

1987

# Utah v. Stanley E. Gotschall : Brief of Respondent

Utah Supreme Court

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Deirdre A. Gorman; attorney for appellant.

David L. Wilkinson; attorney general; Sandra L. Sjogren; assistant attorney general; attorneys for respondent.

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UTAH SUPREME COURT  
BRIEF

UTAH  
DOCUMENT  
K F U

IN THE SUPREME COURT OF THE STATE OF UTAH

45.9

STATE OF UTAH

DOCKET NO.

870294

Plaintiff-Respondent,

:

Case No. 870294

v.

:

STANLEY E. GOTSCHALL,

:

Category No. 2

Defendant-Appellant.

:

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM A CONVICTION OF SECOND DEGREE  
MURDER, A FIRST DEGREE DEGREE FELONY, IN  
VIOLATION OF UTAH CODE ANN. § 76-5-203  
(1978), IN AND FOR WEBER COUNTY, STATE OF  
UTAH, THE HONORABLE DAVID E. ROTH, JUDGE,  
PRESIDING.

DAVID L. WILKINSON  
Attorney General  
SANDRA L. SJOGREN  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

DEIRDRE A. GORMAN  
205 26th Street  
Suite 13  
Ogden, Utah 84401

Attorney for Appellant

**FILED**

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Respondent, : Case No. 870294  
v. :  
STANLEY E. GOTSCHALL, : Category No. 2  
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DAVID L. WILKINSON  
Attorney General  
SANDRA L. SJOGREN  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

DEIRDRE A. GORMAN  
205 26th Street  
Suite 13  
Ogden, Utah 84401

Attorney for Appellant

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
JURISDICTION AND NATURE OF PROCEEDINGS.....	1
STATEMENT OF ISSUE PRESENTED ON APPEAL.....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT.....	6
ARGUMENT	
POINT I      THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR IN FAILING TO DISMISS A PROSPECTIVE JUROR FOR CAUSE.....	6
POINT II     THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S PRIOR ACTS UNDER RULE 404(b) OF THE UTAH RULES OF EVIDENCE AS EVIDENCE OF DEFENDANT'S MOTIVE, INTENT, AND KNOWLEDGE.....	13
POINT III    BECAUSE DEFENDANT FAILS TO CITE TO THE RECORD ON APPEAL TO SUPPORT THE FACTUAL ALLEGATIONS UPON WHICH HE BASES HIS LEGAL ARGUMENTS, AND A REVIEW OF THE RECORD AMBIGUOUSLY REFERRED TO BY DEFENDANT DOES NOT SUPPORT HIS ARGUMENT, DEFENDANT'S CONVICTION SHOULD BE AFFIRMED....	17
POINT IV     THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF NEGLIGENT HOMICIDE.....	20
CONCLUSION.....	23

## TABLE OF AUTHORITIES

### CASES CITED

<u>Ross v. Oklahoma</u> , 108 S. Ct. 2273 (1988).....	12
<u>State v. Baker</u> , 671 P.2d 152 (Utah 1983).....	20-21
<u>State v. Bingham</u> , 684 P.2d 43 (Utah 1984).....	18
<u>State v. Forsyth</u> , 641 P.2d 1172 (Utah 1982).....	13
<u>State v. Hewitt</u> , 689 P.2d 22 (Utah 1984).....	7
<u>State v. Jones</u> , 657 P.2d 1263 (Utah 1982).....	18
<u>State v. Jones</u> , 734 P.2d 473 (Utah 1987).....	12
<u>State v. Pacheco</u> , 712 P.2d 192 (Utah 1985).....	13
<u>State v. Saunders</u> , 699 P.2d 738 (Utah 1985).....	13
<u>State v. Steggell</u> , 660 P.2d 252 (Utah 1983).....	18
<u>State v. Tucker</u> , 657 P.2d 755 (Utah 1982).....	18
<u>State v. Valarde</u> , 734 P.2d 449 (Utah 1986).....	20-21
<u>State v. Wells</u> , 603 P.2d 810 (Utah 1979).....	17

