration by the jury in its deliberations. It's a knife with a black handle trimmed in red, found in late August or early September 1989, and marked as Exhibit 43-S by a member of the Sanpete Search and Rescue organization, and found, as I indicated, at a place designated by the red "X" on the diagram, which is Exhibit 42-S.

The State claims the following from this evidence: This knife was located 121 feet south of where

the cut boot was located. State contends this knife was probably used to cut said boot.

The defendant claims the following from this evidence: That is, the knife matches Terry Hay's description of the knife used by Lony Crosby. The knife was located south of the campsite where Lony Crosby was shot. Terry Hay testified that he threw the knife to the south.

Mr. Unsworth, would you take this evidence and treat it like the other evidence, and get it into the jury room? We're going to re-sequester you. We brought you in for a little breath of fresh air, and now we'll send you back to where we found you and you will again be sequestered.

Go ahead and take the jury, Mr. Unsworth.

[Whereupon, the jury exited the courtroom.]

THE COURT: All right. The record should indicate that the jury is now gone. I would suggest that you just keep the defendant in the holding cell for 15 minutes, in case there's any reaction from this or we get any questions. And if, after 15 minutes, you haven't heard anything from us, then I would just follow your usual practice, which I assume is down the elevator --

TRANSPORTATION OFFICER: We're only 30 feet from the elevator, even down in the jail.

ADDENDUM B

FRANCES M. PALACIOS, (#2502)
ROGER K. SCOWCROFT, (#5141)
Attorneys for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION IN LIMINE TO EXCLUDE EVIDENCE
Plaintiff	:	
v.	:	
TERRY L. HAY,	:	Case No. 901900171FS JUDGE MICHAEL R. MURPHY
Defendant.	:	

The defendant, TERRY L. HAY, respectfully moves this Court for an Order to Exclude Evidence at trial regarding transportation of the victim's corpse by the defendant.

This Motion is made on the grounds (1) That such evidence is not relevant to determination of guilt, and (2) that any probative value of such evidence is substantially outweighed by the danger of unfair prejudice and confusion of the jury. See Rules 401, 402 and 403, Utah Rules of Evidence (1990), and see State v. Maurer, 770 P.2d 981 (Utah 1989).

DATED this 25 day of June, 1990.

RESPECTFULLY SUBMITTED,

[signature] for
FRANCES M. PALACIOS
Attorney for Defendant

[signature]
ROGER K. SCOWCROFT
Attorney for Defendant

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THE COURT: I just don't want him sitting there with the cuffs biting into him while he is listening to a motion.

All right. Mr. Scowcroft.

MR. SCOWCROFT: Thank you, Your Honor. Your Honor, we have made a motion to exclude evidence at the trial regarding allegations that Mr. hay transported the victim's remains approximately five to six weeks after the homicide.

There are two grounds for this. First of all, we would argue that evidence of that nature is not relevant to the issues that need to be determined in this case. That's under Rule 401 and 402 of the Utah Rules of Evidence. The reason it isn't relevant, Your Honor, is that we have stipulated to a number of evidentiary issues in this case. First of all, we have stipulated to the site of the homicide. Second, Terry has admitted having committed the homicide. So I think we would all agree here that what we are really basically -- the only real issue for the jury to determine here is his state of mind. We intend to raise a defense of justification, that being self defense.

Because this act of moving the victim's remains is alleged to have occurred five or six weeks after the homicide, it is simply not probative of his state of

mind when the homicide took place five or six weeks earlier. If anything, I would argue it reflects his state of mind when he moved the remains.

Our second argument, Your Honor, is that if the court finds that this evidence is at all relevant the danger of prejudice, confusion and misleading of the jury substantially outweighs any probative value that the evidence has. That comes under Rule 403 of the Rules of Evidence. The reason, Your Honor, is that it's inflammatory, it's a gruesome act. For that reason, if it is relevant, and we don't believe it is relevant, there is substantial danger that the jury will be misled and will form an attitude toward Terry that has really nothing to do with the criminal charge here, that being homicide.

