1992

State of Utah v. Thomas Wesley Callahan : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 920747-CA
THOMAS WESLEY CALLAHAN,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-103 (1990), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, THE HONORABLE RAY M. HARDING, PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990). This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1992).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARD OF APPELLATE REVIEW

1. Is defendant's ineffective assistance of counsel claim, focusing on trial counsel's alleged failure to pursue certain witnesses to testify on defendant's behalf, properly before this Court?

In order to review such a claim, this Court must have before it evidence of how the testimony of the missing witnesses would create a reasonable probability of a different result for defendant. State v. Templin, 805 P.2d 182, 188 n. 26 (Utah 1990).

2. Was the fact of defendant's prior conviction for aggravated assault properly admitted into evidence?

"Whether a piece of evidence is admissible is a question of law, and [the appellate court] always review[s] questions of law under a correctness standard." But when the rule of evidence "vests a measure of discretion in the trial court," the appellate court reverses only if it concludes that the trial court exercised its discretion "unreasonably." State v. Ramirez, 817 P.2d 774, 781-82 n.3 (Utah 1991).

3. Was the evidence sufficient to support the jury's verdict?

"In reviewing a jury verdict to determine if it was based on sufficient evidence, we view the evidence presented and all inferences that can be drawn therefrom in the light most favorable to the verdict. Where there is any evidence, including reasonable inferences that can be drawn from it, from which findings of all the elements of the crime can be made beyond a reasonable doubt, our inquiry is complete and we will sustain the verdict." State v. Gardner, 789 P.2d 273, 275 (Utah 1989) (citations omitted), cert. denied, 110 S.Ct. 1837 (1990). Accord State v. Hamilton, 827 P.2d 232, 236 (Utah 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Rule 609 of the Utah Rules of Evidence, governing impeachment by evidence of conviction of crime, provides in pertinent part:

> (a) **General Rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence

> outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) **Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed. . . [exceptions explained].

Rule 23B of the Utah Rules of Appellate Procedure, governing motions to remand for determination of ineffective assistance of counsel, may be found in addendum a at the end of this brief.

STATEMENT OF THE CASE

Defendant was charged with one count of aggravated assault for an incident that occurred on August 4, 1992, in which he struck Steven Dickerson on the head with a metal bar (R. 13). Following a jury trial on September 14, 1992, defendant was convicted as charged (R. 39). On October 19, 1992, the court sentenced defendant to not more than five years in the Utah State Prison and ordered restitution in the amount of $89.00 (R. 77-78).

STATEMENT OF THE FACTS

On July 22, 1992, defendant Thomas Wesley Callahan began working for Carl Murdock as a helper in repairing auto body damage in a shop in Lindon, Utah (R. 139-41). At the beginning of that month, the 75-year-old Murdock had met defendant at church and, after hiring him, allowed defendant to live in his camper, use the bathroom facilities in the shop, and drive his pick-up truck. Defendant was given keys to both the shop and the truck (R. 142). After a couple of weeks, however, defendant became "very argumentative" and, on the morning of August 4th, Carl Murdock terminated defendant's employment (R. 143).

In the shop office that afternoon, Carl Murdock paid defendant for the work he had completed and asked defendant to return the truck and shop keys (R. 144-45). Defendant responded by demanding two weeks' severance pay, or about $400. Carl Murdock refused to pay, and left the office to tell his son, Ken, and Ken's helper, Steve Dickerson, about the interchange (R. 145).

Steve Dickerson, over six feet tall and 225-30 pounds, accompanied Carl Murdock back to the shop office, where he stood in the doorway (R. 146, 162, 179). When defendant finished a telephone call, he asked Dickerson to move out of the doorway, which he did. Defendant went into the shop and picked up an iron bar measuring approximately one inch in diameter by 12 inches long from Murdock's tool box (R. 146, 163-64). Murdock and Dickerson followed him, the argument continued, and the parties eventually moved outside, where the demands for the keys resumed (R. 149, 165, 202). According to Murdock, defendant raised the bar above his head and said, "What are you going to do about it?" (R. 146, 148). According to Dickerson, defendant pointed the bar in front of him, stating, "You stand back. You stay out of this" (R. 166-67).

The argument finally reached an impasse after defendant emptied his pockets to demonstrate that he had no keys (R. 149, 167, 228). At that point, Dickerson suggested that the police should be called (R. 150, 169, 231). Murdock turned away from defendant, presumably to go inside to make the telephone call.[1]

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[1] The police, however, had already been summoned by a boy who worked for Dennis Gray, the owner of the shop (R. 195).

