1993

The State of Utah v. Theodis White, Jr. : Brief of Appellant

Utah Court of Appeals

Joan C. Watt; Lisa J. Remal; Salt Lake Legal Defender Association; Attorneys for Appellant.
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930696 IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
THEODIS WHITE, JR.,	:	Case No. 930696-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Attempted Criminal Homicide, a second degree felony, in violation of Utah Code Ann. § 76-5-203 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

TEXT OF STATUTE

Rule 403, Utah Rules of Evidence provides:

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ISSUE PRESENTED FOR REVIEW

Did the trial judge commit reversible error in admitting the bloody clothing of the victim?

STANDARD OF REVIEW

Rule 403 determinations involve questions of law which are reviewed for correctness. The appellate court affords the trial judge "some discretion" in determining whether the evidence should have been admitted and reverses the trial court's decision where the trial court "acted unreasonably in striking the balance" under Rule 403. Ramirez, 817 P 2d 774, 781 n.3 (Utah 1991).

In Ramirez, 817 P.2d at 781 n.3, the Court stated:

> . . . [O]n occasion, the legal standard for admissibility of evidence vests a measure of discretion in the trial court. For example, Utah Rule of Evidence 403 requir s that a trial court balance the probativeness o a piece of evidence against its potential for unfair prejudice; if the potential for unfair prejudice outweighs the probativeness, the evidence is excluded as a matter of law. Utah R. Evid. 403. The trial court initially performs that balancing. If it concludes that the evidence is admissible, we review that decision for correctness. But in deciding whether the trial court erred as a matter of law, we de facto grant it some discretion, because we reverse only if we conclude that it acted unreasonably in striking the balance. [citations omitted]

(emphasis added).

A review of Rule 403 case law demonstrates that in the past, the Utah Supreme Court has afforded trial courts "some discretion" which is neither "broad discretion" nor "de novo" review. See, e.g., State v. Maurer, 770 P.2d 981 (Utah 1989) (discussing interpretation given Rule 403 by various courts and reversing trial judge's ruling admitting letter written by defendant

to victim's father); State v. Verde, 770 P.2d at 120[1]; State v. Cloud, 722 P.2d 750, 752-3 (Utah 1986).

Following the Ramirez decision, the Supreme Court stated: "[I]n reviewing a trial court's ruling on the admissibility of evidence under rule 403, we will not overturn the court's determination unless it was an 'abuse of discretion.'" State v. Hamilton, 827 P.2d 232, 239 (Utah 1992) citing State v. Verde, 770 P.2d 116, 120 (Utah 1989). However, in State v. Pena, 232 Utah Adv. Rep. 5 (Utah 1994), the Court recognized that "the term 'abuse of discretion' has no tight meaning." See also Tolman v. Salt Lake County Attorney, 818 P.2d 23, 26-27 (Utah App. 1991) (recognizing that trial judge abuses his or her discretion where conclusion of law is incorrect and where a finding of fact is clearly erroneous).

Rule 403 rulings involve the "application of legal propositions to facts" and therefore fall into the "third category" of standards of review discussed in Pena. See State v. Pena, 232 Utah Adv. Rep. at 5. The standard of review applicable to a trial court's determination of whether the facts are such that the evidence should not be admitted pursuant to Rule 403 is therefore a question "of law and is reviewable nondeferentially for correctness,

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1. Prior to the decisions in Verde and Hamilton, the Supreme Court articulated a "clearly erroneous" standard of review in some Rule 403 cases. See, e.g., State v. Maurer, 770 P.2d 981, 983 (Utah 1989); State v. Johnson, 784 P.2d 1135, 1141 (Utah 1989); but see State v. Cloud, 722 P.2d at 752-3 (applying abuse of discretion standard). The subsequent opinions in Ramirez, 817 P.2d at 781 n.3, and Pena, 232 Utah Adv. Rep. at 5-6, clarify that Rule 403 determinations involve questions of law which are decided after granting "some discretion" to the trial judge.

as opposed to being a fact determination reviewable for clear error. [footnote omitted]." Pena, 232 Utah Adv. Rep. at 5-6; see also State v. Ramirez, 817 P.2d at 781 n.3. In applying the law to the facts, however, "some" discretion is given to the trial judge. Ramirez, 817 P.2d at 781 n.3.

