1989

State of Utah v. Juan Jose Lopez Jr. : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 890324

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 890324-CA
v.	:	
JUAN JOSE LOPEZ, JR.,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTIONS OF SECOND DEGREE MURDER, A FIRST DEGREE FELONY; AND CHILD ABUSE, A SECOND DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOHN A. ROKICH, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions of second degree murder, a first degree felony; and child abuse, a second degree felony. This Court has jurisdiction to hear this appeal under Utah Code Ann. § 78-3a-3(2)(j) (Supp. 1989) based upon the order of the Utah Supreme Court transferring jurisdiction on May 19, 1989.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Was defendant entitled to severance of the two offenses that occurred at the same time and were incident to a single criminal objective where the evidence of the second offense was intertwined with the evidence of the first offense?

2. Was it error for the trial court to refuse to give defendant's additional instruction on manslaughter when the jury was correctly instructed on manslaughter?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-1-402 (1978):

> (1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode . . ..

Utah Code Ann. § 76-1-401 (1978):

> In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single crimial objective.
>
> Nothing in this part shall be construed to limit or modify the effect of section 77-21-31 in controlling the joinder of offenses and defendants in criminal proceedings.

Utah Code Ann. § 77-35-9 (1978):

> (a)Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged arise out of a criminal episode as defined in section 76-1-401.
>
> . . .
>
> (d) If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses . . . in an indictment or information, . . . the court shall order an election of separate trials of separate counts, . . . or provide such other relief as justice requires.
>
> . . .

STATEMENT OF THE CASE

The State charged defendant with second degree murder, a first degree felony in violation of Utah Code Ann. § 76-5-203 (Supp. 1989), and child abuse a second degree felony in violation of Utah Code Ann. § 76-5-109(2) (Supp. 1989). A jury found defendant guilty of both charges on November 28, 1988. Judge

John A. Rokich sentenced defendant to consecutive terms of five years to life for second degree murder and one to fifteen years for child abuse.

STATEMENT OF THE FACTS

In the early morning hours of March 2, 1988 defendant stabbed his girlfriend, Cindy Hernandez, to death with an eight inch kitchen knife while her seven year old son, Roberto, watched (T. 72-4, 133, 147, 263). After stabbing Ms. Hernandez, defendant rifled through her purse (T. 74-5). When Roberto asked defendant if his mother was allright, defendant began choking him until he passed out (T. 77-8). Defendant told Roberto if he told anyone, defendant would kill him (T. 78). Defendant fled the State, and was eventually arrested in Burley, Idaho (T. 177).

Defendant lived in Ms. Hernandez' home with her and her three children (T. 62-4, 85). On the evening before the homicide, Ms. Hernandez left the home and went to a bar (T. 63, 88-9). Later, defendant left the children alone while he went to look for Ms. Hernandez (T. 31-2, 65, 273). Defendant returned home alone much later (T. 69, 76-7). After defendant returned home, three or four people came to visit him and purchased drugs from him (T. 70, 243, 78, 307-08). They went into the bathroom and used the drugs (T. 98-9, 307-08).

Ms. Hernandez returned home while defendant's friends were there (T. 70, 245, 281). A white male, who stayed outside the door, arrived with her (T. 245, 281). Ms. Hernandez said she did not want defendant's friends in her house, told them to leave and started to call the police (T. 70-1, 102-3, 246-7). (Her

attempt to call someone is corroborated by the fact that the telephone was off the hook near her body the next morning (ex. 4-S, ex. 9-S)). All but one of the people in the apartment, defendant's friend Chito, did leave immediately (T. 70-1, 246-7, 309).

Defendant and Ms. Hernandez began fighting and defendant threw her against the wall (T. 71). Defendant came out of the kitchen with a knife and pushed Ms. Hernandez into some pottery (T. 72-3). Defendant raised the knife above his head and "made it go down fast" into Roberto's mother while Roberto watched (T. 73-4). Roberto said that Chito stayed in the hallway while defendant hit and stabbed his mother (T. 107). Chito hit his mother after defendant stabbed her (T. 108). Roberto went into his own room and heard a lot of screaming before it finally became quiet (T. 74).

There were six cuts on Ms. Hernandez' body all together (T. 139) along with several blunt trauma injuries (T. 140-42). Three of the stab wounds were potentially life threatening (T. 144). The most serious of these entered the right side of her neck, severed the food pipe, the left carotid artery, the left subclavian artery and continued through the left lung into the inner surface of the back side of the chest cavity (T. 131-2,144). A second wound cut the fourth and fifth right ribs, into the lung, through the diaphragm, into the liver, back through the diaphragm and nicked the lung again (T. 135-36). A third entered the right shoulder, through the arm, into the chest cavity without exiting the armpit, between the third and fourth ribs and into the lung (T. 137).

