1989

The State of Utah v. Bruce Aaron Ellis : Brief of Appellant

Utah Court of Appeals

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4966

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
BRUCE AARON ELLIS,	:	Case No. 890657-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (Supp. 1989), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Scott Daniels, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 77-35-26(2)(a) (Supp. 1989) and Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes and constitutional provisions are provided in Addendum A:

Utah Code Ann. § 76-1-402(4) (1990)
Utah Code Ann. § 76-1-601 (1990)
Utah Code Ann. § 76-5-102 (Supp. 1989)
Utah Code Ann. § 76-5-103(1)(b) (Supp. 1989)
Utah R. Evid. 403

STATEMENT OF THE ISSUES

Did the trial court err in precluding the jury from considering the defendant's theory regarding the lesser included offense of simple assault?

Did the trial court err when it denied the defendant's motion to exclude the photographs marked State's Exhibits Nos. 1-8?

STANDARD OF REVIEW

"Each party is . . . entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it." State v. Torres, 619 P.2d 694, 695 (Utah 1980).

A trial court's decision regarding the admissibility of potentially prejudicial photographs is subject to an "abuse of discretion" standard. State v. Lafferty, 749 P.2d 1239, 1257 (Utah 1988). If the trial court erred in its decision, appellate courts "must determine the harmfulness of the trial court's error." Id. "A conviction will not be reversed because of the erroneous admission of evidence absent a showing that the error likely affected the substantial rights of the defendant." State v. Cloud, 722 P.2d 750, 754 (Utah 1986).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103(1)(b) (Supp. 1989). Following a two day jury trial beginning on September 27, 1989, in the Third Judicial District

Court, in and for Salt Lake County, State of Utah, the Honorable Scott Daniels, presiding, the court sentenced Bruce Aaron Ellis to an indeterminate term of zero to five years at the Utah State Prison and a $5000 fine (with a 25% surcharge). (R 89). The court stayed the sentence and placed Bruce Ellis on probation. (R 89).

STATEMENT OF THE FACTS

On June 29, 1989, at approximately 5:00 p.m., Steven Drew gave a co-worker, Stephen Evans, a ride home from work. Transcript of September 27, 1990, Trial Proceeding [hereinafter referred to as "TA"] at 89. While proceeding towards their respective homes, the two men noticed a parked pickup truck resembling a truck owned by Dale Purdy, another co-worker who had not been at work that day. (TA 59, 89). Drew and Evans then stopped by the truck, parked at a location different than Purdy's actual residence, to ascertain if Purdy was present. (TA 60, 89).

Although Purdy was not there, his girlfriend, Diane Konecny, was in the house situated by the truck. (TA 137). According to Dale Purdy, Diane "had taken [his] truck the night before; had not come back." (TA 118). She did not return the following morning, having apparently spent the night in the home of the Defendant/Appellant, Bruce Ellis. (TA 118, 155-56). The truck had not been stolen, (TA 73), though Diane had "asked [Ellis] if [he] knew [someone] who would buy the truck from her. (TA 136). Purdy was thus stranded at his home, unable to travel to work without the benefit of his truck. (TA 118).

Drew and Evans asked "several people standing [in] front" of Ellis' residence if Mr. Purdy or his girlfriend were around. (TA 60). Bruce Ellis approached Drew and Evans and, according to the State's witnesses, discussed whether the truck should be sold for an "eight ball." (TA 62). Drew and Evans departed for Purdy's home to tell him that his truck may be sold. (TA 72).

After Drew and Evans updated Dale Purdy with news of their discovery, the State's witnesses admitted that "Mr. Purdy wasn't happy in learning where his truck was[.]" (TA 73). Drew and Evans both knew that Purdy was angry about Dianne leaving him. (TA 126). The three men returned to confront Bruce Ellis. (TA 74). The men did not return to confront Dianne Konecny. (TA 74).