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

In an Information dated June 3, 1993, the State charged Defendant/Appellant Theodis White, Jr. with one count of Attempted Criminal Homicide, Murder, a second degree felony, in violation of Utah Code Ann. § 76-5-203 (1953 as amended). R. 6.

On July 19, 1993, Appellant filed a Notice of Intent to Rely on Defense of Diminished Capacity. R. 18. Thereafter, the trial judge ordered the appointment of two examiners and ordered that their reports be filed by August 19, 1993. R. 62.

On September 23 and 24, 1993, the case was tried to a jury. R. 123. The jury convicted Mr. White of Attempted Criminal Homicide as charged in the Information. R. 173.

On October 18, 1993, the trial judge imposed sentence and entered judgment. R. 178. On November 2, 1993, Defendant/Appellant filed his Notice of Appeal. R. 180.

STATEMENT OF THE FACTS

On May 23, 1993, at about 1:00 to 1:30 a.m., Kevin "Jake" Barney, David "Todd" Egleston and Paul Keenan were driving eastbound on 800 South in Salt Lake City. R. 254. The trio had been at

Todd's house, then had driven somewhere to play video games, and later were just driving around with the stereo cranked up. R. 273, 277.

The trio had been drinking whiskey during the two or three hours before the incident in this case. R. 275. They came to a light at 300 East and 800 South and saw a brown Celica with three people inside. R. 255-6. Defendant/Appellant Theodis White ("Theo") was a passenger in the Celica. R. 257.

Occupants of the two vehicles began yelling back and forth then Todd, the driver of the first car, "flipped off" the occupants of the Celica. R. 257.[2] Todd testified that he "flipped off" the occupants of the other car

> because they said something, they were yelling something. And the driver was like leaning forward and gesturing at himself like if I wanted to fight or something. And at that point I think that we were going to fight and we were going to pull over and we told them that ... .

R. 257-8.

At that point, Theo "was hanging out the window waving a knife and Paul said 'he has a gun' and he was tripping out and screaming." R. 258, 314. Theo screamed at the occupants of the other car so loudly that they could hear him as they drove at about 45 m.p.h. R. 281. As the two cars drove along, Theo apparently yelled many times that the occupants of the first car were "going to

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2. David Egleston testified that when he said that he "flipped 'em off" he meant that he "flipped the bird. Gave 'em the middle finger," and that extending his middle finger toward others was another way of saying "F___ off." R. 257, 280.

die" or words to that effect. R. 292, 306. Theo appeared to be "uncontrollably angry." R. 306.

Todd testified that he attempted to drive away from the Celica, but the Celica followed. Todd drove down a road near Liberty Park which turned out to be a dead end. R. 264. Todd turned the car around and thought he could get past the Celica without hitting it. R. 283. Instead, he made contact wi .1 the Celica and damaged his car as he drove out of the dead end. R. 265, 283. The collision between the two vehicles upset the occupants of the Celica. R. 380.

The three drove back to 700 East, then down to about 3300 East where they pulled off into a neighborhood near Granite High and stopped to inspect the damage to the car. R. 266. After they were out of the car, the brown Celica arrived. Theo jumped out of the Celica while it was still moving. R. 292, 303. When the Celica stopped, Todd ran to a nearby 7-Eleven. R. 270. The driver of the Celica hit Paul under the eye, then Paul ran to the 7-Eleven. R. 294. Jake jumped into Todd's car, then Theo stabbed him eight times with a knife. R. 294, 329. Exhibits 9 through 12 depict Jake's wounds. R. 330, 334. While Theo was stabbing, Jake was kicking and holding up his hands. R. 334. Theo repeated things like "this is what you deserve" and "take this" as he stabbed Jake. R. 335.

