

1993

# Salt Lake City v. Thomas Parrish : Brief of Appellant

Utah Court of Appeals

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APR 08 1994

DOCKET NO. 930770

IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, :

Plaintiff/Appellee, :

v. :

THOMAS PARRISH, : Case No. 930770-CA

Defendant/appellant, : Priority No. 2

BRIEF OF APPELLANT

This is an appeal from a judgment and conviction for Battery, a class B misdemeanor, in violation of Salt Lake City Ordinance 11.08.020, in the Third Judicial Circuit Court in and for Salt Lake County, State of Utah, the Honorable Michael L. Hutchings, Judge, presiding.

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**FILED**  
Utah Court of Appeals

APR 06 1994

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**STATEMENT OF JURISDICTION**

Jurisdiction is conferred on this Court pursuant to Rule 26(2) (a) of the Utah Rules of Criminal Procedure and Utah Code Ann. Section 78-2a-3(2) (f) (1992), whereby the defendant in a Circuit Court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony. In this case, Appellant was found guilty of Battery, a class B misdemeanor, and sentenced in a bench trial by the Honorable Michael L. Hutchings, Judge of the Third Circuit Court, Salt Lake City Department, State of Utah.

**STATEMENT OF THE ISSUES AND STANDARD OF REVIEW**

The issue before this Court and standard of review is as follows:

1. Did the trial court commit reversible error in Appellant's trial for Battery by allowing evidence of his prior conviction of Disorderly Conduct?

The admission of evidence is a question of law and is reviewed for correctness, however, the trial court's subsidiary factual determinations, if any, are given deference by the Appellate Court and will be overruled only when clearly erroneous. State v. O'Neal, 206 Utah Adv. Rep. 14, 16 (Utah Ct. App. 1993); State v. Diaz, 220 Utah Adv. Rep. 29, 31 (Utah Ct. App. 1993).

When reviewing a trial court's balancing of the probativeness of the piece of evidence against its potential for unfair prejudice under Rule 403, the appellate court will only reverse if the trial court's decision as a matter of law was unreasonable. O'Neal, at 16.

TEXT OF PERTINENT RULES

Utah Rule of Evidence 403 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.

Utah Rule of Evidence 404 provides:

**Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except;

(1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Utah Rule of Evidence 608 provides:

**Rule 608. Evidence of character and conduct of witness.**

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence



of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(c) **Evidence of bias.** Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

**STATEMENT OF THE CASE**

This appeal is from judgment and conviction for Battery, a class B misdemeanor, in violation of Salt Lake City Ordinance 11.08.020. Mr. Parrish was found guilty in bench trial on October 29, 1993. Mr. Parrish was sentenced on October 29, 1993 to 180 days in jail. The court suspended 150 days and placed Mr. Parrish on good behavior probation for a period of one year. On November 30, 1993, Mr. Parrish filed a Notice of Appeal. Due to excusable neglect on the part of Mr. Parrish's counsel, a Motion, Stipulation, Order to Extend the Time for Filing the Notice of Appeal, and a second Notice of Appeal was filed on December 29, 1993.

### STATEMENT OF THE FACTS

The substance of the allegation against Mr. Parrish was that he kicked his wife in the back as she lay on their bed. During the course of the bench trial, Mr. Parrish commented on direct examination that this was not the first time his wife had called the police, nor was it the first time he had been arrested. (Transcript "T" 19). On cross examination the city prosecutor elicited an admission from Mr. Parrish that this was the third time in as many months that his wife had called the police. (T. 20).

Since it was clear that the city prosecutor intended the trial court to infer from this question that Mr. Parrish had beaten his wife in the past, defense counsel on re-direct asked Mr. Parrish if at any time he had ever beaten his wife. Mr. Parrish denied that he had at any time beaten his wife. (T. 21). On re-cross examination, the city prosecutor confronted Mr. Parrish with a prior conviction for Disorderly Conduct, an infraction, in violation of Salt Lake City Ordinance 11.12.020, from a few days ago. Not content with merely bringing up the prior conviction, the city prosecutor questioned Mr. Parrish as to his specific conduct in the case.