Drew, Evans, and Purdy returned to a nearby location, the driveway where the truck had been moved. (TA 121). According to Dale Purdy, he confronted Ellis and asked him if "he had seen Dianne or knew anything about the truck parked out there." (TA 122). Purdy said Ellis told him, "she was not there, and [the truck] ran out of gas[.]" (TA 122). Bruce Ellis, however, testified that he told Purdy that Dianne was in the house. (TA 137). "[Purdy] went back [in the house] and asked Dianne for the keys and she told him no. She told him that if he gave her her kids, she'd give him the keys." (TA 137).

Under either Purdy's or Ellis' version, after Purdy returned to Drew and Evans one of two sequences of events occurred. When Purdy told them he could not get the keys, Drew and Evans

approached Ellis through a front gate while Drew grabbed what appeared to be a tire iron and came over the fence at Ellis. (TA 138). Steven Drew threatened to "beat my [Ellis'] brains out . . . for being with Mr. Purdy's . . . girlfriend [Dianne Konecny]." (TA 156). Ellis, drinking a glass of water at the time, threw the glass at Steven Drew in an attempt to stop him from coming over the fence. (TA 139, 143). Bruce Ellis testified that he threw it with his right hand. (TA 143). Ellis is left-handed. (TA 143).

The alternative scenario submitted by the State alleged that after Purdy told Drew and Evans that he could not get the keys, the three men were passively content with finding the truck and securing its return. (TA 95). This version, however, ignores the testimony of Stephen Evans, the State witness who conceded that the primary objective of the three men in returning to the scene was for "the confrontation . . . with Mr. Ellis" as Mr. Purdy's girlfriend "was nowhere around." (TA 74). According to Steven Drew, he calmly asked Ellis, "Can we please have the keys so we can get out of here?" (TA 110). Drew claimed that Ellis responded with profanity and the two men then argued bitterly. (TA 95). Drew also contended that Ellis "said, 'I ought to kill you,' and he turned and he throws the bottle at me and I duck and it catches the back of my leg." (TA 95). Drew testified that Ellis "threw it offhand," (TA 107), from a distance of "ten to [twelve] feet." (TA 96).

After Drew was hit, Purdy drove him to the hospital. (TA 68, 97). No doctor worked on Drew's leg for "[t]he first hour and a half" following his arrival at the hospital. (TA 103). The

police apparently had requested photographs of the wound. In one of the pictures, State's Exhibit No. 7, the surgeon who treated Steven Drew, Dr. David Howe, admitted that medical personnel appeared to be "holding the wound in an open position." (TB 9). Taking photographs was not a typical emergency room procedure. (TB 9).

Dr. Howe testified that the injury was not life threatening, nor was there any protractive loss of the use of his leg. Transcript of September 28, 1990, Trial Proceeding [hereinafter referred to as "TB"] at 11. Although the involved muscle would not heal "back a hundred percent" and "lose a little *bit of [its] function[,]" Dr. Howe indicated that "it would be hard* to test and [to] show that there's much difference[.]" (TB 7). Howe believed that the injury was "probably four inches" in length and about "an inch and a half to two inches" in depth. (TB 5). A permanent scar would result. (TB 7). He also fully explained the medical procedure used to treat the wound and the type of body parts potentially effected. (TB 5-13). Bruce Ellis cross examined Dr. Howe, but he did not dispute the doctor's testimony concerning his opinion of the wound.

Prior to trial, however, Bruce Ellis moved to exclude the photographs of the wound on many grounds, one of which addressed the anticipated testimony of Dr. Howe. (TA 5). Ellis believed that the photographs required an appropriate medical foundation, (TA 99), and the information conveyed by the photographs, if any, could be established by the more detailed, and less prejudicial, testimony of

Dr. Howe. (TA 5). The court denied the motion, though it acknowledged the defendant's continuing objection. (TA 4-5, 100).

After the presentation of evidence, Ellis also moved for a directed verdict on the aggravated assault charge and for the opportunity to submit the matter to the jury as a simple assault charge. (TB 14). The court denied his motion. (TB 16).