Jake grabbed Theo's wrist and pushed him away, then opened the car door and pushed the other fellow away and started running. R. 336. Jake arrived at the 7-Eleven two or three minutes after

Todd and Paul. R. 272. He was walking and running, and he was bleeding. R. 272.

Dr. R. Dirk Noyes, a surgeon at L.D.S. Hospital, described the wounds for the jury. R. 369-75. The most serious wound was in the stomach area where the stabbing had perforated the stomach, causing bleeding and the leakage of stomach juices. R. 372-374.

Theo was arrested several days after the incident. R. 6-7, 378-9. After being advised of his Miranda rights, Theo made a statement regarding the incident to Detective Judd. R. 378-9. During the course of that statement, Theo discussed the fact that he has epilepsy and is supposed to take Dilantin but had not been taking it because it made him sick. R. 388.

Twila Lu Jan, Theo's girlfriend at the time of the incident and an occupant of the Celica, testified that she thought Theo was supposed to take Lithium and and that he was acting "kind of funny" on the night of the incident and told her he had taken "acid." R. 402. Dr. Golding testified that Theo told him he took two or three "hits" of acid or L.S.D. and consumed a fair amount of alcohol on the night of the incident. R. 429.

The defense introduced psychological testimony from Dr. Golding, a forensic psychologist who had been appointed by the court to do an evaluation of Theo, regarding Theo's diminished mental capacities. R. 415-92. Dr. Golding testified that he found three areas that affected Theo's ability to function: (1) Theo had been a victim of sexual abuse by a close relative for an extended period of time, (2) Theo was physically abused by his father who

engaged in substantial amounts of violence and eventually spent time in prison as the result of violent conduct, and (3) Theo experienced a "chaotic upbringing" which included witnessing large amounts of violence and having a chaotic relationship with the adults who were raising him. R. 418-9.

Theo grew up seeing random and chaotic violence. R. 420. His father was a violent alcoholic who did things such as sitting the children down and telling them that life was not worth living and that they were to watch him die, then ingesting pills. R. 420. Theo's father also pulled out guns and ultimately went to prison for the murder of his girlfriend's cousin and the attempted murder of his girlfriend. R. 422. Theo and his sister witnessed the killing and attempted homicide of their father's girlfriend who was their "functional step-mother." R. 428. Theo had seen or talked to his mother only once or twice in a number of years. R. 422.

Theo recalls going into a rage on the night of the incident. R. 430. Dr. Golding testified that Theo had an explosive response to the incident, and characterized this as "almost a random response." R. 431.

Dr. Golding testified that Theo's mental capacities were diminished by the events he had experienced during his childhood. R. 444. Physical and verbal confrontations worked as "trigger mechanisms" which led to rages over which Theo had very little control. R. 465. Alcohol consumption and drugs such as L.S.D. exacerbated the condition. R. 465. Dr. Golding opined that at the time of the stabbing, Theo's "capacities were diminished" due to

alcohol and drugs along with his personality structure based on his background and his susceptibility to trigger mechanisms, and that he was, "in colloquial terms," in a "blind rage with the associated diminishment of capacities." R. 467.

SUMMARY OF THE ARGUMENT

Admission of the blood covered pants and shirt worn by Jake Barney at the time of the incident requires a new trial. The white pants and blue and white striped shirt containing large amounts of blood were gruesome, highly prejudicial pieces of evidence. The clothing had no probative value. The location and description of the wounds was established by the testimony of the emergency room doctor, Jake Barney and Jake's friends. The shirt and pants added no information and presented less precise information about the wounds than the testimony listed above. Because the clothing had no probative value but was highly prejudicial, it was inadmissible under Rule 403, Utah Rules of Evidence. The error requires a new trial given the extensive testimony demonstrating a diminished capacity to form intent.