Specifically, the prosecutor tried to characterize the Disorderly Conduct conviction as involving a finding that Mr. Parrish had threatened his wife or engaged in some sort of threatening behavior toward his wife. (T. 21). Mr. Parrish then admitted that he was found guilty of disturbing the peace and not threatening his wife. Again the prosecutor questioned him further

as to his conduct on that occasion attempting to elicit an admission that Mr. Parrish had engaged in fighting, threatening, and tumultuous behavior. (T. 21). When Mr. Parrish denied the allegations, the city prosecutor confronted him with the fact that she had prosecuted that case as well, inferring that she knew the facts to be otherwise.

At this point, Mr. Parrish's counsel objected to the prosecutor's reference to the prior case on the grounds that it was intended to be character evidence and was, therefore, inadmissible, and even if it were admissible, under Rule 403, the probative value was substantially outweighed by the prejudicial effect. (T. 22). The city argued that Mr. Parrish had opened the door to this line of questioning by testifying that he expected to be arrested, that he had been arrested three times before, and that he had never beaten his wife. The city further argued that because Mr. Parrish had denied threatening his wife, evidence of his prior conviction for Disorderly Conduct could be used to impeach his credibility. (T. 22).

The trial court overruled Mr. Parrish's objection, reasoning that Mr. Parrish did open the door and, therefore, the prior conviction was a legitimate area of cross-examination. In addition, the court found that the prejudice involved did not outweigh the probative value of the evidence. (T. 23).

Commenting that this case ultimately came down to deciding the credibility of the witnesses, the trial court found Mr. Parrish guilty of Battery, a class B misdemeanor. (T. 27).

### SUMMARY OF ARGUMENT

The Trial Court committed reversible error by admitting evidence of Mr. Parrish's prior conviction for Disorderly Conduct. Evidence of his prior conviction is not admissible under Rule 404(b) of the Utah Rules of Evidence or Rule 608(b) of the Rules of Evidence. It is clear that the city introduced Mr. Parrish's prior conviction intending to show that he had a violent temper and that on this occasion he acted in conformity with his violent character.

Additionally, the trial court erred in ruling that Mr. Parrish opened the door to cross examination of his prior conviction of Disorderly Conduct. Mr. Parrish denied beating or threatening his wife in the past. He admitted that he was guilty of disturbing the peace. Evidence of the prior conviction for Disorderly Conduct cannot be characterized as rebuttal evidence as it did not directly contradict his statements. Disorderly Conduct covers a wide range of behavior which includes disturbing the peace and need not necessarily involve violent or threatening behavior.

Furthermore, even if Mr. Parrish's prior conviction was admissible under Rule 404(b) or Rule 608(b), Rule 403 of the Rules of Evidence bars its introduction because the prejudicial effect of such evidence substantially outweighs its probative value. Evidence of Mr. Parrish's prior conviction has very little probative value. The mere fact that Mr. Parrish had been convicted of Disorderly Conduct a few days prior is immaterial to the question of whether he was guilty of Battery in an unrelated incident. Evidence of his prior conviction was not probative to

his credibility as it is not a crime of dishonesty and did not contradict Mr. Parrish's assertion that he had never beaten his wife in the past.

Lastly, the introduction of Mr. Parrish's prior conviction for Disorderly Conduct was reversible error as there is a reasonable likelihood that the error affected the outcome of the proceedings. Aside from the complainant's testimony, the city had no independent evidence to support its case. The city's entire case hinged upon the credibility of the complainant's testimony, and discrediting Mr. Parrish's testimony. While it is reasonable to expect a judge in a bench trial to exercise greater discipline of mind than a jury, it is unreasonable to assume that evidence that Mr. Parrish had been involved in altercations with his wife in the past did not affect the trial judge's assessment of his credibility. For this reason, the likelihood of a different outcome to the trial is sufficiently high to undermine confidence in the verdict.

## ARGUMENT

### I. MR. PARRISH'S PRIOR CONVICTION FOR DISORDERLY CONDUCT IS NOT ADMISSIBLE UNDER RULE 404(b).

The trial court erred in admitting Mr. Parrish's prior conviction for Disorderly Conduct. Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or accident.

Utah R. Evid. 404(b).

It is clear that the city sought to introduce Mr. Parrish's prior conviction for Disorderly Conduct in an attempt to show that he had a propensity to commit violent acts towards his wife. Proof that Mr. Parrish had been involved in some type of altercation with his wife on a prior occasion could serve no other conceivable purpose. These were two entirely unrelated incidents. The fact that Mr. Parrish might have been guilty of Disorderly Conduct in the past is not probative as to whether he was guilty of committing Battery against his wife on a later date. Mr. Parrish's prior disputes with his wife are not probative to his intent on this occasion. State v. Featherson, 781 P.2d 424, 427-28 (Utah 1989).