SUMMARY OF THE ARGUMENT

The trial court erred in refusing to submit the case to the jury under the State's theory, aggravated assault, and the defendant's theory, simple assault. While the court may have properly refused to grant defendant Ellis' motion for a directed verdict on the aggravated assault charge, it nonetheless erred in refusing to allow the jury to consider his lesser included offense theory. The evidence presented provided a rational basis for the simple assault charge, but the trial court's ruling made unavailable the defendant's theory as a third option for the jury. The jury should not have been forced to choose between aggravated assault or acquittal.

The court also erred in admitting nonessential, cumulative, and irrelevant photographs of a wound. The jury instruction on aggravated assault focused only on whether the defendant used "force likely to produce death or serious bodily injury." The end result, and pictures thereof, were irrelevant to proving the element of the alleged crime. The only relevant evidence was testimony describing Bruce Ellis' throwing motion and the circumstances accompanying the altercation between Ellis and Steven Drew, the injured party.

By admitting graphic close-ups of the gaping wound, the court left open the "strong potential for creating unfair prejudice." Moreover, prior to trial Bruce Ellis informed the court of less prejudicial means of depicting the information, if any, reflected by the photographs. The State's witnesses, particularly Dr. Howe, would have addressed any information contained in the photographs in a manner less inflammatory than the eight (8" X 11") color pictures. The photographs were nonessential and had little or no probative value; they unfairly detracted the jury from the true focus of the case.

ARGUMENT

POINT I

THE COURT ERRED IN NOT ALLOWING THE JURY TO CONSIDER THE DEFENDANT'S THEORY OF THE CASE

After each party presented their case-in-chief, Mr. Ellis made the following objection:

> Your Honor, the court stated yesterday that I might make any appropriate motions today rather than yesterday when the state initially rested.
>
> Your Honor, it would be our motion to dismiss the aggravated assault count and to ask the court to submit this matter to the jury as an assault, a simple assault in terms of the state's evidence presented.

(TB 14) (emphasis added). Bruce Ellis then questioned whether the State "met the prima facie burden of [proving] serious bodily injury or the likelihood that it [the defendant's actions] would." (TB 15). The court denied Mr. Ellis' motion, believing that the jury could find that Ellis' actions were likely to create serious

bodily injury. (TB 16). The court erred, however, in not also permitting the jury to consider Bruce Ellis' theory of simple assault. Cf. State v. Baker, 671 P.2d 152 (Utah 1983) ("The court must only decide whether there is a sufficient quantum of evidence presented to justify sending the question to the jury, . . . if there is a sufficient quantum of evidence to raise a jury question regarding a lesser offense, then the court should instruct the jury regarding the lesser offense")

In State v. Torres, 619 P.2d 694 (Utah 1980), the Utah Supreme Court emphasized the following principles, especially applicable to the case at bar:

> We are not concerned with the reasonableness, nor the credibility of the defendant's evidence relating to his claim of self defense. Each party is, however, entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it.

Id. at 695.

By denying Mr. Ellis' motion, the trial court precluded the jury from considering the defendant's theory of the case. Even if the jury should have been able to consider the aggravated assault charge, the court should not have refused "to submit this matter to the jury as an assault, a simple assault in terms of the state's evidence presented." (TB 14). The evidence provided the jury with a reasonable basis for Ellis' simple assault theory. (TA 135-157).

The State and the defendant both agreed that Steven Drew was hit by a jar thrown by Bruce Ellis. See generally (TA 87-115, 135-64). The parties disagreed, however, on whether the force used

was likely to produce serious bodily injury. The State contended that Ellis had thrown the jar at Drew in a manner "likely to produce death or serious bodily injury." (TA 45-46) (emphasis added); (T 95).

Bruce Ellis admitted that he threw the jar, (TA 139), and that Steven Drew had "suffered a scar" (i.e. bodily injury). (TB 15). But Ellis disputed the element of "seriousness,"[1] (TB 15), as he did not throw it in a manner likely to produce death or serious bodily injury. Both parties agreed that Ellis threw it with his wrong hand. (TA 107, 143). Even the "victim" viewed Bruce Ellis' throwing motion as awkward or unorthodox. Ellis may have had "a hell of a fast ball[,]" (TA 107), but Drew nonetheless acknowledged that Ellis "threw it offhand." (TA 107).