We cited a case, Your Honor, State v. Mauer and I think maybe the court -- we submitted the case and I believe the court --

THE COURT: I tried it the second time.

MR. SCOWCROFT: Yes. So I don't need to talk a lot about that. But a couple of things that Mauer did. The Mauer court recognized that a -- well, in that case that Mr. Mauer's state of mind when he wrote the letter, parts of which were excluded under Rule 403, is independent and not necessarily probative of his state

of mind when the homicide occurred.

This is a similar case. Same charge, similar defense, and I would argue on the basis of Mauer that the letter in the Mauer case, that is, the speech of the defendant was certainly more probative of his state of mind in relation to the criminal charge than these alleged acts are here. And we would argue, on the basis of Mauer that if that evidence was excludable, then this evidence ought to excludable here.

THE COURT: Mr. Behrens.

MR. BEHRENS: Well, the evidence in this case would show that the alleged homicide occurred on August 1st of '89, and the remains were discovered on December 31 of 1989. In that five month period of time the State would allege and produce witnesses to show that the defendant made various statements as to what happened to the victim; and we will also show conduct which was inconsistent with the self defense theory that's been raised.

It's our impression that the defendant went and moved the remains approximately three weeks after the homicide; and there is evidence to show that the condition of the remains was very decayed, and it is a very gruesome act. I think the jury is entitled to hear, first of all, the explanation of how these remains

came to be in Utah County, to begin with, because that's going to come out. That's how this whole case was discovered in the first place, and to what lengths the defendant was willing to go to cover up the murder, the homicide, and also that he is attempting to conceal evidence of that homicide, all of which would be inconsistent with his defense of self defense.

It would be inconsistent with a claim of self defense.

THE COURT: Do you have some case law to that effect? It seems to me that it's ambiguous, that act, at least as to the charge. I'm having some difficulty understanding the relevance of his movement of the remains and how that reflects upon the self defense theory.

MR. BEHRENS: Because it reflects upon his credibility. Initially when he was questioned on this he made a statement that the homicide occurred in Murray, and that he moved the body to Utah Lake, and now we have a stipulation that the homicide occurred in Sanpete County, and again the body was still moved to Utah Lake.

We have to be able to explain how the body was moved, and it's inconsistent with the statements he's already made.

He has made a number of -- claimed a number of different versions as to what happened to the victim in this case; this being one of them. I think we are entitled to present that to attack his credibility.

THE COURT: Does your witness intend to testify?

MS. PALACIOS: Mr. Hay? Yes.

THE COURT: What about that, Mr. Scowcroft?

MR. SCOWCROFT: I still don't think this evidence has to come out. I think some inconsistent statements may come out if he takes the stand, but I don't think it's correct to suggest that this evidence has to come out.

THE COURT: Well, no. I'm saying; isn't it relevant as to his credibility; and that is; that if he testifies; then they can cross examine him about his propensity to tell the truth.

MR. SCOWCROFT: I don't think that's necessarily so, Your Honor. I think there are other possible explanations for that.

For one thing; a person experiencing denial and even remorse in actions of this kind could be consistent with those types of -- with that type of conduct; rather than with attempting to cover it up or lie. So I think there are other --

THE COURT: I'm not suggesting, at least right now, that his actual movement of the body is inconsistent with his defense of self defense. That's not what I'm asking now.

What I am asking: Isn't it relevant to the issue of credibility that he told -- allegedly told one story about the body, how it got to wherever it got, and they have evidence that there is a different story indicating that he didn't tell the truth?

And perhaps if he's not telling the truth then, perhaps he is not telling the truth on the stand? What about that?

MR. SCOWCROFT: I think that could be so, and they are entitled to bring those things out. However, I think we are in a situation where we have to balance Mr. Hay's rights to a fair trial under these rules.

THE COURT: On the basis of what you just indicated to me, the motion, insofar as it depends on relevance, is denied.