In sum, no legitimate reason existed to introduce evidence of Mr. Parrish's prior conviction of Disorderly Conduct. Rule 404(b) limits the admissibility of evidence of prior crimes due to the tendency of a fact finder to convict the accused because

of his bad character rather than because he is shown to be guilty of the offense charged. "Because of this tendency, such evidence is presumed prejudicial and, absent a reason for the admission of the evidence other than to show criminal disposition the evidence is excluded". State v. Saunders, 699 P.2d 738, 741 (Utah 1985).

**II. MR. PARRISH DID NOT "OPEN THE DOOR" TO CROSS EXAMINATION OF HIS PRIOR CONVICTION FOR DISORDERLY CONDUCT UNDER RULE 608(b).**

Mr. Parrish's denial that he had ever beaten or threatened his wife did not open the door to introduction of his prior conviction for Disorderly Conduct pursuant to Rule 608(b). Rule 608(b) of the Utah Rules of Evidence states:

Specific instances of the conduct of a witness for the purpose of attacking or supporting the witnesses' credibility other than conviction of crime as provided in Rule 609 may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witnesses character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.

Utah R. Evid. 608(b).

It is a well settled rule that when a defendant chooses to testify in his own defense he is subject to being impeached. Impeachment may include cross examination which would tend to contradict his credibility. Such evidence may be introduced to impeach the defendant's credibility even if it is also evidence of a prior bad act that would not otherwise be admissible. State v.



Reed, 820 P.2d 479, 481 (Utah Ct. App. 1991); State v. Lopez, 626 P.2d 483, 485-86 (Utah 1981); State v. Wells, 603 P.2d 810, 812 (Utah 1979). However, Mr. Parrish's prior conviction for Disorderly Conduct does not contradict his assertion that he has never beaten or threatened his wife and for that reason is not admissible to impeach his testimony under Rule 608(b). Disorderly Conduct, under the Salt Lake City Code, is an offense against public order not an offense against persons. Pursuant to Salt Lake City ordinance 11.12.020, a person is guilty of Disorderly Conduct if he:

1. Refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition by any act which serves no legitimate purpose; or
2. Intending to cause inconvenience, annoyance, or alarm, or recklessly creating a risk thereof:
  - a. engages in fighting or in violent, tumultuous, or threatening behavior; or
  - b. makes unreasonable noises in a private place which can be heard in a public place, or maliciously or wilfully disturbs the peace or quiet of another or of any neighborhood or family by loud or unusual noise or by discharging firearms of any description, or by threatening, traducing, quarreling, challenging to fight, or fighting, or by use of profane or blasphemous language; or
  - c. obstructs vehicular or pedestrian traffic; or
3. Uses insulting, obscene, or profane language in a place or under circumstances

which could cause a breach of the peace of good order of the city.

It is clear that Disorderly Conduct covers a very wide range of behavior. When confronted with his prior conviction for this offense, Mr. Parrish admitted to disturbing the peace. It was improper for the city prosecutor to attempt to use this prior conviction to impeach Mr. Parrish's assertion that he had never beaten or threatened his wife. The prosecutor cannot pick and choose among the many types of conduct covered under this ordinance in an attempt to circumvent Rule 404(b) and introduce otherwise inadmissible evidence. It is not at all clear that Mr. Parrish's conviction for Disorderly Conduct involved any kind of behavior which contradicts his assertion that he had never beaten or threatened his wife. No evidence was submitted by the city to indicate whether Mr. Parrish's conviction for Disorderly Conduct was based on threatening behavior or simply a loud and quarrelsome family fight.

This case is, therefore, distinguishable from the above-cited cases. In Reed, Lopez, and Wells, prior bad act evidence was admitted which directly conflicted with the defendant's assertions. For example, in Reed, the defendant testified that he did not use drugs. A police officer's testimony of discovery of drug paraphernalia in the defendant's house was thus admissible impeachment evidence. In Lopez, the defendant denied on direct having kicked someone in the head in a fight which was related to the current case at trial. Therefore, testimony of a state's rebuttal witness that the defendant had kicked another person in

the head during that incident was proper. And, again, in Wells, the Court held that evidence directly contradicting the defendant's assertion that he had never pointed a weapon at the victim before was proper.