The undisputed testimony could have supported either the greater offense theory or the lesser included offense theory. The jury should have been able to consider the two competing theories in order to resolve whether the force used was likely to produce "serious bodily injury," as opposed to "bodily injury." See also (TA 3) (wherein the court acknowledged that "one of the issues is whether or not . . . the force used was likely to produce death or serious bodily injury. . . .")

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[1] Ellis also testified that he had acted in self defense. (TA 139).

During the sentencing phase of the proceedings, the trial court conceded the possibility that the jury could have convicted Ellis under the lesser included offense:

> [Defense counsel]: . . . This is a case where, as we discussed informally, had a lesser included offense been submitted, it might well have been that the jury would have returned a verdict of simple assault.
>
> The Court: Probably would have--possibly would have.

(TB 45).[2]

The court's acknowledgement of the defendant's position further confirmed the reasonableness of his simple assault theory. The court did not dispute Ellis' statements regarding his prior objections, nor did it refute the plausibility of his theory. Rather, the court's statements reflected the erroneous nature of its previous decision. Indeed, the court went on to state:

> this crime is certainly nothing, you know, I would approve of, but it's not like--it's not the crime of the century, either, you know, get in a fight and you throw the bottle at somebody; it's pretty bad, but it's not like robbing a 7-Eleven with a gun or something. It's horrid, question of bad temper.

(TB 48). If self defense did not apply, the "bad tempered," impulsive act could have been appropriately classified under both simple assault and aggravated assault. See Utah Code Ann. §§ 76-5-102, -103(1)(b) (1990).

Not only did the court err in not allowing the jury to consider the defendant's theory, the error was compounded by the

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[2] See infra note 3 and accompanying text.

fact that the theory pertained to a lesser included offense. The standard for determining whether to instruct a jury on a lesser included offense is a two pronged analysis.

> [The instruction] must be given if (i) the statutory elements of greater and lesser included offenses overlap to some degree, and (ii) the evidence provides a "rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

State v. Hansen, 734 P.2d 421, 424 (Utah 1986) (construing State v. Baker, 671 P.2d 152, 159 (Utah 1983)); Utah Code Ann. § 76-1-402(4) (1990).

The first prong was satisfied by the plain language of the statutes. The "simple" assault statute states, inter alia: "Assault is: (a) an attempt, with unlawful force or violence, to do bodily injury to another; (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or (c) an act, committed with unlawful force or violence, that causes bodily injury to another." Utah Code Ann. § 76-5-102 (1990). The "aggravated assault" statute reads in relevant part, "A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he: (a) intentionally causes bodily injury to another; or (b) uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury." Utah Code Ann. § 76-5-103(1)(b) (1990) (emphasis added). Accordingly, the overlapping elements of the greater and lesser included offenses satisfied the initial requirement. Cf. State v. Hansen, 734 P.2d 421, 424 (Utah 1986) ("the test is whether the

elements overlap at all"); State v. Barkas, 91 Utah 574, 65 P.2d 1130, 1133 (1937) ("There can be no doubt that a charge of assault with intent to do bodily harm, includes also a simple assault, because that assault must be proved as a necessary element of the greater offense").

The second prong, the rational basis test, should be considered in light of the principles announced in State v. Hansen, 734 P.2d 421 (Utah 1986). The Hansen Court interpreted the two pronged analysis as one which "should be liberally construed," 734 P.2d at 424, especially where, as here, the defendant requested the lesser included offense instruction.[3] Id. at 424 n.5; State v.

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[3] Initially, Bruce Ellis moved "to dismiss the aggravated assault count and to ask the court to submit this matter to the jury as an assault, a simple assault in terms of the state's evidence presented. (TB 14) (emphasis added). His motion thus contained a dual request. After Ellis had questioned the "serious" element of the crime, (TB 14-16), the court denied his motion. (TB 16). In response to the court's ruling, Ellis noted his present intention for the record: "We've not--we're not offering a lesser included offense, so I believe that the court should find that a jury cannot find beyond a reasonable doubt that the state has proved its case, and should direct a verdict of not guilty." (TB 16).