Steve Dickerson testified:

> Tom proceeded -- as Carl turned around, Tom -- looked like to me that he was going to reach and hit one of us with the pipe, hit Carl. And so I went to grab the pipe from Tom's hand because he had it in his hand raised above his head. And at that time I didn't grab the pipe and I was hit on the head with it.

(R. 170). In responding to a series of defense questions seeking to establish his role as the aggressor, Dickerson described his involvement in the dispute between Murdock and defendant by commenting: "All my point to be there was to make sure Carl wasn't going to get hurt. It wasn't my argument. And so when he had the pipe in the air I went to grab the pipe out of his hand is all. I wasn't going to let him try to hit me or hit Carl" (R. 173).

During the course of the argument, Dennis Gray, the shop owner, was working nearby on a front-end loader (R. 193-94). He testified that "Tom had the bar and he was holding it up like this, and saying, 'Somebody around here is going to get hurt'" (R. 195). Gray stated that it seemed to him that Dickerson had his hand out and was demanding the keys. Then Dickerson ran up to defendant "quite aggressively," and "Tom hit him in the side of the head with this pipe" (R. 196).

Dickerson testified, "And I remember as I got hit, it just like dazed me for a second and I pushed him [defendant] to the ground" (R. 170). Dickerson then ran off towards the shop to get away from defendant, who was chasing him with the iron bar raised in the air (R. 171-72, 196-97). By that time, Carl Murdock had returned to the scene and saw Dickerson "come by holding his head

and Tom raised with this bar trying to hit him again" (R. 150). Murdock tackled defendant, and defendant "swung" at Murdock, grazing his head (R. 151, 197). Dennis Gray then grabbed defendant around the neck and "tried to calm him down and tried to stop him from killing somebody with the bar" (R. 198). Gray released defendant, who took the iron bar to the camper and returned without it a few moments later, just as the police were arriving (R. 199). Defendant was arrested, charged with aggravated assault and, after a jury trial, convicted as charged.

SUMMARY OF ARGUMENT

Defendant claims that his trial counsel was ineffective for failing to pursue witnesses to testify on defendant's behalf. However, defendant has failed to present any factual basis at all upon which this Court could meaningfully assess whether counsel's performance was deficient and whether the alleged deficiency actually prejudiced the fairness of defendant's trial. Before asking this court to adjudicate his ineffectiveness claim, defendant should have created a proper record in the trial court.

If the trial court erred in admitting the fact of defendant's prior conviction for aggravated assault into evidence, the error was harmless. Defendant's credibility was undermined by a record replete with inconsistencies and conflicts between his testimony and that of the other witnesses. Defendant has wholly failed to show how, absent the brief exchange concerning defendant's prior conviction, there was a reasonable likelihood of a more favorable result for defendant.

Because defendant has failed to marshal the evidence in support of the claim that the evidence was insufficent to support his conviction, he has waived consideration of the issue on appeal.

ARGUMENT

POINT ONE

DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, FOCUSING ON TRIAL COUNSEL'S FAILURE TO PURSUE WITNESSES TO TESTIFY ON DEFENDANT'S BEHALF, IS NOT PROPERLY BEFORE THIS COURT.

Defendant asserts that his trial counsel was ineffective for failing to investigate, interview, and subpoena witnesses to testify on defendant's behalf. While he cites to the proper law for assessing ineffectiveness claims, defendant wholly fails to factually substantiate his claim.

The two-part test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) has been adopted by the Utah Supreme Court:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

State v. Templin, 805 P.2d at 186 (quoting Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2064) (footnotes omitted).

The Utah Supreme Court has stated that a court need not determine the deficient performance prong if there has been no

showing of prejudice. "'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" State v. Frame, 723 P.2d 401, 405 (Utah 1986) (quoting Strickland, 466 U.S. at 697, 104 S.Ct. at 2069).

In this case, defendant has wholly failed to present any factual basis upon which a reviewing court could meaningfully assess whether defense counsel's alleged deficiencies actually prejudiced the fairness of defendant's trial. He asserts only that defendant identified to his trial attorney certain friendly witnesses, that his attorney failed to contact them, and that these witnesses would have corroborated defendant's version of what happened (Br. of App. at 11-12). He does not identify the names of the witnesses, nor does he provide any evidence concerning how these witnesses would have testified had they been called during trial. Defendant has not met the burden of showing that if these witnesses had testified, there was a "reasonable probability that the result of his trial would have been different." State v. Templin, 805 P.2d at 188 n.26 (citation omitted).