### STATUTES AND RULES

R. Utah Ct. of App. 24(a)(9).....	2, 18-19
Utah Code Ann. § 76-2-103(4) (Repl. Vol. 8B, 1978 ch.)..	2, 21
Utah Code Ann. § 76-5-203 (1978).....	1-2
Utah Code Ann. § 76-5-206(1) (Repl. Vol. 8B, 1975 ch.)..	2, 21
Utah Code Ann. § 77-35-26(2)(a) (Supp. 1988).....	1
Utah R. Civ. P. 47(f)(6).....	2, 7
Utah R. Civ. P. 75.....	18
Utah R. Evid. 404(b).....	1-2, 14, 17, 20

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Defendant-Appellant. :

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BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a jury conviction of Second Degree Murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1978), the Honorable David E. Roth, presiding. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 77-35-26(2)(a) (Supp. 1988).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the lower court err in refusing to dismiss a prospective juror for cause who initially expressed misunderstanding of the burden of proof but who later agreed to apply the appropriate standard?
2. Did the lower court properly admit evidence of defendant's prior bad acts under Rule 404(b) of the Utah Rules of Evidence as evidence of defendant's motive, intent, and knowledge?
3. Did defendant fail to properly cite to the record to support his factual allegations that evidence of the victim's character was improperly admitted and misrepresent the facts, thus precluding a proper review of this argument?

4. Did the trial court err in refusing to instruct the jury on negligent homicide as a lesser included offense under the facts of this case?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Rule 24(a)(9) of the Rules of the Utah Court of Appeals.

Rule 47(f)(6) of the Utah Rules of Civil Procedure. Rule 404(a) & (b) of the Utah Rules of Evidence.

Utah Code Ann. § 76-5-206(1) (Repl. Vol. 8B, 1975 ch.);

Utah Code Ann. § 76-2-103(4) (Repl. Vol. 8B, 1978 ch.).

The text of these statutes and rules is set forth in the corresponding argument portion of this brief.

STATEMENT OF THE CASE

Defendant, Stanley E. Gotschall ("Pete"), was charged with second degree murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1978). A jury found defendant guilty of second degree murder on August 4, 1987. He was sentenced on August 4, 1987 to serve a term of not less than five years and which may be for life at the Utah State Prison. The Notice of Appeal was filed on August 20, 1987.

STATEMENT OF FACTS

On May 17, 1987 at approximately 2:00 a.m., defendant, Stanley "Pete" Gotschall struck Don Miller multiple times with the thick end of a pool cue at the Horseshoe Lounge and Showroom, killing him (R. 231-33; 274-75). The obvious death blow was to the base of the skull, probably severing the vertebral artery and causing massive subarachnoid hemorrhage (R. 229-31). Another

blow to the back of and behind the right ear caused a skull fracture (R. 234-35). Eyewitnesses agree that all but one blow was struck after the victim was motionless on the floor (R. 275, 312).

Stanley "Pete" Gotschall was tried before a jury on July 30, 1987, and was convicted of second degree murder, a first degree felony, on August 4, 1987 (R. 81). Defendant appealed his conviction on August 13, 1987 (R. 98). Background facts pertinent to the issues on appeal are as follows:

On May 16, 1987, Sandra Donaldson and others entered the Round-Up Bar and Cafe before leaving to fish (R. 274). She had seen defendant previously in this establishment and understood that he managed the cafe (R. 405-06). At about 3:00 p.m. defendant approached Mrs. Donaldson and told her "that [she] was so ugly he would be doing [her] a favor if he bashed [her] head in with his attitude adjustor" (R. 406-07). Mrs. Donaldson further testified that she was aware that defendant called the baseball bat that he was swinging at the time, his "attitude adjustor" (R. 408).

Later that same evening, defendant again entered the Round-Up and spoke to Veda Hadden, the bartender (R. 411). In this conversation, defendant remarked that he would have liked to bash in the head of a previous bartender with a baseball bat (R. 412). Ms. Hadden further testified that defendant left the Round-Up at 1:35 a.m., approximately one half hour before the victim's death (R. 413).



