

JAN 31 2005

**In the Third Judicial District Court
Summit County, State of Utah**

STATE OF UTAH,

Plaintiff,

vs.

MARIA A. TISCARENO,

Defendant.

**MEMORANDUM DECISION
AND ORDER**

Case No. 031500228

Hon. Deno G. Himonas

Defendant, Maria A. Tiscareno, moves the Court for an order (1) arresting judgment¹ and (2) striking the juror affidavits and related statements (the "Juror Affidavits") on which the State relied in its Objection to Defendant's Motion for Arrest of Judgment. For the reasons set forth below, the Court strikes the Juror Affidavits and grants Tiscareno a new trial.

BACKGROUND

In November of 2003 the State charged Tiscareno with child abuse.² According to the Information, Tiscareno, the operator of Abby's Daycare in Park City, had violently shaken N.M., a one-year old boy, causing him severe head injury.

Tiscareno pled "not guilty" and the case proceeded to trial on October 25, 2004. Four days later, October 28, 2004, the Court instructed the jury as to the applicable law and submitted the case to them for decision. Four of the Court's instructions to the jury bear repeating here:

¹For relief Tiscareno seeks a judgment of acquittal or, alternatively, a new trial.

²Utah's child abuse statute provides in pertinent part as follows:

Any person who inflicts upon a child serious physical injury or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows: (a) if done intentionally or knowingly, the offense is a felony of the second degree; (b) if done recklessly, the offense is a felony of the third degree; or (c) if done with criminal negligence, the offense is a class A misdemeanor.

INSTRUCTION NO. 21

* * *

You should construe each instruction in the light of and in harmony with the other instructions and you should apply the instructions as a whole,

INSTRUCTION NO. 27

Under the law of the State of Utah, any person who intentionally or knowingly inflicts upon a child serious physical injury or, having the care or custody of such child, intentionally or knowingly causes or permits another to inflict serious physical injury upon a child is guilty of Child Abuse.

INSTRUCTION NO. 29

In order for you to convict defendant of the offense of Child Abuse . . . , the prosecution must prove each of the following essential elements beyond a reasonable doubt:

1. On . . . the date charged in the Information defendant did:
 - a. [i]nflict serious physical injury upon the child named; or
 - b. cause or permit another to inflict serious physical injury on said child, defendant having physical care or custody of the child named[;] and
2. That such infliction of serious physical injury was done intentionally or knowingly; and
3. That the person upon whom the serious physical injury was inflicted was at the time a child.

INSTRUCTION NO. 30

No person is guilty of an offense unless his conduct is prohibited by law and that person acts with a mental state which is called "intentionally" or "knowingly."

* * *

A person engages in conduct "intentionally" or with "intent" with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person engages in conduct with "knowledge" or "knowingly" with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly or with knowledge with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Tiscareno's counsel did not object to the Court giving these instructions. To the contrary, he affirmed that he took "no exception to the jury instructions as they've been provided" to him. Transcript, p. 615.

After deliberating for approximately three and one-half hours, the jury returned a verdict of "guilty" of second-degree child abuse, which was the sole count contained in the Information. The jury, however, also returned a separate writing, signed by each juror, stating, "Your Honor: although we have found Mrs. Tiscareno guilty as charged, we all believe and agree that this was not a malicious act, but a tragedy for both families." The Court read the guilty verdict, polled the jurors, and excused them without revealing the existence of this writing to the parties or counsel.

On December 10, 2004, Tiscareno filed her Motion for Arrest of Judgment Pursuant to Utah Rule of Criminal Procedure 23. The State filed its response, along with the Juror Affidavits, on December 17, 2004. Tiscareno moved to strike the Juror Affidavits five days later. And on January 11, 2005, the Court heard oral argument on Tiscareno's Motion for Arrest of Judgment and her Motion to Strike Juror Affidavits.

ANALYSIS

As noted above, Tiscareno asks the Court to strike the Juror Affidavits and to either enter a judgment of acquittal or grant her a new trial. As also noted above, the Court grants the request to strike and orders a new trial.