Furthermore, the issue is not properly before this Court. Rule 23B of the Appellate Rules of Procedure provides that in a case such as this, prior to filing his appellate brief, counsel should have filed a motion to remand the case to the trial court for the presentation of evidence. See Utah R. App. P. 23B(a) or addendum a. The motion should have been accompanied by "affidavits alleging facts not fully appearing in the record on appeal that

show the claimed deficient performance of the attorney . . . and the claimed prejudice suffered by the appellant as a result of the claimed deficient performance." Utah R. App. P. 23B(b) or addendum a. By following this rule, defendant would have created the record necessary for a determination of his ineffectiveness claim by this Court.

POINT TWO

ANY ERROR THAT MAY HAVE BEEN COMMITTED IN PERMITTING THE FACT OF DEFENDANT'S PRIOR CONVICTION FOR AGGRAVATED ASSAULT TO COME INTO EVIDENCE WAS HARMLESS.

On cross-examination of defendant, the following exchange occurred:

Prosecutor:	Now, Mr. Callahan, have you been convicted of a felony before?
Defendant:	Yes, Ma'am.
Prosecutor:	What was that felony?
Defendant:	I believe it was classified as aggravated assault.
Prosecutor:	Okay, thank you. I have no further questions.

R. 255. On appeal, defendant asserts that defense counsel was ineffective for failing to object to this testimony, that the prosecuting attorney was guilty of prosecutorial misconduct for pursuing the testimony, and that the court erred in admitting the testimony without first engaging in the balancing of probativeness and prejudice required by rule 609(a), Utah Rules of Evidence (Br.

of App. at 18).[2]

To prove ineffective assistance of counsel, as explained, defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced defendant. State v. Templin, 805 P.2d 182, 186-87 (Utah 1990). Similarly, to prove prosecutorial misconduct, defendant must show both misconduct by the prosecutor and resulting prejudice to defendant. State v. Vigil, 840 P.2d 788, 795 (Utah App. 1992). In this case, even assuming arguendo that the first prong of each test has been met, defendant has failed to prove the prejudice prong.

Assuming the court erred in failing to balance the prejudicial impact of the previous conviction against its probative value, the proper standard for reversal "is whether absent the error, there was a reasonable likelihood of a more favorable result for the defendant." State v. Bruce, 779 P.2d 646, 656 (Utah 1989). Accord State v. Gentry, 747 P.2d 1032, 1038 (Utah 1987); State v. Wight, 765 P.2d 12, 19 (Utah App. 1988). Thus, for all three claims made

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[2] Defendant also asserts that the prosecutor should be "sanctioned for offering the evidence before the evidentiary findings for its use required by Rule 609 had been made by the trial judge" (Br. of App. at 18). In essence, defendant wants the very act of asking about a prior conviction categorized as prosecutorial misconduct. Plainly, rule 609(a) contemplates that some prior convictions will be appropriately admitted. It does not contemplate per se categories of exclusion. Furthermore, it is defendant's responsibility to move for exclusion of the testimony or to register a contemporaneous objection, neither of which is evidenced by the record. Only then does the burden shift to the prosecutor to show "that the probative value of admitting the convictions, as far as shedding light on the defendant's credibility, outweighs the prejudicial effect to the defendant." State v. Banner, 717 P.2d 1325, 1334 (Utah 1986).

by defendant, the proper test is whether, absent the evidence of prior conviction, the result of the trial would likely be different for defendant.

In this case, the evidence was undisputed that defendant struck the victim. The only question was whether the attack constituted an assault or an act of self-defense. Defendant in essence argues that the question was so close that evidence of his prior conviction sufficed to undermine his credibility with the jury and tip the scales towards conviction. But for evidence of his prior conviction, defendant believes he would have been acquitted.

The case, however, is not nearly as close as defendant asserts. Indeed, the evidence that defendant's story is not credible is so substantial that evidence of his prior conviction would have had a negligible impact on a jury. Defendant's testimony was long and rambling, a detailed narrative account of events leading up to the assault on Steve Dickerson (see, e.g., R. 220-25, 233-38). In many instances, defendant's testimony was diametrically opposed to that of the witnesses. For example, defendant testified in some detail about a conversation of well over an hour that he had on the Saturday evening before the incident with Dennis Gray. Defendant testified that he remembered it was a Saturday because he was going to a dance and wanted Gray to finish quickly so that defendant could leave for the dance. According to defendant, during the conversation Gray offered him a job (R. 247). Dennis Gray was subsequently asked whether he had

ever discussed future employment with defendant. Gray responded unequivocally: "No way, no. . . . I have a few helpers that help me occasionally, but I don't have people working for me full-time, and I wouldn't have hired Tom anyhow" (R. 256). He also stated that he did not "believe in working on Saturdays" and did not come to the shop on Saturday (R. 257).