ARGUMENT

POINT. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING THE VICTIM'S BLOODY CLOTHING.

Outside the presence of the jury, defense counsel objected to the anticipated introduction by the State of the victim's bloody clothing on the grounds that the bloody clothing was more

prejudicial than probative and therefore inadmissible under Rule 403, Utah Rules of Evidence. R. 309. The trial judge overruled the objection. R. 311-12. See Addendum A for transcript of argument and ruling. Defense counsel renewed her objection when the State introduced the evidence. R. 332. The trial judge again overruled the objection. R. 332.

Rule 403, Utah Rules of Evidence provides:

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403 requires that the court balance the probative value of the disputed evidence against its potential prejudicial effect. Johnson, 784 P.2d at 1141.

"The probative value of the evidence is judged by the 'strength of the evidence and its ability to make the existence of a consequential fact either more or less probable [footnote omitted]' and 'the proponent's need for the evidence.'" Johnson, 784 P.2d at 1140.

Relevance is determined according to whether the evidence will assist the trier of fact in understanding the nature of the crime or the manner in which the crime was committed. State v. Royball, 710 P.2d 168 (Utah 1985).

Rule 401, Utah Rules of Evidence provides that "[e]vidence is relevant if it has 'any tendency to make the existence of any

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" State v. Maurer, 770 P.2d 981, 983 (Utah 1989). Evidence which is merely cumulative of other evidence or which can "readily be provided to the jury by less potentially prejudicial means" is of minimal, if any, relevance. State v. Cloud, 722 P.2d 750, 752 (Utah 1986) (prejudicial photographs inadmissible unless proponent establishes they convey relevant evidence which is not otherwise available to jury); State v. Lafferty, 749 P.2d 1239, 1257 (Utah 1985) (an important consideration in establishing probative value is whether evidence can be established by other means); State v. Poe, 441 P.2d 512 (Utah 1968) (photographs which conveyed only information which had already been introduced through testimony were inadmissible); State v. Wells, 603 P.2d 810 (Utah 1979) (photographs "superfluous" where they conveyed information contained in medical examiner's testimony).

Evidence which has some probative value is nevertheless inadmissible under Rule 403 where the prejudicial effect of such evidence outweighs its probative value. Circumstances which require exclusion of otherwise relevant evidence are those which "'entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than wasting time, at the other extreme.'" Maurer, 770 P.2d at 984, quoting Fed. R. Evid. 403 advisory committee's note, quoted in M. Graham, Handbook of Federal Evidence § 403.1 at 178 (2d ed. 1986).

> "'Unfair prejudice' within [Rule 403's] context means an undue tendency to suggest decision on an

> improper basis, commonly, though not necessarily, an emotional one." [citation omitted] "In reaching a decision to exclude on grounds of unfair prejudice . . . [t]he availability of other means of proof may also be an appropriate factor." [citation omitted].

Id.

The Utah Supreme Court has "recognized that inherent in certain categories of relevant evidence is an unusually strong propensity to unfairly prejudice, inflame, or mislead the jury" and that such evidence "is uniquely subject to being used to distort the deliberative process and improperly skew the outcome." State v. Lafferty, 749 P.2d 1239, 1256 (Utah 1988). Evidence which falls in such categories will be excluded under Rule 403 unless the proponent of the evidence can establish that it is "unusually probative." Id.

While the Utah Supreme Court has not expressly recognized that a victim's bloody clothing can be as gruesome as photographs and carry the same propensity for prejudice and distortion as gruesome photographs, other courts have recognized the potential for prejudice inherent in this type of evidence. See, e.g., State v. Steele, 586 P.2d 1274 (Ariz. 1978) ("The admission of gruesome objects such as photographs, clothing and weapons, when introduced for no other purpose than to inflame and arouse the passions of the jury, can lead to a conviction resulting from the jury's revulsion and not from the State's proving the elements of the crime."); see also Jennings v. State, 506 P.2d 931, 935 (Okl. Crim. App. 1973) (recognizing that victim's bloody clothing is admissible only where necessary to clarify a relevant fact, and not where "its only effect

would be to arouse passion and prejudice in the minds of the jury").