Debra L. Adams, who was with defendant at the Round-Up Lounge, testified that they went to the Horseshoe Lounge around 1:30 a.m. (R. 257). The victim, Don Miller, arrived shortly thereafter (R. 257). Although Mr. Miller arrived with a girl, she left with another patron (R. 258). At this point, defendant, Ms. Adams, Mr. Miller, Robin Bancroft, and Ray Loos were seated at the bar (R. 259).

Robin Bancroft tipped over her beer, and used a bar towel to wipe up the mess (R. 337). When she attempted to throw the bar towel back to the bartender, she missed and hit Debra Adams (R. 338). Debra testified that Robin apologized (R. 261). However, defendant walked up behind Ray and hit him (R. 261). When Ray turned around to confront his attacker, Don Miller intervened (R. 262). Mr. Miller told defendant to "mellow out" (R. 262). Following this incident defendant ceased his attack, Mr. Miller returned to his seat at the bar, and Mr. Loos and Mr. Bancroft left the Lounge (R. 342-43).

The bartender followed Loos and Bancroft to the door and locked it because it was approximately 2:00 a.m., closing time (R. 263). The bartender, Laurie Child, returned to the bar, and Mr. Miller asked for another beer (R. 374). When Ms. Child refused his request because it was past closing time; Mr. Miller knocked his empty beer bottle off of the bar (R. 374). Ms. Child again refused to give him another beer and replaced the empty bottle, which Mr. Miller again knocked off the bar (R. 374). Ms. Child testified that this argument was not an angry dispute, and that she and Mr. Miller were good friends (R. 375).

After Mr. Miller knocked the bottle on the floor for the second time, defendant approached him and started screaming that it was his bar and Mr. Miller was not to behave that way (R. 266). Defendant began threatening Mr. Miller with bodily harm, while Mr. Miller encouraged defendant to "mellow out" (R. 267). It then appeared that defendant was heading out the door; but before he exited, he stopped and came back into the bar toward Mr. Miller (R. 270). Defendant picked up a pool stick and started swinging it (R. 273). Defendant hit Mr. Miller, who had his back turned to defendant, on the head (R. 273). Mr. Miller fell to the floor and defendant continued hitting him (R. 275). shortly thereafter another patron left to call the police (R. 278).

The police arrested defendant approximately one hour later (R. 529). After reading defendant his Miranda warnings, Officer Sandberg took a statement which was admitted as State's Exhibit 11 (R. 248). In this statement, which was read to the jury upon defendant's request, defendant claimed that he hit Mr. Miller in self-defense (R. 489).

During the selection of the jury, Mr. Hundel, a prospective juror, made statements which evidenced his lack of understanding of the concepts of burden of proof and defendant's right not to testify (R. 149-52). Defendant moved that Hundel be dismissed for cause (R. 154). After further questioning of Mr. Hundel, the Court denied defendant's challenge for cause (R. 155). However, Mr. Hundel did not sit as a member of the jury because he was dismissed by one of defendant's peremptory challenges (R. 155-56).

## SUMMARY OF ARGUMENT

The lower court did not err in refusing to dismiss a prospective juror for cause and requiring defendant to exercise a peremptory challenge in order to excuse the venireman. The court also properly allowed evidence of prior bad acts to show defendant's motive, intent, and knowledge under Utah Rules of Evidence 404(b).

Defendant's failure to properly cite to the record and to explain the facets of his legal argument supporting his claim that evidence of the victim's character was improperly admitted render this point largely unreviewable. In attempting to resolve the ambiguity of this point, the State submits that evidence of character was not improperly admitted.

The Court properly refused to include instructions of negligent homicide as a lesser included offense of second degree murder according to the facts of this case, as viewed most favorably for the defendant.

## ARGUMENT

### POINT I

THE LOWER COURT DID NOT COMMIT REVERSIBLE  
ERROR IN FAILING TO DISMISS A PROSPECTIVE  
JUROR FOR CAUSE.