Defendant also testified in detail about an object with which he said Dickerson struck him across the chest prior to defendant striking Dickerson in self-defense (R. 231-32, 249-50). He described it as "a wood or metal object," "about four foot long," "a colored object . . . blue or turquoise green," that eventually ended up on the ground (R. 249-50). Steve Dickerson testified that he pushed defendant to the ground after defendant had struck him, but that at no time did he have any object in his hands (R. 269). Dennis Gray testified that the only person who had a weapon was defendant (R. 259). The responding police officer testified that he looked for the object that defendant described but was unable to locate it (R. 265).

Defendant further testified that when he took the iron bar into the camper after the incident, he just tossed it down, either on the bed or near the television, and began to pack up his things. He then moved the bar and didn't remember where he put it (R. 236). In trying to explain how the bar ended up hidden under the blanket on the bed, defendant stated, "My bed wasn't made. I'm sorry, but I'm a bachelor. I know ladies like to make their bed, but I slept in it, so I left mine unfolded" (R. 254). Defendant in essence

intimated that because the bedclothes were awry, they could have easily concealed a bar that was tossed onto them. In contrast, both Dennis Gray and the police officer testified that the weapon was "shoved down underneath" defendant's fully made bed, presumably with the intent to hide it (R. 259, 263).

In addition to these specific points of conflict, other areas of defendant's testimony are either so detailed or so overblown as to bring his own credibility into serious question. He describes the incident at issue in extreme detail, as if it were a movie unfolding frame by frame, noting every nuance of what he saw, heard, felt, and did. See addendum b or R. 231-238. On its face, the extreme detail alone is enough to raise questions about either defendant's extraordinary memory or the truth of what he asserts.

Further, defendant describes three accidents that occurred during his short employment tenure, all of which speak to physical limitations that would render the assault difficult or impossible. Two co-workers precipitated the first accident, causing defendant's right hand to be "slit . . . about an inch and a half, . . . all the way to the bone" (R. 215). Carl Murdock caused the second incident, resulting in defendant's hand being "jerked . . . completely out of joint" (R. 215). The third injury occurred while defendant was holding a piece of equipment. In this instance, Dennis Gray made the error, and the equipment, according to defendant, "jerked my arm and pulled the tendons and ligaments all the way down and popped my wrist" (R. 216). In all three instances, defendant was victimized by the apparent carelessness of

co-workers, but chose not to seek medical help for fear of being labelled accident-prone and thereby losing his job (R. 242-43). Defendant presumably testified about these injuries to show that he was physically unable to raise his arm and strike the blow that injured Dickerson.[3]

In combination, the inconsistencies and conflicts described seriously undermine defendant's credibility. And, once the jury chose not to believe defendant, there simply was not a reasonable likelihood of a more favorable result for him, even absent the brief exchange concerning defendant's prior conviction. Indeed, any negative influence derived from admitting the fact of defendant's prior conviction pales in comparison to the prejudice resulting from the multiple instances of conflicting testimony. Because defendant has not met his burden of showing how admission of the prior conviction prejudiced him, his conviction should be affirmed.

POINT THREE

BECAUSE DEFENDANT HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF HIS CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HIS CONVICTION, HE HAS WAIVED CONSIDERATION OF THE ISSUE ON APPEAL.

Defendant asserts that the evidence was legally insufficient to convict him of aggravated assault. In order for this Court to consider such a claim, defendant "must marshal the evidence supporting the . . . findings and demonstrate how the evidence,

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[3] Notably, however, defendant's theory was self-defense, not that he did not hit Dickerson.

including all reasonable inferences drawn therefrom, is insufficient to support the disputed findings." State v. Peterson, 198 Utah Adv. Rep. 56, 58 (Utah App. 1992). If a defendant fails to marshal the evidence, the right to have the claim considered on appeal is waived. State v. Moore, 802 P.2d 732, 738 (Utah App. 1990). Accord State v. Gallegos, No. 890513-CA, slip op. at 6 (Utah App. April 8, 1993).

In this case, defendant simply recites that the evidence was insufficient and offers conflicting testimony to support his preferred theory of self-defense (See Br. of App. at 18). It is, of course, the jury's prerogative both to assess the credibility of the witnesses and to weigh their testimony. State v. Martinez, 709 P.2d 355, 356 (Utah 1985). Certainly, had the jury believed defendant's version of what happened and disbelieved all of the other witnesses, it could have concluded that defendant's assault was rooted in self-defense and acquitted him. But they chose not to do so, and defendant has neither marshalled the evidence in support of the trial court's decision, nor shown how that evidence and the inferences that may properly be drawn from it are so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, 659 P.2d 443, 444 (Utah 1983). Under such circumstances, this Court should not disturb the jury's decision. State v. Moore, 802 P.2d at 738. Accord State v. Booker, 709 P.2d 342, 345 (Utah 1985); State v. Gallegos, slip op. at 7.

CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction.

RESPECTFULLY submitted this 28th day of April, 1993.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of Appellee were mailed, postage prepaid, to Lee C. Rasmussen and H. Wayne Green, Attorneys for Defendant, 211 East 300 South, Suite 213, Salt Lake City, Utah 84102, this 28th day of April, 1993.

Joanne C. Slotnik

ADDENDA

ADDENDUM A

Rule 23B. Motion to remand for determination of ineffective assistance of counsel.

(a) **Grounds for motion; time.** A party to an appeal in a criminal case may move the court to remand the case to the trial court for the purpose of entering findings of fact relevant to a claim of ineffective assistance of counsel. The motion shall be available only upon an allegation of facts constituting ineffective assistance of counsel not fully appearing in the record on appeal. The motion shall be filed prior to the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.

(b) **Content of motion; response; reply.** The content of the motion shall conform to the requirements of Rule 23. The motion shall include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits shall also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. A response shall be filed within 20 days after the motion is filed. Any reply shall be filed within 10 days after the response is filed.

(c) **Order of the court.** Upon consideration of the motion, affidavits, and memoranda, the court may order that the case be temporarily remanded to the trial court for the purpose of entering findings of fact relevant to the claim of ineffective assistance of counsel. If it appears to the appellate court that the attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) **Effect on appeal.** Oral argument and the deadlines for briefs shall be vacated upon the filing of a motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by a motion for remand, unless a stay is ordered by the court upon stipulation or motion of the parties or upon the court's motion.

(e) **Proceedings before the trial court.** Upon remand the trial court shall conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand. The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a preponderance of the evidence. The trial court shall enter written findings of fact.

(f) **Preparation and transmittal of the record.** At the conclusion of all proceedings before the trial court, the clerk of the trial court and the court reporter shall prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

ADDENDUM B

(INDICATING ON DRAWING).

THEN CARL TURNED AROUND AND SAID, "WELL, I GUESS" -- HE SAID, "I GUESS I'M JUST GOING TO HAVE TO CALL THE LAW." AND I SAID, "GO AHEAD." I WAS STARTING TO CALL THE LAW A LITTLE WHILE AGO WHEN I WISH I HAD, MYSELF.

NOW CARL WAS LEAVING. HE'S RIGHT HERE AND CARL STARTS TO LEAVE. AT THIS POINT DENNIS GRAY HAD MOVED OVER HERE RIGHT AROUND IN HERE (INDICATING ON DRAWING). THEN CARL WAS LEAVING. HE KEEPS TELLING ME -- TELLING EVERYBODY HE'S GOING TO PROTECT CARL. HE TOOK OFF. THIS IS AN OPEN FIRE PIT THAT DENNIS GRAY HAS OUT THERE, AND THERE'S ROPE AND STUFF LIKE THAT IN THERE. HE TOOK OFF AT A GOOD TROT RIGHT OVER THERE. AT THAT POINT I WAS TURNING TO GO TO THE HOUSE AND I WAS ABOUT THIS WAY. AND I CAUGHT HIM OUT OF THE CORNER OF MY EYE TAKING OFF AT A FAST TROT FOR THE RUBBLE. AND I TURNED AND SAID, "DENNIS, HE'S GOING FOR A WEAPON, HE'S GOING TO GET SOMETHING TO HIT ME WITH." I SAID THAT FOUR OR FIVE TIMES. HE FINDS SOMETHING ABOUT FOUR FOOT LONG. I DON'T KNOW IF IT WAS METAL OR WOOD. IT WAS ABOUT THIS BIG, WHETHER IT WAS THREE-QUARTERS OF AN INCH OR INCH AND A HALF. BUT IT WAS RIGHT OVER HERE AND ABOUT FOUR FOOT LONG. AND THEN HE TAKES OFF AND STARTS COMING TOWARDS ME. AND I SAID, "DENNIS" -- DENNIS DIDN'T DO ANYTHING.

ANYWAYS, HE STARTS COMING TOWARDS ME. AND DENNIS IS KIND OF LIKE THIS. I DON'T KNOW WHAT HE'S THINKING OF. I'M ASKING HIM TO STOP HIM, PLEADING WITH HIM. HE COMES RIGHT UP RIGHT ABOUT HERE IN FULL STRIDE.