I. THE MOTION STRIKE THE JUROR AFFIDAVITS.

In an effort to explain away the separate writing that the jury delivered to the Court along with the Verdict, and to bolster the Verdict, the State submitted affidavits from seven of the eight jurors, a memorandum from a detective who spoke to some or all of the jurors, and transcriptions of various telephone messages between the jurors, the detective, and the State's prosecutor. Tiscareno objects to the State's use of these materials based on Utah Rule of Evidence 606(b). Her objection is well-taken.

Rule 606(b) flatly forbids the Court from considering the Juror Affidavits. It reads:

(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

(Emphasis added.) The Rule, and its prohibition against using juror affidavits to support a verdict, could not be more clear. Consequently, the Court strikes the Juror Affidavits.

II. THE MOTION TO ARREST JUDGMENT.

Tiscareno's Motion for Arrest of Judgment is not nearly as straightforward as her Motion to Strike Juror Affidavits. The underpinning of Tiscareno's argument is that the Court improperly instructed the jury with respect to the *mens rea* requirement for second-degree child abuse. More specifically, Tiscareno argues that (1) second-degree child abuse is a specific intent crime, (2) a specific intent crime requires the specific intent that a certain result be reached, and (3) the Court erroneously instructed the jury that they should convict if they determined that she had intended to engage in the underlying conduct, without regard to any result. Tiscareno's argument is sound.

Both the language of Utah's child abuse statute (Utah Code Ann. § 76-5-109) and its graduated framework for punishment make clear that second-degree child abuse is a specific intent crime. To this end, the statute provides that "[a]ny person who inflicts upon a child serious physical injury" is guilty of a second-degree felony if it is "done intentionally or knowingly," a third-degree felony if it is "done recklessly," and a class A misdemeanor if it is "done with criminal negligence." *Id.* In other words, the Legislature made plain that what is being punished is not conduct standing alone, but "conduct (whatever it may be) . . . done with the required culpability to effect the result the Legislature has specified." *Alvarado v. Texas*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985) (emphasis in original); *cf. Connecticut v. Holmes*, 817 A.2d 689, 700 (Conn. App. 2003) ("Assault in the first degree is a specific intent crime. It requires that the criminal actor possess the specific intent to cause serious physical injury to another person."). Any other reading, to paraphrase Tiscareno, would render Utah's child abuse scheme nonsensical.

The Court, however, through the use of the disjunctive "or" in Instruction No. 30 effectively told the jury that it was to find Tiscareno guilty if it concluded that she had engaged in the conduct that caused the result.³ No intent to bring about the result specified in the statute—"serious physical injury"—was required. Under the instructions given here, a parent who, entirely by accident, pushes a child off a swing would be guilty of second-degree child abuse if the child suffers a serious injury.

³The Court correctly instructed the jury that second-degree child abuse requires the "infliction of serious physical injury" and that such infliction be "done intentionally or knowingly." Jury Instruction Nos. 28 & 29. But it also instructed that a person acts "'intentionally' . . . when it is his conscious objective or desire to engage in the conduct or cause the result." Jury Instruction No. 30 (emphasis added). Taking these instructions together and harmonizing them, as the Court must (*see Gillespie v. So. Utah State College*, 669 P.2d 861, 865 n.1 (Utah 1983); Instruction No. 21), leads to the inescapable conclusion that the Court instructed the jury to convict Tiscareno if it found that she had intended to engage in the underlying conduct, period. (*But see Holmes*, 817 A.2d at 700-01 (improper reiteration of "complete statutory definition of intent" to include "intent to engage in conduct was eliminated by its correct instruction on intent"), *but see Connecticut v. Sivak*, 852 P.2d 812, (Conn. App. 2004) ("At some point, appellate review should consist of more than a numerical count of how many times the instruction was correct rather than incorrect.")).

This result runs afoul of common sense and violates the Utah Legislature's dictate that the criminal code is to be construed to "safeguard conduct that is without fault from criminal condemnation." Utah Code Ann. §§ 76-1-104.⁴

The fact that the Court erroneously instructed the jury as to the law is not the end of the inquiry. The Court must still determine, among other things, (1) if Tiscareno has lost the right to challenge the instruction, and (2) if so, whether counsel's failure to take exception to the instruction amounted to the ineffective assistance of counsel. The answer to both questions is "yes".