Now, we need to address 403. How do you intend, Mr. Behrens, if the defendant takes the stand and if he testifies in such a way that it's appropriate for you to cross examine him as to the different stories he told, it seems to me that we can run into a 403 problem

by the manner in which you proceed on that.

Do you intend to just get into the issues that he moved the body, period, without any other grisly details of how he did it, or anything like that?

MR. BEHRENS: In our case-in-chief, absolutely, because there's evidence found in Sanpete County that the act of homicide occurred there, and that the body was buried there and then moved from there later on.

As far as actually how it was accomplished, or what not, we don't have specific evidence as to that. I have got to go into that on cross examination.

THE COURT: Is the only inflammatory portion that you're claiming, Mr. Scowcroft, and that is, that the act happened, and that he, Mr. Hay, moved the body? Is that the only inflammatory thing you are claiming, or is it in your concern about evidence about how he moved the body and the condition of the body at the time, and its decayed state? What is it you're concerned about?

MR. SCOWCROFT: We are concerned about him having moved the body.

THE COURT: Period.

MR. SCOWCROFT: Right. We think that the State can avoid that issue and have plenty of evidence to proceed on, has many statements from Mr. Hay which

I think the State may argue are inconsistent.

I do not think this is going to prejudice the State's case; and I think, as I said before, we just have to balance the rights here. I don't think the State has been prejudiced, and I think that Mr. Hay would be, by bringing in evidence that bones were found in different locations. That's just not necessary to prove their case.

And of course that's a consequence of the body having been moved. If we exclude evidence that the body has been moved, then I believe we need to exclude evidence that bones were found in different places.

I don't understand how that would prejudice the State's case. And I don't think it would have the effect of denying the State an opportunity to introduce into evidence prior inconsistent statements, if that is their intent.

THE COURT: All right. I have previously determined that the evidence in question is relevant. And given the fact that what this case is going to be about is self defense, the credibility of Mr. Hay is not only relevant, but it is highly relevant. Rule 403 requires that in order for evidence to be excluded, the probative value must be substantial, and I emphasize substantially outweighed by the danger of unfair prejudice

and other things.

However, in this case the unfair prejudice is the only factor that's being raised. I'm not persuaded at this time that the probative value is substantially -- and again I emphasize substantially -- outweighed by the danger of unfair prejudice.

If we were to get into the issue of some gruesome aspects of the movement of the body, my ruling would be otherwise. But what we have here is merely a question of whether or not the body was moved, and if so, was it moved by Mr. Hay.

And what did Mr. Hay -- and what did Mr. Hay say about that on prior occasions. Because that's the limited issue, the motion is denied.

MR. SCOWCROFT: Thank you, Your Honor.

MS. PALACIOS: That's all we have at this time.

THE COURT: Let's figure out what time we are going to start. We will start at 9:00 p.m. Excuse me, 9:00 o'clock a.m. I thought we would get an early start on Monday. 9:00 o'clock a.m.

MR. SCOWCROFT: There is one other matter, Your Honor, I wanted to -- since Mr. Behrens and Mr. McDougal are here, we wanted to provide Terry with some other books to read in the jail. My understanding of

ADDENDUM C

A. No, sir.

Q. There was still parts of him showing?

A. Yes.

Q. And you say it was about six weeks later. Could it have been as short as three to four weeks later?

A. No, sir.

Q. You think it was about a month and a half?

A. (Witness nods head indicating affirmative.)

Q. By this point you're up there in the middle of the night and you have got Lony's body, which has been decomposing for a month and a half; is that correct?

A. Yes.

Q. That's a terrible sight?

A. I didn't look.

Q. You didn't look? Did you notice anything about it?

A. Just sleeping bag and dirt.

Q. Well, there was a terrible smell, wasn't there?

A. Yes.

Q. And it was in an awful condition, wasn't it?

A. Yes.

Q. To a point where it would almost be falling

apart at various limbs and that type of thing, correct?

A. Yes, it could have been.

Q. Something might break apart?

A. Probably could have, yes.

Q. Okay. When you went to retrieve his body, you bent down to pull it out of the hole, you grabbed his heels and you tried to pull him out, didn't you?