Q. WHO IS THAT?

A. THAT MAN RIGHT THERE (WITNESS POINTING).

Q. JUST DRAW ON THE BOARD.

A. HE COMES UP AND HE RAISES THAT STICK OR METAL, WHATEVER IT WAS, AND COME DOWN ON ME. I PUT THE BAR UP, GO LIKE THIS. AND WHEN HE RECHECKS -- AT THAT POINT DENNIS GRAY STEPS OVER HERE. AND WHEN HE RECHECKED I TURNED TO DENNIS AND SAID, "DENNIS, STOP HIM." MY HEAD WAS TURNED. THAT WAS MY MISTAKE. AT THAT POINT HE CROSSED THE THING ACROSS MY CHEST. MY PAPERS WENT FLYING, BOTH MY PENCILS. MY PEN, WHICH THIS MAN WAS SUPPOSED TO TAKE FROM THE OFFICER AND DID NOT -- I HANDED IT LATER ON TO THE OFFICER, THE OTHER OFFICER.

Q. YOU'RE SAYING MR. DICKERSON HAD HIT YOU ACROSS THE CHEST?

A. YES, SIR. AND THEY HAD FOUND A TWO INCH OR SO BRUISE RIGHT HERE. HAD THE PAPERS AND THINGS NOT BEEN IN THERE IT MIGHT HAVE BEEN A BIGGER BRUISE OR I MIGHT HAVE BROKE A RIB. BUT THE PAPERS WERE THERE AND PROBABLY SAVED ME FROM GETTING SERIOUS INJURY.

AT THAT POINT, THEN -- EXCUSE ME. MY MOUTH

GETS DRY.

THEN I BUCKLE DOWN A LITTLE BIT, COME DOWN, NOT SO MUCH IN DEFENSE BUT FROM THE BLOW. AND HE'S BACK AGAIN, AND THE OBJECT HE HAD IN HIS HAND I WOULD SAY NOW IS ABOUT TWO AND A HALF FEET LONG. WHETHER IT WAS WOOD OR METAL, WHETHER THE WOOD BROKE OR THE METAL BENT, I DON'T KNOW. AND HE HIT AGAIN AND IT CAME ACROSS THE BAR AND HIT THE BOTTLE AND THE BOTTLE HIT ME. I GUESS THE BAR AND THE BOTTLE CUSHIONED THE BLOW BECAUSE IT WASN'T ALL THAT DAMAGING TO ME. AT THAT POINT I TOOK THE BAR AND I SWUNG. I MISSED, ABOUT 8 TO 12 INCHES. I DIDN'T KNOW HOW BAD MY ARM WAS REALLY HURTING. AND I THOUGHT: OH BOY, I'M IN TROUBLE. I KIND OF MOVED BACK JUST A LITTLE BIT. IT LOOKED LIKE HE WAS COMING IN TO ME AND I SWUNG AGAIN. AT THAT POINT HE HIT ME RIGHT DOWN HERE AND I WENT DOWN HARD.

Q. WHEN YOU SAY HE WAS COMING INTO, WHAT DO YOU MEAN BY THAT?

A. HE CAME IN TO TACKLE ME AND TAKE ME DOWN, I MEAN TOTAL AGGRESSION. AND I HIT MY NECK AND MY HEAD PRETTY HARD. AND THEN WE WERE DOWN AND I WAS TRYING TO GET UP. AND I REALIZED I MUST HAVE HIT MY HEAD HARDER THAN I KNEW BECAUSE I HAD LOST THE BAR. AND I DIDN'T KNOW I HAD LOST IT, BECAUSE AS I WAS TRYING TO GET UP I HAD TO SCOOP THE BAR BACK UP. AND THEN MY BODY WAS

SIDEWAYS TO HIM, AND I WAS TRYING TO BREAK LOOSE AND MY FEET WERE LAYING ON THE GROUND. AND I SWUNG IT KIND OF BLINDLY TOWARD HIM. I DON'T KNOW IF I HIT HIM THE SECOND ONE OR THE THIRD ONE; WHATEVER. I KNOW I MISSED HIM THE FIRST ONE. BUT I FELT LIKE I MIGHT HAVE HIT HIM ONCE. I'M NOT SURE. AT THAT POINT; WE WERE BOTH RIGHT HERE.

ERASE THIS NOW.

OKAY, HE GETS UP AND HE TAKES OFF RIGHT AROUND HERE. WHEN HE GETS UP I'M THINKING HE'S GOING AFTER ANOTHER WEAPON. HE CAME AFTER ME ONCE, I FIGURE HE'S GOING AFTER ANOTHER ONE. SO I GET UP AND I TAKE OFF THROUGH HERE. AND HE'S LIKE THIS (DEMONSTRATING). AND AGAIN, I DIDN'T KNOW WHAT KIND OF SHAPE I WAS IN, BECAUSE HE WAS JUST MAKING TRACKS. HE WAS COMING HERE. CARL WAS COMING RIGHT AROUND HERE, AND I WAS COMING DOWN HERE, AND AS FAR AS I COULD GO. AND HE WAS LIKE THIS.