Upon a cursory review of these statements, Ellis appeared to not request the lesser included offense. After a more thorough examination of the language used, however, Ellis' statement ("we're") reflected only his present intention. His initial statement ("We've") concerning his past intention was quickly corrected in deference to the motion already denied by the court. Moreover, he also moved to forward the same theories, aggravated assault and simple assault, on the basis that a "not guilty" verdict should be rendered for the aggravated assault charge. (TB 16) (Ellis moved "for a directive verdict on forwarding the same theories, your Honor, that this court should direct a verdict of . . . not guilty [on the crime alleged]"); cf. (TA 45). Finally, as reflected by subsequent statements by the court, the propriety of the defendant's earlier request for a lesser included offense was never disputed. See supra note 2 and accompanying text.

Oldroyd, 685 P.2d 551, 553 (Utah 1984); cf. State v. Chesnut, 621 P.2d 1228 (Utah 1980) ("If there [is] any evidence, however slight, on any reasonable theory of the case under which defendant might be convicted of a lesser included offense, the trial court must, if requested, give an appropriate instruction"). In addition:

> The [two pronged test] of [State v. Baker, 671 P.2d 152, 159 (Utah 1983)] is not a mere technical rule designed to trip up judges and prosecutors. It serves a fundamental policy of permitting the jury to find a defendant guilty of any offense that fits the facts, rather than forcing it to elect between the charges the prosecutor chooses to file and an acquittal. As we recognized in Baker, "[w]here one of the elements of the offense charged remains in doubt but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction."

State v. Hansen, 734 P.2d 421, 424-25 (Utah 1986) (citations omitted and emphasis in original).

Assuming, arguendo, the jury properly rejected Bruce Ellis' claim of self defense, the jury still could have rationally viewed the evidence under either the State's theory, aggravated assault, cf. State ex. rel. McElhaney, 579 P.2d 328 (Utah 1978), or Mr. Ellis' theory, simple assault. Cf. Keeble v. United States, 412 U.S. 205, 208 (1973) ("it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater"); compare Utah Code Ann. § 76-5-102 (1990) with Utah Code Ann. § 76-5-103(1)(b) (1990). If Ellis' actions evidenced his intent to stop Steven Drew--or even an intent to cause "bodily injury," cf. (T 143), the jury may have

nonetheless found that the evidence did not reveal an intent to use "force likely to produce death or serious bodily injury." (R 69). The rational basis prong was satisfied by the testimony of either the State's witnesses or the defendant, all of whom gave different interpretations of the "likely to produce serious bodily injury" element of the alleged crime. Cf. State v. Oldroyd, 685 P.2d 551, 553-54 (Utah 1984) (if "overlapping exists and the evidence is ambiguous and susceptible to alternative interpretations, the trial court must give a lesser included offense instruction if any one of the alternative interpretations provides both a 'rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense'").

The jury, not having been given the opportunity to consider the lesser included offense, was forced to choose between "aggravated assault" and "acquittal." If the jury disbelieved the claim of self defense, it had no other choice but to convict Bruce Ellis of aggravated assault. The court erred in requiring the jury to make such a determination. See Keeble v. United States, 412 U.S. 205, 213 (1973) ("We cannot say that the availability of a third option--convicting the defendant of simple assault--could not have resulted in a different verdict"); cf. State v. Hansen, 734 P.2d 421, 428 (Utah 1986) ("This is exactly the sort of forced choice that lesser included offense instructions are designed to avoid, and exactly the choice that the jury would not have had to make if [the lesser included offense] instruction had been given"); State v. Oldroyd, 685 P.2d 551, 555 (Utah 1984) ("if the evidence offered in

the case would permit a jury to find a defendant guilty of the lesser offense and not guilty of the greater, due process requires that a lesser included offense instruction must be given").