In State v. Johns , 784 P.2d at 1141, the defendant claimed that introduction of the trooper's bloodstained uniform was error under Rule 403. The Court pointed out that "[a] brown shirt with dried blood on it does not equate with the evidence we have previously deemed highly prejudicial." Id. Nevertheless, the Court recognized that "admission of the trooper's uniform may have created some danger of prejudice." Id. The Court's resolution of the 403 claim in Johnson is based in part on its recognition that the brown shirt and similarly colored blood did not create the gruesome type of evidence it was referring to in Lafferty. In other words, because the blood was barely visible on the trooper's uniform, the evidence was not as gruesome as the photographs in Cloud.

By contrast, in the present case, the evidence at issue consists of a navy blue and white shirt and white pants. Large blood stains are evident on both pieces of clothing. The contrast between the white pants and white stripes leaves no questions as to the contour of the blood stains or the large amount of blood on the clothing. This evidence has the same potential for prejudice inherent in gruesome photographs.

Appellate courts in this state have reversed 403 rulings regardless of whether the admitted evidence fit into the special categories outlined in Lafferty. See, e.g., State v. Maurer, 770 P.2d 981 (Utah 1989) (holding that admission of the entire contents of a letter written by the defendant to the decedent's father was reversible error under Rule 403).

In the present case, the clothing worn by "Jake" Barney had little, if any, probative value. As was the case in Johnson, 784 P.2d at 1141, other pieces of evidence were "better resources for determining the magnitude of injury" than the bloodstained clothing. Paul Keenan testified briefly about the extent of Jake's injuries (R. 295), "Jake" Barney testified about his wounds (R. 334, 336-7), and Dr. Noyes described the wounds (R. 369-74). In addition, the State introduced photographs of the wounds as State's exhibits 11-S, 10-S, 9-S, and 12-S. R. 330.

Furthermore, rather than simply introducing the clothing, the prosecutor focused on the pants and shirt, asking the witness to indicate "where on the shirt [he was] stabbed" and where on the pants he was stabbed. R. 333-4. The clothing had apparently been cut after the incident as evidenced by Jake's uncertainty as to whether a cut in the shirt was from the stabbing or made for some other purpose. R. 333. He stated:

> KEVIN JACOB BARNEY: Well, they had to cut it right down the middle so it was this, actually looks like this is the, might be the stab wound right here where it stabbed through my shirt and right here is another hole. You can't really tell anything 'cause they are short sleeves. There is another hole up here in the left sleeve.

R. 333.

Because the clothing had no "tendency to make the existence of any fact ... more probable or less probable," it had no relevance. In addition, the existence of other, more direct evidence of the wounds made this evidence unnecessary and irrelevant.

Balanced against the lack of relevance is the overwhelming prejudicial effect of this evidence. The Court recognized in Johnson that even where the blood stains were barely visible against the brown trooper's uniform, admission of the clothing "may have created some danger of prejudice." Johnson, 748 P.2d at 1141. In this case, where large quantities of blood are strikingly evident against white clothing, the prejudicial effect of the evidence substantially outweighs any probative value.

The error in admitting the bloody clothing requires a new trial. An error is harmful "when a reasonable likelihood exists that absent the error, the result would have been more favorable to the defendant. [citations omitted]." State v. Dibello, 780 P.2d 1221, 1230 (Utah 1989). The "reasonable likelihood" test is met where an appellate court's "confidence in the outcome is undermined." Dibello, 780 P.2d at 1230, citing State v. Knight, 734 P.2d 913, 919-20 (Utah 1987).