NOW SOMEWHERE IN HERE -- NOW I'M MOVING AT A PRETTY GOOD PACE. CARL SEES ME AND GOES INTO A FIGHT POSITION. THEN HE VERY -- THIS IS ALL VERY QUICK. THE ADRENALIN IS PUMPING, MIND IS GOING 90 MILES AN HOUR. THEN HE GOES INTO A TACKLE POSITION, AND HE JUST WENT AHEAD AND CROUCHED DOWN LIKE THIS. IN THE PROCESS I SAW MR. DICKERSON, WHAT LOOKED LIKE RIGHT AROUND IN HERE, PUT HIS HAND TO HIS HEAD. HE'S KIND OF LIKE THIS. I THINK IT WAS -- AND I PRESUME THAT I HIT HIM. AND I DIDN'T

WANT TO HURT CARL SO I TRIED TO SLOW UP AND PULL UP. AND WE HIT ABOUT THAT POINT. IT WASN'T REALLY HARD. AND WE CONNECTED RIGHT HERE (INDICATING ON DRAWING). I WENT AHEAD AND BENT ON OVER HIM LIKE THIS. NOW IF THE BAR WENT ACROSS HIS HEAD, I DON'T KNOW. BUT I WAS TRYING NOT TO HURT HIM AND I NEVER EVER SWUNG AT CARL.

AT THAT POINT WE GOT UP, BOTH OF US. NOW I DON'T KNOW IF HE WAS FOLLOWING ME RIGHT THERE AT THAT TIME OR NOT. I JUST STARTED -- I WAS GOING BACK TO MY HOUSE. AND I WAS TAKING THE BAR BECAUSE I WASN'T SURE -- THERE'S CARL WITH HIS MIND. I DON'T KNOW WHAT HE'S GOING TO DO ACTUALLY. AND I DON'T KNOW IF STEVEN IS REALLY HURT THAT HE WON'T GET A WEAPON AND COME BACK OUT, BECAUSE I DON'T KNOW IF I'VE HURT HIM OR IT'S JUST BOUNCED OFF HIS HEAD. I MEAN HE'S RUNNING PRETTY GOOD, SO HE'S STILL WHAT I CALL A LIVE WIRE. THEN I GO BACK UP TO HERE. DENNIS GRAY IS RIGHT HERE. AND EVIDENTLY CARL FOLLOWED ME. THEN I HEAR SOME NOISE AND I TURN AROUND BECAUSE I'M NOT SURE WHAT'S GOING ON, IF HE'S COMING BACK OUT OR WHAT. AND I TURN AROUND AND HERE'S KEN MURDOCK RUNNING FULL SPEED RIGHT FOR ME, RIGHT THERE.

AT THAT POINT I DON'T KNOW WHAT HE'S GOING TO DO. HE SHOVES ME AND GRABS ME AT THE SAME TIME RIGHT HERE. I KIND OF MOVE AND WITH MY ARM PUSHES HIS ARM ASIDE. AND STOOD BACK AND I SAID, "THERE DOESN'T NEED TO

BE ANYMORE OF THIS." AND RIGHT THEN HE STOPPED. HE SEEMED TO STOPPED, SO I MOVE BACK. I'M WATCHING AND NOT POSITIVE WHAT'S GOING ON. THIS IS ALL PRETTY EXCITING RIGHT NOW. I TURNED TO GO BACK TO MY HOUSE. AT THAT TIME DENNIS GRAY, IN WHAT I CALL A GREAT POSE, SAYS TO ME, "I COULD BREAK YOU IN TWO." AT THAT POINT I JUST KIND OF LOOK AT HIM AND JUST KIND OF SHOOK MY HEAD AND THOUGHT TO MYSELF, WHY DIDN'T HE JUST STOP THIS WHOLE THING. IT'S HIS PLACE, HE COULD HAVE DONE THAT.