POINT II

THE COURT ERRED IN ADMITTING UNNECESSARILY THE PREJUDICIAL PHOTOGRAPHS OF THE VICTIM'S WOUND

Another motion made by Bruce Ellis concerned the admissibility of State's Exhibits Nos. 1-8, the gruesome photographs depicting Steven Drew's wound. (TA 99-100, 116-117). The trial court declined to exclude the photographs, stating:

> I have looked at the photographs and determined that because one of the issues is whether or not the injury initiated or the force used was likely to produce death or serious bodily injury, since that's the issue, the State must prove everything. The photographs are relevant. They're not so gruesome in my opinion as to outweigh the prejudicial effect; doesn't outweigh the probative value, consequently the motion to exclude those exhibits will be denied.
>
> [The State then added]: Your Honor, for the record, I believe . . . Ms. Wells indicated to the court that she thought the Lafferty homicide standard should apply, and it is my understanding the court said no.
>
> The Court: That's right. I think it is a different situation. If you have photographs of a corpse, they are not directly relevant because everyone agrees the person is dead. How serious the injury was is not an issue. Where the issue is, [was] the assault [likely to] produce serious bodily injury, I think the standard is different and I don't think the Lafferty case applies.

(TA 3-4); (R 69). The court erred in its decision because it misunderstood the applicable law.

In State v. Lafferty, 749 P.2d 1239 (Utah 1988), the Utah Supreme Court considered whether "the trial court erred in admitting

certain photographs during the [trial]." Id. at 1256. The Court initially reviewed the governing evidentiary rule, Utah R. Evid. 403, which provides: "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." Utah R. Evid. 403 cited in Lafferty, 749 P.2d at 1256. The Court interpreted the rule's language as requiring more than "a simple balancing of probative value and potential for unfair prejudice[.]" 749 P.2d at 1256.

> our past decisions have recognized that inherent in certain categories of relevant evidence is an unusually strong propensity to unfairly prejudice, inflame, or mislead a jury. Evidence in these categories is uniquely subject to being used to distort the deliberative process and improperly skew the outcome. Consequently, when evidence falling within such a category is offered, we have required a showing of unusual probative value before it is admissible under rule 403. In the absence of such a showing, the probative value of such evidence is presumed to be "substantially outweighed by the danger of unfair prejudice."

Id. at 1256 (emphasis added). The presumption is therefore in favor of excluding the evidence unless the State shows the "unusual probative value" of the evidence. Id. In other words, "potentially prejudicial photographs are 'generally inappropriate' and should not be admitted in evidence unless they have some essential evidentiary value that outweighs their unfairly prejudicial impact. . . Only after a determination has been made that the photographs have such value need the weighing be made." State v. Cloud, 722 P.2d 750, 753

(Utah 1986) (construing State v. Garcia, 663 P.2d 60 (Utah 1983)) (emphasis added).

Cloud and Garcia were only two of the many "past decisions" referred to by the Lafferty Court as cases subject to the "essentiality" requirement. See also State v. Rammel, 721 P.2d 498, 501 (Utah 1986) (statistical evidence of matters not susceptible to quantitative analysis, such as veracity of a witness); State v. Johns, 615 P.2d 1260, 1264 (Utah 1980) (a rape victim's past sexual activities with someone other than the accused); see generally State v. Lafferty, 749 P.2d 1239, 1256 n.14 (Utah 1988). The "essentiality" requirement is not applied differently to homicide cases. The requirement applies to any evidence, however relevant, which is "being used to distort the deliberative process and improperly skew the outcome." Lafferty, 749 P.2d at 1256.

In the case at bar, the trial court never addressed the "essentiality" requirement. Instead, the court understated the nature of the involved issue. The issue[4] was not simply whether "the force used was likely to produce death or serious bodily injury[.]" (TA 3). Rather, the issue focused on whether the State had established the "essential" nature of the photographs and their "unusual probative value."

"The point of the reference to 'essential evidentiary value' in the context of potentially prejudicial photographs of the

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[4] The threshold issue pertained to the relevancy of the photographs. See infra note 6 and accompanying text.

victim's body is that such photographs would generally be inappropriate where the only relevant evidence they convey can be put before the jury readily and accurately by other means not accompanied by the potential prejudice. State v. Garcia, 663 P.2d 60, 64 (Utah 1983) (emphasis in original); cf. State v. Lafferty, 749 P.2d 1239, 1257 (Utah 1988) ("An important consideration in assessing the probative value of a photograph is whether the facts shown by the photograph can be established by other means").