Unlike all of these cases, Mr. Parrish's prior conviction for Disorderly Conduct was not proper rebuttal evidence as it did not contradict his testimony on direct. The trial court erred by allowing the city to introduce inadmissible character evidence under the guise of impeachment evidence.

**III. EVEN IF MR. PARRISH'S PRIOR CONVICTION FOR DISORDERLY CONDUCT WERE ADMISSIBLE UNDER RULES 404(b) OR 608(b), THE EVIDENCE SHOULD HAVE BEEN EXCLUDED BECAUSE THE PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.**

The trial court erred in refusing to exclude Mr. Parrish's conviction for Disorderly Conduct pursuant to Rule 403. Rule 403 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.

This Court has considered several factors when balancing the probativeness of evidence against its prejudicial effect. These factors include:

The strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval

of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

O'Neal, 848 P.2d at 701.

In this case, both the prior conviction and the current charge involved the same complainant and were similar in that both incidents arose out of domestic disputes. Because of these similarities the risk was unjustifiably high that the fact finder would unfairly characterize Mr. Parrish as someone who routinely terrorized his wife. Such hostility toward Mr. Parrish unfairly undermined his testimony. The prejudice against Mr. Parrish is exacerbated by the fact that the only defense he could offer was his word against that of his wife's. Lastly, evidence of Mr. Parrish's prior conviction was not crucial to the city's case. Evidence of the prior incident shed no light on the events which led to the later charge of Battery.

In sum, the trial court unreasonably concluded that the probative value of the conviction was not outweighed by the danger of unfair prejudice and, thus, erred in admitting the evidence.

**IV. THE ADMISSION OF MR. PARRISH'S PRIOR  
CONVICTION FOR DISORDERLY CONDUCT WAS NOT  
HARMLESS ERROR.**

The trial court's admission of Mr. Parrish's prior conviction for Disorderly Conduct was not harmless error. Harmless errors are "errors which, although properly preserved below and presented on appeal, are sufficiently inconsequential that . . .

there is no reasonable likelihood that the error affected the outcome of the proceedings". State v. Hamilton, 827 P.2d 232, 240 (Utah 1992). An error requires reversal when the likelihood of a different outcome is sufficiently high to undermine confidence in the verdict. Id. In making this determination the Court should consider a number of factors including "the importance of the witness' testimony to the prosecution's case and the overall strength of the state's case." Id.

Here, the city's evidence consisted solely of the complainant's allegation. There were no independent witnesses nor was there any physical evidence. Clearly, evidence that Mr. Parrish had allegedly been involved in a prior domestic dispute with his wife was devastating. Since Mrs. Parrish's testimony was the only evidence before the court, evidence of the prior incident was so prejudicial as to undermine confidence in the verdict.

While it is safe to assume that a "trial court will be somewhat more discriminating in appraising both the competency and the effect properly to be given evidence," it is unreasonable to assume that the admission was harmless error simply because the case was tried to the bench and not to a jury. Featherson, 781 P.2d at 431. This case hinged on a determination of the credibility of the two witnesses involved. One can safely assume that the trial court, in theory, understood the limited purpose of the introduction of Mr. Parrish's prior conviction. However, it is quite another matter to reasonably expect the court to successfully execute the mental gymnastics required to reach that result. As

disciplined as the trial court's thinking may have been, it is expecting too much of any human being in a case as close as this one to completely ignore allegations that Mr. Parrish had previously threatened or abused his wife. In the absence of any other evidence, admission of Mr. Parrish's prior conviction for Disorderly Conduct constituted prejudicial error.

**CONCLUSION**

Based on the foregoing argument the defendant, Mr. Parrish, respectfully moves this Court to reverse his conviction for Battery, a class B misdemeanor, and remand this case for a new trial.

RESPECTFULLY SUBMITTED this 5 day of April, 1994.




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REBECCA C. HYDE  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, REBECCA C. HYDE, hereby certify that I have caused eight copies of the foregoing to 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 office of the City Prosecutor, 451 South 200 East, Salt Lake City, Utah 84111, this 5 day of April, 1994.

  
\_\_\_\_\_  
REBECCA C. HYDE  
Attorney for Defendant/Appellant

MAILED/DELIVERED this \_\_\_\_ day of April, 1994.

**DELIVERED BY**

APR 6 1994

**PAT ADAMSON**

## **ADDENDUM**



## TEXT OF PERTINENT RULES

Utah Rule of Evidence 403 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.

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(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(c) **Evidence of bias.** Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.