In this case, Theo presented significant evidence demonstrating that he had a diminished mental capacity or otherwise was unable to form the requisite intent. Jake and the occupants of the car in which Jake was riding described Theo as "tripping out and screaming" and uncontrollably angry . R. 258, 306, 314. Theo was also described as acting "kind of funny" on the night of the incident. R. 402. Evidence was presented that Theo suffered from epilepsy but had not been regularly taking the prescribed Dilantin, had also not been taking Lithium as required, and had taken two hits of L.S.D. on the night of the incident in addition to consuming a

fair amount of alcohol. R. 388, 402, 429.

The defense also introduced the testimony of Dr. Golding, a forensic psychologist who had been appointed to evaluate Theo. R. 416. Dr. Golding testified that three areas impacted on Theo's ability to function and diminished his mental capacities: (1) Theo was a victim of sexual abuse by a close relative for an extended period of time, (2) Theo's father engaged in substantial amounts of violence and physically abused Theo, and (3) Theo experienced a "chaotic upbringing" which included witnessing large amounts of violence, including a homicide perpetrated by his father, and had a chaotic relationship with the adults who raised him. R. 415-19, 444. Dr. Golding opined that at the time of the incident, Theo's "capacities were diminished" by drugs, alcohol and a personality structure based on his background that caused him to go into a blind rage in response to certain "trigger mechanisms." R. 465-7.

Considering Dr. Golding's testimony combined with the evidence which suggested that Theo was out of control or acted in a blind rage, a reasonable likelihood exists that had the prejudicial clothing not been admitted, the jury would not have convicted Theo.

CONCLUSION

Defendant/Appellant Theodis White, Jr. respectfully requests that this Court reverse his conviction and remand the case for a new trial.

SUBMITTED this 9th day of March, 1994.

JOAN C. WATT
Attorney for Defendant/Appellant

LISA J. REMAL
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 9th day of March, 1994.

JOAN C. WATT

DELIVERED this 9 day of March, 1994.

ADDENDUM A

ASK THAT YOU RETURN AT 1:30 SO THAT WE CAN START PROMPTLY AT THAT TIME.

(RECESS).

JUDGE YOUNG: THE RECORD MAY SHOW WE ARE CONVENED IN THE STATE VERSUS THEODIS WHITE CASE OUTSIDE THE PRESENCE OF THE JURY AT THE REQUEST OF COUNSEL TO DEAL WITH A COUPLE OF LEGAL MATTERS.

MS. REMAL: THAT'S CORRECT, YOUR HONOR.

MR. BLAYLOCK: YOUR HONOR, PERHAPS IT WOULD BE BEST IF I STARTED. I INDICATED TO THE COURT THAT BRENDA CARAKER WAS A WITNESS THAT I INTENDED TO CALL.

JUDGE YOUNG: THE NAME AGAIN?

MR. BLAYLOCK: BRENDA, C-A-R-A-K-E-R, CARAKER. SHE IS AN INDIVIDUAL WHO WAS KNOWN TO DEFENSE COUNSEL. A COPY OF THE REPORT WAS MADE AVAILABLE TO DEFENSE COUNSEL. SHE IS A PERSON WHO AT ABOUT 11:10 THAT EVENING WAS CONFRONTED BY MR. WHITE WITH A KNIFE. I INDICATED THAT I INTENDED TO CALL HER BUT HAD NEGLECTED TO MENTION HER NAME TO THE JURY. AND REQUEST THE RULING OF THE COURT WITH REGARDS TO WHETHER OR NOT SHE'D BE AVAILABLE.