Defendant claims that it was prejudicial error for the court to refuse to dismiss a prospective juror, Mr. Hundel, for cause; thus requiring defendant to exercise one of his peremptory challenges in order to excuse the venireman. Specifically, defendant contends that Mr. Hundel failed to grasp the principle that an accused does not have an affirmative burden to prove his

innocence, and that a defendant need not testify unless he chooses to do so. (Defendant's brief, at 9). The court properly denied defendant's challenge for cause and defendant's subsequent use of his peremptory challenge to remove Mr. Hundel did not result in prejudicial error.

Rule 47(f)(6) of the Utah Rules of Civil Procedure states that a prospective juror should be dismissed for cause when it becomes evident:

That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging.

This Court has stated, on the other hand, that only those jurors who hold "strong and deep impressions" demonstrating a closed mind and an unwillingness to apply the law should be excused for cause. State v. Hewitt, 689 P.2d 22, 25 (Utah 1984). In this case, the prospective juror did not demonstrate such a disposition.

Initially, the concepts of burden of proof and of a defendant's constitutional right not to testify are legal doctrines that are occasionally difficult for the layman to grasp without an explanation of the practical application. The record shows that Mr. Hundel did not understand these concepts when defense counsel began her questioning. Sensing this, Judge Roth clarified these concepts. The dialogue in question commenced as follows:

Ms. Gorman: I only have a few questions  
also. Could all of you keep an  
open mind until all the evidence

is in? Could all of you do that? Or would you be making up your mind halfway through after the State was done?

Okay. Do any of you have a problem with the fact that as Mr. Gotschall sits here today he is innocent? Do any of you have a problem with the fact because a person is charged with a crime, you have the propensity to think he probably did it? Anybody think that?

Any of you disagree with the fact that because he is here charged, he is anything else than innocent? Do you have any problems with that?

And just one last question. Would you, after hearing the State's side of the evidence--I guess I should explain, the prosecution will go first. They bring on their side. And then after that, it is the defendant could present evidence. Would any of you have a problem if, after the State offered their evidence, would you expect the defendant to offer his?

What would any of you think if the defendant didn't offer any evidence? Would you want to hear his version? Okay, What if he didn't offer a version, would you hold the State to their burden of proof beyond a reasonable doubt? Could you do that without hearing the defendant's version of the facts?

Mr. Hundel: I think it would be difficult to decide.

The Court: The questions are coming in a form I am not sure the Jury can respond to appropriately. If you will permit me to Instruct the Jurors that it is always the

burden on the State to prove the guilt of the defendant beyond a reasonable doubt. If they can do that. The defendant has no obligation to present a defense. He has no obligation to testify if he doesn't want to. And you would be instructed that you are not to hold that against him. And you must still judge the State's case on its own merits. And unless the State has proven him guilty beyond a reasonable doubt, you will find the defendant not guilty. If any of you quarrel with that law--

Ms. Gorman: Mr. Hundel, you indicated you might have a problem. What would that be?

Mr. Hundel: I was just stating a fact. The State presents their case, and the defendant has no case at all. I don't know, it wouldn't seem like, you know, a fair trial. Naturally the man wants to defend his innocence if he is innocent.

Ms. Gorman: Do you think a man has to defend his innocence, or the State has to prove he is guilty?

Mr. Hundel: Somebody has to do something. I mean it can't be in limbo.

Ms. Gorman: Can't be what?

Mr. Hundel: Can't be in limbo. The State has to present a case enough to prosecute, or the defendant has to present a case enough to make him look innocent. I mean it can't be like hanging in mid-air. Somebody has got to do something. You know what I mean?

Ms. Gorman: How about after you heard the States' evidence, and you weren't--you have some questions about a couple of elements. What would your verdict be?

Mr. Daines: Your Honor, I object to asking for the verdict.

The Court: I am not sure that's an appropriate question.

Mr. Hundel: I couldn't answer the question.

The Court: If you heard the State's evidence and were not convinced of the defendant's guilt beyond a reasonable doubt, and even though the defendant presented no defense would you be able to find him not guilty?

Mr. Hundel: I don't know. I don't know. I would have to--I don't know.