(WITNESS EMOTIONAL)

ANYWAY, I MOVE BACK TO MY HOUSE RIGHT HERE. I HAVE THE BAR WITH ME, BECAUSE ONCE AGAIN, I WASN'T SURE WITH ALL THE EXCITEMENT AND EVERYTHING -- WELL, ANYWAY. AND I WALKED IN HERE AND MY THOUGHTS WERE, I'LL JUST PACK MY STUFF. AND I REMEMBER COMING IN, AND I LAID THE BAR ON THIS COUNTER. AND I GOT MY BAG OFF THE -- IT WAS UP IN THE FRONT, SO I GOT IT OFF AND STARTED PACKING. AND SOME OF THE THINGS WERE HERE IN THE WAY, AND I MOVED IT. I WASN'T POSITIVE WHERE I MOVED IT, BUT I'LL TAKE HIS WORD WHERE IT WAS. I DON'T KNOW IF I PUT IT ON THE TV OR ON THE BED. I TOLD HIM I DIDN'T REMEMBER WHERE IT WAS.

AT THAT POINT I WAS KIND OF SHOOK UP. AND I WAS IN HERE. AND I HEARD SOME NOISE AND I LOOKED OUT THE WINDOW AND SAW THE POLICE, SO I CAME OUT RIGHT ABOUT IN HERE. THERE WAS A POLICEMAN RIGHT HERE AND ONE RIGHT

HERE. AND I PRESUME THIS GENTLEMAN WAS IN HERE TALKING. THIS GENTLEMAN SITTING HERE WAS IN TALKING TO THE OTHER PEOPLE, I PRESUME.

I START TELLING THIS OFFICER WHAT WAS HAPPENING. THE OTHER OFFICER CAME UP, AND IN THE PROCESS I LOOKED DOWN AND OF COURSE MY STUFF WAS GONE AND I HAD THIS BENT PEN. IT WAS BENT. I SAID, "HERE'S THIS BENT PEN," AND I HANDED IT TO THIS OFFICER. IN THE PROCESS THIS OFFICER SITTING HERE COMES OUT AND SAYS, "WERE YOU IN A FIGHT?" AND I SAID, "YES, SIR, IT WAS RIGHT HERE." AND I START TO TELL HIM, AND THEN DENNIS GRAY COMES UP RIGHT ABOUT HERE AND SAYS HE WANTS HIS KEY. AND I HAND HIM HIS KEY AND THE OFFICER SAYS, "DO YOU HAVE HIS KEY?" AND I SAID, "YES, SIR." AND HE SAID, "WELL, GIVE HIM HIS KEY." AND I TOOK THE KEY -- I HAD FORGOTTEN ABOUT THIS PART OVER HERE. THE KEY WAS THERE. IT WAS ON THE BARREL. CARL WAS RIGHT THERE WITH ME. THE KEY TO DENNIS'S OFFICE, NOT THE KEY TO HIS TOYOTA. AND THEN HE SAID, "GIVE HIM THE KEY," AND SO I GAVE HIM THE KEY. AND THE OFFICER SAID, "WHY DIDN'T YOU GIVE HIM HIS KEY AWHILE AGO?" AND I SAID, "DENNIS GRAY DIDN'T ASK ME FOR MY KEY." AND HE SAID, "YOU'RE UNDER ARREST." AND I SAID, "DON'T YOU WANT TO HEAR WHAT HAPPENED?" AND HE SAID, "NO." AND THE OTHER OFFICER MADE THE GESTURE TO HIM, AND SAID, "HERE'S THE BENT PEN, DO YOU WANT IT?" HE SAID,

"NO." HE ALREADY HAD HIS EVIDENCE. HE ALREADY HAD HIS CASE. HE DIDN'T CARE ABOUT ME. HE TURNED RIGHT AROUND -- AND I SAID, "WHAT ABOUT MY PAPERS AND PENCILS?" THERE ARE BROKEN PENCILS. THEY WERE ON THE GROUND, OR STICKS, WHATEVER IT WAS, WAS ON THE GROUND. HE SAID, "DON'T YOU TAKE CARE OF THAT, WE'LL WORRY ABOUT IT." SO I'M HANDCUFFED AND I GO DOWN HERE AND THEY TOOK ME TO A PATROL CAR.

Q. WHY DON'T GO AHEAD AND TAKE YOUR SEAT AT THE STAND.

MR. BAINUM: I DON'T HAVE ANY FURTHER QUESTIONS.

THE COURT: VERY WELL, YOU MAY CROSS-EXAMINE.

MS. LAYCOCK: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MS. LAYCOCK:

Q. MR. CALLAHAN, AM I TO UNDERSTAND THAT THROUGHOUT THIS ENTIRE ALTERCATION YOU WERE ALWAYS THE PEACEFUL ONE?

A. PEACEFUL? IN THE OFFICE I REALIZED THAT THE SITUATION COULD GET ESCALATED. I TRIED TO KEEP MY COMPOSURE.

Q. YOU REPEATEDLY TOLD US YOU JUST KEPT SAYING