MS. REMAL: AND YOUR HONOR, I INDICATED THAT I'M NOT SURPRISED BY HER. I CERTAINLY AM AWARE OF HER, OF THIS, BEFORE. MY CONCERN, FIRST OF ALL, IS AS TO THE RELEVANCE OF HER TESTIMONY. AND AS MR. BLAYLOCK POINTED

OUT, THE TESTIMONY OF THE EVENT IS THAT SHE WAS APPARENTLY PREPARED TO DESCRIBE WHAT HAPPENED A COUPLE OF HOURS PRIOR TO THE EVENT IN QUESTION HERE. AND BASED ON THAT IT'S MY POSITION THAT HER TESTIMONY IS NOT RELEVANT TO THE CASE.

SECONDLY, EVEN IF THE COURT DECIDES THAT SHE IS RELEVANT I WOULD SIMPLY REQUEST THAT WE QUESTION THE JURORS WHO WERE SELECTED AS TO WHETHER OR NOT THEY KNOW HER OR ARE FAMILIAR WITH HER SINCE THAT WASN'T DONE PREVIOUSLY BECAUSE MR. BLAYLOCK FORGOT TO MENTION HER NAME.

THERE WAS A SECOND ISSUE THAT WE DISCUSSED AND THAT IS REGARDING THE BLOODY PANTS AND SHIRT OF MR. BARNEY'S THAT MR. BLAYLOCK INTENDS TO INTRODUCE TO THE COURT, IN THE CASE BEFORE THE JURY. IT IS MY ARGUMENT THAT THAT CLOTHING, THOSE TWO EXHIBITS, THE SHIRT AND THE PANTS, WHICH, AS YOU WILL SEE WHEN YOU SEE THEM, ARE QUITE BLOODY. THAT THEY ARE EACH MORE PREJUDICIAL THAN PROBATIVE AND UNDER RULE 403 OF THE RULES OF EVIDENCE I WOULD ASK THE COURT TO EXCLUDE THAT.

MY REASON FOR SAYING THAT IS, NO. 1, BECAUSE OF THE APPEARANCE OF THE CLOTHING THEMSELVES, IT IS QUITE BLOODY, I BELIEVE THAT THEY'RE INFLAMMATORY BUT, SECONDLY, THERE CERTAINLY IS OTHER EVIDENCE THAT MAKES, THAT PRESENTS THE SAME FACTS TO THE JURY. THE OTHER EVIDENCE I EXPECT, AT LEAST, WILL BE THE TESTIMONY OF KEVIN BARNEY WHO WILL TESTIFY ABOUT WHAT WOUNDS AND HOW MANY WOUNDS HE

RECEIVED. THERE HAS BEEN ALREADY THE TESTIMONY OF MR. KEENAN AND MR. EGLESTON ABOUT THE BLOOD THAT THEY OBSERVED WHEN MR. BARNEY CAME OVER TO THEM AT THE 7-ELEVEN.

AND APPARENTLY DR. NOYES, WHO IS THE DOCTOR WHO TREATED MR. BARNEY, IS GOING TO TESTIFY. CERTAINLY, HE IS GOING TO BE ABLE TO TESTIFY AS TO THE LOCATION OF THE WOUNDS, THE AMOUNT OF BLOOD THAT WAS LOST, THE PHYSICAL AFFECT OF THOSE WOUNDS ON MR. BARNEY.

IT APPEARS TO ME THAT ESPECIALLY GIVEN THE FACT THAT THERE WERE OTHER SOURCES OF THE INFORMATION ABOUT THE LOCATION OF THE WOUNDS, AND EVERYTHING ABOUT THE WOUNDS, THAT ADMITTING THE BLOODY CLOTHING ON TOP OF THAT OTHER EVIDENCE IS CERTAINLY MORE BENEFICIAL THAN PROBATIVE. I MENTIONED TO THE COURT THAT ALTHOUGH THESE CERTAINLY AREN'T PHOTOGRAPHS, THEY ARE PHYSICAL EXHIBITS, THE CLOTHING. I THINK ANALOGOUS REASONING SHOULD BE USED IS THAT THAT IS USED IN CASES SUCH AS STATE V. CLOUD, WHICH IS A UTAH SUPREME COURT CASE DEALING WITH PHOTOGRAPHS OF THE BLOODY SCENE. ALTHOUGH CERTAINLY I RECOGNIZE THERE IS A DIFFERENCE BETWEEN PHOTOGRAPHS AND CLOTHING I THINK THE SAME REASONING APPLIES AND, THAT IS, THE COURT NEEDS TO BALANCE THE PROBATIVE VALUE AGAINST THE PREJUDICIAL VALUE IN ALSO DETERMINING WHETHER OR NOT THERE ARE OTHER LESS PREJUDICIAL AND LESS INFLAMMATORY SOURCES FOR THE SAME INFORMATION.