(R. 449-52). Based on the foregoing, defendant contends that Mr. Hundel refused to apply the burden of proof to the State and that he should have been dismissed for cause. However, the record merely evidences understandable confusion about this concept.

Defendant points out that at one point Mr. Hundel stated that "the defendant has to present a case enough to make him look innocent." (R. 152; Defendant's brief at 9.) However, this response was made to an inartful compound question which asked "Do you think a man has to defend his innocence, or the State has to prove he is guilty?" (R. 152.) A review of the entire record surrounding this discussion, and encompassing the statement in question, reveals that the prospective juror simply felt that some procedure must be taken to further the case--his confusion was simply as to whether it should be the State or defendant who needed to move forward.

The State does not assert that Mr. Hundel came into the courtroom with a complete understanding of the concept. However,

upon further questioning, his misunderstanding of the law and his willingness to comply with the judge's instructions is evident:

The Court: Mr. Hundel, I don't want to leave any loose ends with how you feel about this. Let me walk through the process and see if we have a misunderstanding. You do understand it is the State's burden to prove the defendant guilty beyond a reasonable doubt?

Mr. Hundel: Yes, I do.

The Court: Do you have any problem with that?

Mr. Hundel: No.

The Court: If the State does not prove the guilt beyond a reasonable doubt, would you be able to find the defendant not guilty? If the State doesn't prove the case.

Mr. Hundel: Well, the defendant has to prove himself innocent before I would.

The Court: He doesn't have to. The law doesn't require that.

Mr. Hundel: The law doesn't require that?

The Court: The burden is on the State throughout the trial to prove guilt beyond a reasonable doubt. Do you accept that?

Mr. Hundel: Yeah.

The Court: Would you require the defendant to present a defense even though the State had not proved guilt beyond a reasonable doubt in your mind?

Mr. Hundel: Not if he don't have to, I guess I wouldn't require it.

(R. 152-53).



During this questioning, it became apparent that the prospective juror did misunderstand the law when he stated that "the defendant has to prove himself innocent" (R. 152). However, the court quickly corrected this misconception and then requestioned Mr. Hundel to ascertain whether he understood the burden of proof principle and would not require defendant to offer evidence to support his innocence. Once educated on the meaning of the concept of innocent until proven guilty beyond a reasonable doubt, Mr. Hundel agreed to apply the concept to defendant.

Even if this juror should have been excused, the issue of prejudice remains. This Court has previously held that is reversible error to force a defendant to use a peremptory challenge to eliminate a juror that should have been excused for cause. State v. Jones, 734 P.2d 473, 474 (Utah 1987), and cases cited therein. Recently, however, in Ross v. Oklahoma, 108 S. Ct. 2273 (1988), the United States Supreme Court held that "where juror who should have been excused for cause was removed by defendant's peremptory challenge, any claim that the jury was not impartial was required to focus, not on the excused juror, but on the jurors who ultimately sat." The Court reasoned that as long as the jury which actually sat for the case was impartial, it is unimportant that defendant was forced to use a peremptory challenge to excuse a potentially biased juror. Should this Court determine that Mr. Hundel should have been excused for cause, the State requests this Court to reevaluate its previous decisions in light of Ross. Defendant in this case has not

claimed that jurors who actually sat on his case were anything but fair and impartial. While he may have wished, for strategy reasons, to eliminate a juror other than Mr. Hundel, unless a juror who sat prejudiced him by acting unfairly or partially, there should be no reversible error.

#### POINT II

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S PRIOR ACTS UNDER RULE 404(b) of THE UTAH RULES OF EVIDENCE AS EVIDENCE OF DEFENDANT'S MOTIVE, INTENT, AND KNOWLEDGE.

State v. Pacheco, 712 P.2d 192 (Utah 1985), this Court held that:

Evidence of prior crimes is admissible if the evidence is relevant to prove a specific element of the crime for which a defendant is on trial. The evidence is not admissible if it is relevant solely to show a defendant's propensity to commit a crime.