During his motion to exclude the photographs, Bruce Ellis informed the court that the State had other means available for establishing the alleged facts: "we believe the State could prove anything that the photographs are likely to show [through] their other types of testimony, specifically the testimony of the medical expert who will be called who has the ability to utilize diagrams and/or models." (TA 5). The court did not comment on the defendant's argument, nor did it modify its prior decision to exclude the photographs. (TA 5). Thereafter, as predicted by Mr. Ellis, the testimony of the State's witnesses established any and all relevant[5] facts which could have been conveyed by the

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[5] Bruce Ellis objected to the testimony of Dr. David Howe, the surgeon who treated Steven Drew, when Howe testified about the injury which could have resulted. (TB 6). The doctor's testimony was irrelevant to the "likely to produce" element of the alleged crime. The doctor knew nothing about the circumstances surrounding the incident or the throwing motion used by the defendant. His testimony, all in regards to the "end result" or the "could-have-been-result," further exacerbated the potential for misleading the jury.

nonessential photographs. The court erred in not finding that the "essentiality" requirement, referred to in Lafferty, precluded the admissibility of the photographs. The trial court also erred in finding that the photographs were "not so gruesome in my opinion as to outweigh the prejudicial effect; doesn't outweigh the probative value, consequently the motion to exclude those exhibits will be denied." (TA 4). As stated above, more than "a simple balancing of probative value and potential for unfair prejudice" was required. State v. Lafferty, 749 P.2d 1239, 1256 (Utah 1988). A "showing of unusual probative value" was required before the evidence could be admitted. Id. (emphasis added).

The trial court did not apply the appropriate legal analysis. A routine balancing test was not enough. Absent a showing of unusual probative value, the photographs were "presumed to be 'substantially outweighed by the danger of unfair prejudice[.]'" Id. The State did not make the requisite showing, nor did the court make the requisite finding.

More importantly, the court's statements presumed that the photographs had "probative value" when, in fact, they had no relevance[6] whatsoever under the instructions considered by the jury. In order to convict Mr. Ellis, Instruction No. 11 required the jury to find, "That said defendant then and there intentionally,

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[6] The photographs and all testimony on anything other than the throwing motion of the defendant were irrelevant to the "likely to produce" element of the Information and the jury instruction. (R 27, 61, 69); (TA 45).

knowingly, or recklessly, used a deadly weapon or such means or force likely to produce death or serious bodily injury to Steve Drew." (R 69) (emphasis added); see Addendum B. The end result was irrelevant to the jury's determination. (R 69). In other words, if Bruce Ellis had intentionally, knowingly, or recklessly thrown the drinking jar but missed Steven Drew, Ellis still could have been held accountable for his actions. See Utah Code Ann. §§ 76-5-102, -103(1)(b) (1990). As explained by the trial court:

> the question is not whether it was serious bodily injury, it was whether it was likely. I mean, if [someone uses] a gun and it doesn't happen to hurt them, that's still aggravated assault. If they shoot them with a pea shooter and it kills them, that's not.

(TB 15).

The court's statements, though contradicted by its ruling, properly focused on the likelihood of the injury--and not on the result. (i.e. whether the mens rea and actus reus of the defendant combined together in a manner "likely to produce" death or serious bodily injury.) Perhaps, a multi-framed pictorial depicting the defendant's motion and delivery in throwing the drinking jar would have addressed the element of "force likely to produce death or serious bodily injury," (R 69), but photographs taken after the throw would not have addressed the "likely to produce" element stated in the instruction. (R 69).

Accordingly, the court should not have ruled that the photographs of the wound, taken at the hospital, were admissible evidence. (TA 3-4). They were neither essential, nor relevant to

the State's prima facie case. When the court denied Bruce Ellis' motion to exclude the photographs, it opened the door to the "strong potential for creating unfair prejudice." State v. Lafferty, 749 P.2d 1239, 1257 (Utah 1988). The graphic depiction of the wound, especially State's Exhibits Nos. 6-8, drew the jury's attention away from the appropriate inquiry concerning the "likely to produce" element.