JUDGE YOUNG: ALL RIGHT. THANK YOU. LET ME STATE THAT IN RELATION TO THE TESTIMONY OF BRENDA CARAKER MY FEELING AT THIS POINT IS THAT I WILL NOT ALLOW HER TO TESTIFY BECAUSE OF THE FACT THAT THE INCIDENT WAS TWO HOURS EARLIER, IT WAS UNRELATED IN TIME AND PLACE, AND THE ONLY THING IS IT'S COINCIDENTALLY CLOSE IN TIMING AND IT WOULD BE INFLAMMATORY. SO I WILL NOT ALLOW THAT TESTIMONY IN UNLESS I DETERMINE THAT IT SHOULD BE RELEVANT ON REBUTTAL AFTER THE MEDICAL TESTIMONY OR OTHER TESTIMONY IN RELATION TO HIS STATE OF MIND. AND IF IT BECOMES RELEVANT THROUGH THE EXAMINATION OF THE DOCTOR THAT HE COULD HAVE BEEN IN THIS STATE OF MIND FOR A PERIOD OF TIME THEN IT MAY BE RELEVANT TO HIS STATE OF MIND. SO THE DEFENDANT'S OBJECTION WOULD BE GRANTED IN TERMS OF NOT ALLOWING HER TO TESTIFY IN THE DIRECT PORTION OF THE STATE'S CASE.

IN RELATION TO THE CLOTHING OF MR. BARNEY THE COURT FINDS THAT THAT'S PART OF THE PHYSICAL EVIDENCE OF THE CASE. AND THIS IS A CASE WHERE THE DEFENDANT IS ACCUSED OF ATTEMPTED CRIMINAL HOMICIDE, OR MURDER, AND THAT'S IN VIOLATION, AS I UNDERSTAND IT, OF 76-5-203. AND THE NATURE OF THE AGGRESSION IS, IN PART, ILLUSTRATED BY THE PHYSICAL EVIDENCE OF THE CLOTHING, AND THE BLEEDING THAT MAY BE SHOWN ON IT--AND I HAVEN'T SEEN THE CLOTHING YET--IS THE RESULT, ALLEGED RESULT OF THE CONDUCT OF THE DEFENDANT IN RELATION TO THE CLOTHING, THEREFORE, THE

COURT FINDS THAT IT'S PART OF THE PHYSICAL EVIDENCE OF THE CASE AND APPROPRIATELY ADMISSIBLE AND NOT DESIGNED TO INFLAME THE JURY. IT'S SIMPLY PART OF THE FACTUAL BASIS. SO THE CLOTHING WILL BE ADMISSIBLE AND MRS. CARAKER'S TESTIMONY WILL NOT BE ALLOWED WITHOUT FURTHER ORDER OF THE COURT.

MR. BLAYLOCK: THANK YOU, YOUR HONOR.

MS. REMAL: THANK YOU, YOUR HONOR.

JUDGE YOUNG: WE WILL BRING THE JURY IN.

(WHEREUPON, THE JURY RETURNS TO THE COURTROOM).

JUDGE YOUNG: MR. BLAYLOCK, YOUR NEXT WITNESS?

MR. BLAYLOCK: THANK YOU, YOUR HONOR. MR. STEVEN BROPHY.