712 at 185. See also State v. Saunders, 699 P.2d 738, 744 (Utah 1985); State v. Forsyth, 641 P.2d 1172, 1175 (Utah 1982).

In this case, during a preliminary conference, Judge Roth considered the question of admissibility of statements made by defendant the evening before the alleged incident (R. 161). Although counsel for defendant strenuously objected, Judge Roth determined that the evidence proposed by the State would show modus operandi, and was thus admissible (R. 162). The Court further stated:

I really don't think it is a close question personally under these circumstances. We are talking about the evening prior to a homicide where a person is saying he has this propensity and this history of using clubs on people [sic] head. And the same night he uses a club or pool stick on somebody's head. I think it is evidence as to his state of

mind leading up to the crime. Evidence bearing on his intent at the time, lack of mistake, motive. It fits. It is prejudicial, sure it is. I think the relevance outweighs the prejudicial effect

(R. 163).

Had the testimony of witnesses Sandra Donaldson and Veda Hadden been used simply to disgrace defendant and to establish a tendency or propensity toward criminal acts, it would have severely prejudiced defendant. However, in accordance with the court's favorable ruling the evidence questioned was properly admitted under Rule 404(b) of the Utah Rules of Evidence, which states:

(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 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.

Sandra Donaldson testified that she saw defendant less than twelve hours before the death of the victim in this case. Upon questioning, the following dialogue took place:

Q: Where were you when you were approached?

A: I was coming up the stairs from the restaurant into the bar.

Q: And what, if anything, did the defendant say to you?

A: He told me that I was so ugly he would be doing me a favor if he bashed my head in with his attitude adjuster.

Q: Did he have anything in his hands at that time?

A: He had a wooden baseball bat in his hands.

. . . .

Q: Does this appear to be the bat, Ms. Gorman--or you were referring to?

A: It looks like it.

Q: At least sizewise this is what it was?

A: It looked bigger when he was swinging it, but I am sure that's it.

Q: Did he call it an attitude adjustor?

A: Yes, he did.

(R. 407-08).

Another witness, Veda Hadden, testified that she also had a conversation with defendant several hours later, but still before the victim's death. During questioning, Ms. Hadden reported:

A: Well, he [defendant] had told me that he was mad at the bartender previous, okay, another bartender that worked there. And, okay, he had had a conflict with this man. And the night this conflict happened, I took the other guy home, okay, to get him away from Pete and from the police that were there.

Q: But what, if anything, did Pete say at this time?

A: He said to me you are lucky that you took Bob home that night. And I said what do you mean. He said you are lucky to run the yellow--I can't say it.

Q: I am talking did he say anything generally about anything that he liked to do with baseball bats?

A: He said he would like to bash his head in.

Q: This particular head?

A: He said he would beat his head . . . .

Referring to this testimony, defendant contends that "such evidence tended to show the defendant had the propensity to commit other wrongs or crimes and was grossly prejudicial. Such evidence, as a matter of law, did not show a common scheme or plan" (Defendant's Brief at 15). On the contrary, purpose of the elicited testimony was not to convince the jury that defendant had assaulted Mrs. Donaldson or had previously attempted to assault Mrs. Donaldson or had previously attempted to assault another bartender. Rather, this evidence shows defendant's state of mind shortly preceding the attack on the victim in this case; his aggressive behavior and pattern of picking fights throughout the day and evening preceding his confrontation with the victim (which, ironically, occurred when the victim attempted to intervene in another altercation initiated by defendant (R. 261)); and his use of a club-like instrument in an offensive manner. The evidence directly supports the State's position that contrary to defendant's initial claim of self-defense, he entertained the intent to initiate a fight and to use the pool stick as an offensive weapon, and the knowledge that in using the weapon on the victim he would cause death. Each of these facts go directly to the element material for a conviction of second degree murder.