Suppose for a moment, that Bruce Ellis used a pea shooter to shoot a pea at Steven Drew's leg. A jury should consider only Ellis' mental state and the accompanying conduct at the time of the alleged crime. Even if the pea somehow became lodged in Drew's eye and blinded him, photographs graphically depicting blood, pus, and a damaged cornea would unduly detract the jury's focus from the "likely to produce" element of the crime. Pictures of the end result would be irrelevant and serve only to inflame the jury.

Similarly, the eight color photographs (8" X 11") used in the present case were unduly emphasized by the State because of their irrelevancy to the proceeding. State's Exhibits Nos. 7 and 8, and to a lesser extent Exhibit 6, were enlarged closeups of a gaping, blood stained wound. Exposing the jury to these "gruesome" pictures[7] could have easily created "unfair prejudice" with its ensuing impact on the jury.

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[7] At the very least, State's Exhibits Nos. 6-8 should have been inadmissible. They had the greatest potential for prejudicially affecting the jury.

"A conviction will not be reversed because of the erroneous admission of evidence absent a showing that the error likely affected the substantial rights of the defendant." State v. Cloud, 722 P.2d 750, 754 (Utah 1986). The error cannot be deemed harmless because the State in the case at bar, unlike the State in other cases, did not have other evidence so overwhelmingly against the defendant that the error was unlikely to affect his substantial rights. Cf. State v. Lafferty, 749 P.2d 1239, 1257 (Utah 1988). Bruce Ellis did admit throwing the drinking jar at Steven Drew but neither his testimony, nor the testimony of the State's witnesses was so overwhelming that, absent the photographs, there was little or no likelihood of a different outcome.

If the jury had been instructed differently, in regards to the lesser included offense instruction, see supra Point I, and in a manner where the end result could have been relevant to their verdict, cf. (R 69), the error may have been harmless. In the present situation, however, the sole consideration relevant to the jury's fact finding mission pertained to the "force likely to produce death or serious bodily injury. . . ." (R 69). Consequently, by exposing the jury to photographs which were nonessential, cumulative, and irrelevant to the proceeding, their affect on the jury cannot be deemed harmless. State v. Cloud, 722 P.2d 750 (Utah 1986). The trial court therefore abused its discretion and committed reversible error when it denied Mr. Ellis' motion to exclude State's Exhibits Nos. 1-8.

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction and remand this case for a new trial.

SUBMITTED this 31st day of October, 1990.

BROOKE C. WELLS
Attorney for Defendant/Appellant

RON S. FUJINO
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, RON S. FUJINO, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 31st day of October, 1990.

RON S. FUJINO

DELIVERED by _____

this _____ day of October, 1990.

_____

ADDENDUM A

76-1-402. Separate offenses arising out of single criminal episode — Included offenses.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

76-1-601. Definitions.

Unless otherwise provided, the following terms apply to this title:

(5) "Dangerous weapon" means any item capable of causing death or serious bodily injury, or a facsimile or representation of the item, and:

(a) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(b) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

76-5-102. Assault.

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another.

(2) Assault is a class B misdemeanor.

76-5-103. Aggravated assault.

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) Aggravated assault is a third degree felony.

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.

ADDENDUM B

INSTRUCTION NO. 11

Before you can convict the defendant, Bruce Aaron Ellis, of the crime of Aggravated Assault, you must believe from all the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:

1. That on or about the 29th of June, 1989, in Salt Lake County, Utah, the defendant, Bruce Aaron Ellis, assaulted Steve Drew;

2. That said defendant then and there intentionally, knowingly, or recklessly, used a deadly weapon or such means or force likely to produce death or serious bodily injury to Steve Drew.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, you must find the defendant guilty of Aggravated Assault. If, on the other hand, you are not convinced of the foregoing elements beyond a reasonable doubt, then you must find the defendant not guilty.