

SWAP Draft 8-28-09, 11:13am
AGGRAVATED ASSAULT AMENDMENTS
2010 GENERAL SESSION

Section 1. Section 76-5-103 is amended to read:

76-5-103 Aggravated assault.

(1) As used in this section, "means or force likely to produce death or serious bodily injury" includes use of the person's hand or any other means or force likely to impede:

(i) the normal breathing of another person; or

(ii) the circulation of another person's blood by applying pressure on the throat or neck

of that person.

~~[(1)]~~ (2) A person commits aggravated assault if ~~[he]~~ the person commits assault as defined in Section

76-5-102 and ~~[he]~~ the person:

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

(b) under circumstances not amounting to a violation of Subsection ~~[(1)(a)]~~ (2)(a), 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) A violation of Subsection ~~[(1)(a)]~~ (2)(a) is a second degree felony.

(3) A violation of Subsection ~~[(1)(b)]~~ (2)(b) is a third degree felony.

Section 2. **[Coordination Clause]** If this bill and SB _____ Criminal Offense Penalties both pass, Section 76-5-103 is amended to read:

76-5-103. Aggravated assault.

(1) As used in this section, "means or force likely to produce death or serious bodily injury" includes use of the person's hand or any other means or force likely to impede:

(i) the normal breathing of another person; or

(ii) the circulation of another person's blood by applying pressure on the throat or neck

of that person.

~~[(1)]~~ (2) A person commits aggravated assault if ~~[he]~~ the person commits assault as defined in Section 76-5-102 and ~~[he]~~ uses:

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

~~[(b) under circumstances not amounting to a violation of Subsection (1)(a), uses]~~

(a) a dangerous weapon as defined in Section 76-1-601 ; or

(b) other means or force likely to produce death or serious bodily injury.

~~[(2)]~~ (3) (a) A violation of ~~[Subsection (1)(a)]~~ this section is a ~~[second degree felony]~~ third degree felony, except under Subsection (3)(b).

~~[(3) A violation of Subsection (1)(b) is a third degree felony.]~~

(b) A violation of this section that results in serious bodily injury is a second degree felony.

Cite as 750 P.2d 186 (Utah 1988)

Utah Code Ann. § 76-6-203 (1978), *Aggravated Burglary*, requires only that the accused be "armed with a deadly weapon," which fact defendant did not deny or dispute.

* [11] As for aggravated assault, defendant admitted choking Mrs. Speer about the throat until, by her testimony, she almost passed out. Thus, uncontroverted testimony establishes that he used "force likely to cause death or serious bodily injury,"⁴ thereby satisfying the requirements of Utah Code Ann. § 76-5-103(1)(b) (1978).

Therefore, even if the jury were to accept defendant's arguments that he did not intend to use the gun on his wife and did not have it in his "possession" while he assaulted her, there is still no theory of the evidence that would have supported a verdict acquitting him of aggravated burglary or aggravated assault and convicting him of the lesser offenses. See *State v. Pitts*, 728 P.2d 113, 116 (Utah 1986); *State v. Baker*, 671 P.2d 152 (Utah 1983).

V.

[12] Defendant next contends that the court erred in instructing the jury that aggravated assault could be committed by reckless conduct. We have held that when charged under subsection (1)(b) of section 76-5-103, aggravated assault can be committed by reckless conduct. *State ex rel. McElhaney*, 579 P.2d 323 (Utah 1978). The instruction complained of was couched in terms of subsection (b). It stated:

2. That defendant then and there used a deadly weapon or such means or force likely to produce death or serious bodily injury.

3. That defendant did so intentionally or knowingly or recklessly.

Given the facts of the case and the way the crime was charged, the jury instruction correctly stated the law.

VI.

[13] Defendant also contends that he was denied effective assistance of counsel.

4. See *State v. Fisher*, 680 P.2d 35, 37 (Utah 1984), where we held that strangulation consti-

He cites three specific instances where his counsel's conduct was assertedly prejudicial: (1) failure to request lesser included offense instructions, (2) failure to call witnesses on a collateral matter, and (3) stipulating to continue a minor criminal charge until after the felony hearing.

In order for this Court to reverse a conviction on the basis of ineffective assistance of counsel, a defendant must show that the specified acts or omissions complained of fall outside the wide range of professionally competent assistance and that a reasonable probability exists that absent counsel's error, the result would have been different. *State v. Frame*, 723 P.2d 401 (Utah 1986).

[14, 15] We have previously determined that defendant was not entitled to instructions on the lesser included offenses; therefore, there can be no error in counsel's failure to request them. Whether or not to pursue a certain line of questioning or call a certain witness at trial is the type of decision that is ordinarily entrusted to the judgment of the attorney. The witnesses that defendant claims should have been called could only have testified as to a collateral matter whose relevance to the issue at trial was at best tangential. The decision not to pursue that particular line of questioning was well within the broad discretion allowed the attorney in conducting a jury trial and does not fall "outside the wide range of professionally competent assistance." *Frame*, 723 P.2d at 405.

[16] As to defendant's third claim, that counsel entered into an unauthorized stipulation to postpone a minor criminal charge, we follow the course advised by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984). There the court stated:

[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by tutes "serious bodily injury."