Defendant suggests that "during the trial, the jury was presented a picture of Stanley Gotschall as a cantankerous man who had made repeated threats to various people that he would hit them with his "'attitude adjustor,' a baseball bat" (Defendant's Brief at 16). This allegation suggests that the State paraded

before the jury a lengthy account of various occurrences over a general extended period of time. Admittedly, such a composition of experiences might do little more than disgrace defendant and show some criminal propensity. This limited use of such evidence is improper. State v. Wells, 603 P.2d 810 (Utah 1979). However, the evidence in this case is much more than a compilation of unrelated bad acts. The incidents related by Donaldson and Hadden were not simply examples of misconduct given to sully the character of defendant. They were specific acts which occurred within twelve hours before the victim's death which suggest that defendant's actions were intentional, motivated by anger and done with knowledge of the result. Under Rule 404(b) of the Utah Rules of Evidence, evidence of such acts is properly admissible as an exception to the general inadmissibility of character evidence. As such, the questioned evidence did not unfairly prejudice defendant and no error was committed.

### POINT III

BECAUSE DEFENDANT FAILS TO CITE TO THE RECORD ON APPEAL TO SUPPORT THE FACTUAL ALLEGATIONS UPON WHICH HE BASES HIS LEGAL ARGUMENTS, AND A REVIEW OF THE RECORD AMBIGUOUSLY REFERRED TO BY DEFENDANT DOES NOT SUPPORT HIS ARGUMENT, DEFENDANT'S CONVICTION SHOULD BE AFFIRMED.

Defendant alleges that the State introduced evidence of the character of the victim in violation of Rule 404(a) of the Utah Rules of Evidence because defendant had not opened the door for such evidence (Defendant's Brief at 20-21). However, defendant cites to the record at 158 as the sole support for his allegation. This single page reference is to the beginning of a

conversation between counsel and the Court in chambers about admitting character evidence. At this point, defendant did not object to the evidence of the victim's character for peacefulness (R. 158-61). The conversation countered around whether the state could put the evidence in before putting on defendant's statement that he hit Mr. Miller in self-defense. The situation was resolved when the state agreed to offer the defendant's statement claiming self-defense before offering the proposed character evidence and defense counsel agreed that this would be appropriate (R. 160-61). No further references to either the trial transcript or the record are made by defendant and it is not clear to what specific testimony defendant now objects. See State v. Bingham, 684 P.2d 43, 46 (Utah 1984) ("This court cannot rule on matters outside the trial court record). Under these circumstances, the Court should assume the correctness of the trial court's judgment and affirm defendant's conviction. Utah R. App. P. 24 (1985); State v. Steggell, 660 P.2d 252, 253 (Utah 1983) (correctness of the trial court's judgment is assumed when counsel on appeal fails to comply with Utah R. Civ. P. 75(p)(2)(2)(d) (1977)--the rule that preceded Utah R. App. P. 24(a)(9) (1985)); State v. Tucker, 657 P.2d 755, 757 (Utah 1982). In that "[t]he burden of showing error is on the party who seeks to upset the judgment," State v. Jones, 657 P.2d 1263, 1267 (Utah 1982), the State should not be put to the task of developing defendant's legal arguments by searching through the record and making reference thereto to support defendant's factual allegations. The obligation to direct the Court to

pertinent parts of the record falls upon defendant, not the State. Rule 24(a)(9) of the Rules of the Utah Court of Appeals succinctly provides:

(a) Brief of Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

. . . .

(9) An argument. The argument shall contain the contentions of the appellant with respect to the issues presented and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on.

However, in an effort to avoid the necessity of supplemental briefing, the statement made by defendant to the police concerning self-defense was the basis for admission of any character evidence regarding the victim's peaceful nature and any character evidence was, therefore, not a violation of Rule 404(a). Officer Scott Sandberg, to whom defendant made the statement concerning self-defense, was called twice by the State and twice by defendant. Initially, the State questioned Sandberg in order to identify a photostatic copy of defendant's statement which was admitted, without objection, as State's Exhibit 11 (R. 246). The State later recalled Officer Sandberg to admit additional exhibits (R. 414). No questions were asked on either of these occasions as to the specific substance of defendant's statement to the police or the character of the victim.