First, while the "manifest injustice exception" contained in Utah Rule of Criminal Procedure 19(e) provides a basis for "a party who fails to object or give an instruction" to assign error, "a party cannot take advantage of an error committed at trial when the party led the trial court into committing the error." *State v. Geukgeuzian*, 2004 UT 16, P9, 86 P.3d 742 (citations and internal quotations omitted). "Accordingly, a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice, 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'" *Id.*, quoting *State v. Hamilton*, 2003 UT 22, P54, 70 P3d 111. And that is precisely what happened here (recall that Tiscareno's counsel represented to the Court that he took "no exception to the jury instructions as they've been provided" to him).

Second, that does not leave a criminal defendant without a remedy for counsel's mistakes. *See, e.g., Geukgeuzian*, 2004 UT at P13. The applicable test is that for the ineffective assistance of counsel as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See State v. Nelson-Waggoner*, 2004 UT 29, P27, 94 P.3d 186. To prevail on her ineffective assistance of counsel claim, Tiscareno must establish "(1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *Id.*, (citations and internal quotations omitted).

Tiscareno meets the *Strickland* test. Counsel's failure to object to the use of the disjunctive in Instruction No. 30 created a situation where the jury had to convict if it determined that Tiscareno had shaken N.M. regardless of whether she had any intent to inflict a physical or mental injury. There was "no conceivable legitimate tactic or strategy" (*State v. Rush*, 2003 UT App 156, *3 (not for official publication)) for counsel's failure to point out to the Court that the law required the specific intent to cause harm. And because by not objecting to Instruction No. 30 counsel made it significantly easier for the jury to convict his client, his performance was "so deficient as to fall below an objective standard of reasonableness." *Nelson-Waggoner*, 2004 UT at P27; *cf. State v. Maestas*, 1999 UT 32, 984 P.2d 376 (failure to request cautionary instruction re eyewitness identification constituted ineffective assistance of counsel).

⁴While this is an issue of first impression in Utah, it has come up in other jurisdictions. Not surprisingly, the majority of courts to address this issue have reached the same result as here. *See, e.g., People v. Maynor*, 683 N.W.2d 565 (Mich. 2003); *Alvarado*, 704 S.W.2d 36.

Furthermore, but for defense counsel's failure to object "there is a reasonable probability that the outcome of the trial would have been different." *Nelson-Waggoner*, 2004 UT at P27. The separate writing that the jury delivered to the Court with the Verdict is central to this conclusion. A reasonable reading of the jurors' unanimous declaration that "this was not a malicious act, but a tragedy for both families" is that the jury had concluded that Tiscareno had no intent to harm N.M. when she shook him. Consequently, there is indeed a reasonable probability that the jury would have acquitted Tiscareno had they been properly instructed, and the Court, therefore, orders a new trial.⁵

Tiscareno asks the Court to take this logic one step farther and declare that the separate writing amounted to an acquittal. According to Tiscareno the writing can only be interpreted as a finding by the jury that Tiscareno did not mean to harm N.M. when she shook him. This simply is not so. It is equally, if not more likely, that the jury was expressing a sentiment that Tiscareno was acting with some sort of excuse (e.g., she was frustrated by him). *See Jackson v. State*, 838 So.2d 594, 595 (Fla. App. 2003) (suggesting acting maliciously means acting without excuse). Alternatively, the jury may have determined that Tiscareno acted "knowingly" and convicted on that basis. The truth is that we will never know what the jury intended by its writing. And it is for this reason that the Court denies Tiscareno's request that it enter a judgment of acquittal and grants her a new trial instead.

CONCLUSION

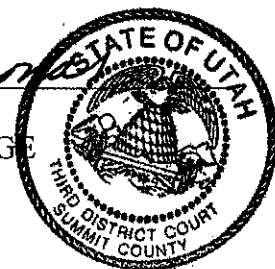
For all of the foregoing reasons, the Court strikes the Juror Affidavits and grants Tiscareno a new trial. No further Order of the Court is necessary in order to effectuate this decision.

The Court sets a pretrial conference for February 15, 2005, at 9:00 a.m., and asks that the parties come prepared to discuss potential trial dates.

Dated this 27th day of January, 2005, in Summit County, State of Utah.

BY THE COURT:


DENO G. HIMONAS
DISTRICT COURT JUDGE



⁵While Tiscareno has asked the Court to grant her a new trial as part of her Motion for Arrest of Judgment, the record should reflect that the Court is acting under Utah Rule of Criminal Procedure 24.