A. Yes.

Q. Is that what happened?

A. Then I picked him up, yes.

Q. When you pulled him out, his foot broke apart, didn't it?

A. I don't know.

Q. You don't remember?

A. No, sir.

Q. If his foot broke apart, you would be sitting there holding the boot in your hand, correct?

A. I didn't pay no attention.

Q. You didn't pay no attention if you had his foot in your hand?

A. No.

Q. At that point it's possible, isn't it, that you wouldn't want to put your hand in that boot, correct?

A. Yes, that would be.

Q. And so the likely thing to do may be to take a knife, cut the back of the boot open and take his foot out of the back by the sock, correct?

A. No, sir.

Q. That wouldn't be the likely thing to do?

A. I don't know. I wouldn't do it.

Q. Okay. If you were to do that, then, you could lay the foot down on top of him and throw the boot away; is that correct?

A. No, sir.

Q. These sideboards belonged to your father's truck, right?

A. Yes, they do.

Q. And he used them to haul firewood primarily, to extend the sides of the pickup?

A. Yes.

Q. And when you drove down there, they were up so that firewood and things could be put in the truck; is that correct?

A. Yes.

Q. And when you backed up the truck, possibly you went up and looked at the body and discovered what condition it was, but you needed some type of a gurney or structure to get him off there, didn't you?

A. No, sir.

Q. Is it your testimony, then, that you actually picked up a decomposing body that had been there six weeks and carried it 100 yards down a hill covered with dirt?

A. Yes, sir.

Q. Let me throw you a hypothetical then. Would it have been easier to knock -- let me ask you this: When they're put together right, these are all stapled together, right, at right angles like that?

A. Yes.

Q. Would it have been easier to knock one of the long ones off, break it apart and take it up the hill, then lay the sleeping bag on top of it? Wouldn't that have been easier?

A. I don't know.

Q. Well, you indicate you carried it down the hill. Would it have been easier to have the sleeping bag laying on top of that and drag him down by hanging onto something like this, than it was to carry his body on a sleeping bag covered with dirt 100 yards down that hill? That could have been easier, wouldn't it?

A. It could have.

Q. Okay. And it would have made it easier to slide it into the back of the truck, right?

A. Possibly.

Q. When you got him into the truck, you threw these two sideboards on top; is that correct?

A. Yes.

Q. But when you got down there, all three of them were intact together. That's what you just testified to; is that right?

A. Yes.

Q. So at some point you must have broken off that other long one from these two, correct?

A. Yes, sir.

Q. You did that to use it as a gurney?

A. I don't know, sir.

Q. So you drive him up to the area west of Utah Lake and you grab hold of this -- not this particular one but one of these on that other sideboard -- and pull him right out of the truck, correct?

A. Yes.

Q. And everything that was there on top of him came with it. Basically, the sleeping bag and cans and trash and gloves and those things were just basically junk in the back of your dad's pickup, correct?

A. Yes.

Q. It all just came sliding out and landed on the ground. And what's the height of a pickup, maybe two and a half, three feet? Then you jump back in the

truck and take off; is that right?

A. Yes. Yes, sir.

Q. Okay.

May I have a moment, please, Your Honor?

THE COURT: Yes.

Q. (By Mr. Behrens) Now, let's go back before your trip to Wales. Basically, you and Lony and Jennifer were all good friends and you saw each other many times a week; is that right?

A. Yes.

Q. And Jennifer and Lony would frequently break up, sometimes once or twice a week for a couple days at a time; is that right?

A. Yes.

Q. Every time she broke up, she would come running to you and say, "Oh, he treats me too bad. I hate it when he does this and that," and you would feel sorry for her, right? Every time that would happen, you would go out, go to movies, or go bum around, or go to the mall and stuff like that?

A. Not every time, no.

Q. Some of the times then, maybe not every time? And at times you would tell Jennifer that you loved her, that you cared about her; is that correct?

A. I just told her I felt sorry for her.