The substance of defendant's statement was revealed later in the trial when the defense called Officer Sandberg to testify (R. 482). Using State's Exhibit 11, defendant asked Officer Sandberg to read aloud the statement which was made by



defendant approximately two hours after the victim's death. In saying that this statement was improperly used at trial by the State in its case in chief, and only used by defendant in forced rebuttal, defendant has misrepresented the facts. (See Defendant's Brief at 21.) Defendant agreed that the statement would come in during the in-chambers discussion referred to above (R. 161).

Barring further factual support or specific reference to the trial transcript or the record, defendant has not met his burden in presenting his allegation of the State's violation of Utah R. Evid. 404(a). Furthermore, an investigation of Officer Sandberg's testimony concerning the questioned statement shows no violation by the State and no prejudice to defendant.

#### POINT IV

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT  
THE JURY ON THE LESSER INCLUDED OFFENSE OF  
NEGLIGENT HOMICIDE.

In State v. Baker, 671 P.2d 152 (Utah 1983), this Court established precise standards for determining the applicability of a proposed lesser included offense in the jury instructions. First, the trial court must "determine whether an offense is established by proof of the same or less than all of the facts required to establish the commission of the offense charged." State v. Valarde, 734 P.2d 449, 451 (Utah 1986). If "the evidence is ambiguous and susceptible to alternative explanations, the trial court must give the 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." Id.

The State admits that there are circumstances in which negligent homicide may appropriately be considered as a lesser included offense of second degree murder. See State v. Velarde, at 453. Therefore, the State does not argue with defendant concerning the first point of the Baker test. However, the State strongly disagrees with defendant's assertion that the second prong of the Baker analysis is also met in the instant case.

Utah Code Ann. § 76-5-206(1) (1978) defines Negligent Homicide as follows:

(1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

"Criminal Negligence" is defined in Utah Code Ann. § 76-2-103(4) (1978):

A person engages in conduct:

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

In viewing the evidence most favorable to the defendant, the facts in this case do not lend themselves to a conviction of negligent homicide. Defendant stated during his testimony.

I hit him in the head. And I think I hit him again. When he went down, I started to kick him in the head, because I didn't know he was hurt. And I was--it has always been my policy when you have got somebody, you know that you are in an altercation with, if you can put them out--I say put them out of business.

(R. 526). This statement demonstrates that defendant was not only cognizant of the probable effects of his actions, but, indeed, he desired to put the victim "out of business." The trial judge properly determined that there was no alternative interpretation that would permit the jury to acquit defendant of second degree murder and convict him of negligent homicide and thus properly refused to so instruct.

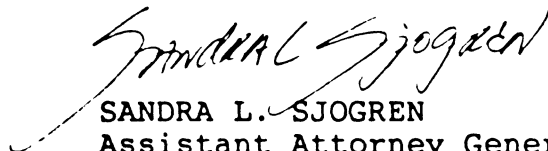
Additionally, the fact that the jury did not choose to acquit defendant of second degree murder and convict him of the lesser included offense of manslaughter (an offense intermediate in level between second degree murder and negligent homicide) supports a conclusion that the absence of an instruction for negligent homicide did not prejudice defendant. The fact that the jury did not choose the lesser offense that was offered logically infers that the denial of an even lower level offense was, at most, non-prejudicial error, and the decision of the trial judge should be upheld.

CONCLUSION

Based upon the foregoing arguments, the State respectfully requests this Court to affirm the decision of the trial court and uphold the conviction of second degree murder.

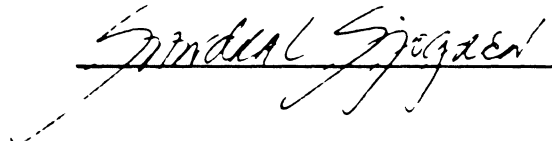
RESPECTFULLY submitted this 27<sup>th</sup> day of October, 1988.

DAVID L. WILKINSON  
Attorney General

  
SANDRA L. SJOGREN  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Deirdre A. Gorman, attorney for defendant, 205 26th Street, Suite 13, Ogden, Utah 84401, this 27<sup>th</sup> day of October, 1988.

  
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