After the screaming stopped, Roberto came to the door of his bedroom and asked defendant if his mother was allright (T. 76). Defendant told Roberto that he should go to bed, that his mother was allright, and that she was just sleeping (T. 76). Roberto asked defendant why he had blood all over him and defendant told Roberto that he beat up "the guy who wouldn't leave" (T. 76). Roberto kept insisting he wanted to see his mother and defendant began choking Roberto, first with his hands, and then with a vacuum cleaner cord (T. 77). It hurt and Roberto held his breath to keep from passing out (T. 77-8, 82). When defendant stopped strangling Roberto, he said if Roberto told anyone, he would kill him (T. 78).

The ligature caused extreme petechial hemmorhages over Roberto's skin and in the white of his eye (T. 151-2, 154, ex. 12-S, 13-S, 14-S, 15-S, 16-S). Petechia is caused when blood vessels burst because the high pressure blood continues to pump into the head but a ligature blocks the flow of low pressure blood out of the head (T. 151-2). This was a particularly impressive example of petechia, seen normally on dead persons, which was potentially life-threatening (T. 153-4).

Chito told defendant to wash the knife and put it back (T. 110). Defendant covered Ms. Hernandez with a blanket after tying her hands together with a cord (T. 51-3, 142-3, 289). Chito left the apartment at least 10 minutes after the others (246-7). Defendant fled and was arrested on March 14, 1988 in Burley, Idaho (T. 177).

After he was arrested, defendant told police officers three different stories about the stabbing. First, defendant denied involvement completely, claiming that he left the apartment before Ms. Hernandez returned that evening and went to Evanston (T. 184). He said he believed Chito was responsible for her death.

Next, defendant said that they fought because Ms. Hernandez said that the unidentified white man was her new boyfriend (T. 187-88). Ms. Hernandez tried to stab him but missed and stabbed herself (T. 189). With the knife in her chest, Ms. Hernandez talked with defendant for one and one-half to two hours while defendant begged her to go to the hospital (T. 190). She begged him to end it for her and he eventually gave in and stabbed her twice more (T. 190). Defendant said he panicked and began choking Roberto when Roberto began screaming and crying (T. 191-2). He thought Roberto was dead, but he was not sure (T. 192).

At trial, defendant said that he lied to the officers because they were rude to him (T. 298-99, 303). He testified that he could not remember stabbing Ms. Hernandez but explained that he did it because he was upset when she brought home a new boyfriend and because she called him a "mother-fucker" and told him to get out of the apartment (T. 281-87). He said he had been upset earlier in the evening beause she seemed to be shirking her duties as a mother and leaving the care of her children to him (T. 273-75). He said he could not remember choking Roberto or tying Ms. Hernandez' hands (T. 89, 302-03).

After the stabbing, defendant testified that he went to his father's home with bllod all over him (T. 289). When his father saw him and defendant would not say what happened, defendant said his father tied him up and took him back to the apartment where they saw the body (T. 290-91). His father wanted him to leave the country and they drove to Reno (T. 291-92). Defendant put his father on a plane to Mexico and drove himself to Wendover and then to Burley, Idaho where he was arrested (T. 293-4).

SUMMARY OF ARGUMENT

Defendant was not entitled to severance of the charges because they were part of a single criminal episode and defendant was not unfairly prejudiced by the joinder. The evidence of both charges was inextricably intertwined and the evidence of defendant choking Roberto was relevant to his state of mind at the time of the murder.

The prosecutor did misstate the law on the definition of manslaughter, however, defense counsel clarified the mistake at the time and the jury was correctly instructed on the elements of manslaughter. Thus, defendant was not prejudiced by the trial court's refusal to give an instruction that merely restated the definition of extreme emotional disturbance already contained in the instructions given to the jury.

ARGUMENT

POINT I

DEFENDANT WAS NOT ENTITLED TO SEVERANCE OF THE CHARGES.

Prior to trial, defendant moved to sever the child abuse charge from the second degree murder charge asserting that they were not part of a single criminal episode and that he was prejudiced by the joinder. Judge Rokich denied the motion and both counts were tried together.

There is no question that two charges arising from a single criminal episode can be tried together absent prejudice to the prosecution or defense. Utah Code Ann. §§ 76-1-402 and 77-35-9 (1978 and 1982). In fact, the State must charge multiple offenses that are part of a single criminal episode together or be forever barred from prosecuting the defendant for the charges arising from the same episode. Utah Code Ann. § 76-1-403 (1978).

Denial of a motion to sever separate counts of a single information will be reversed only where the trial court abused its discretion. State v. Saunders, 699 P.2d 738 (Utah 1985). Thus, the trial court's decision in this case should be affirmed unless the court abused its discretion in determining that the acts were part of a single criminal episode and that defendant was not prejudiced by their joinder.

Defendant's first contention, that these crimes were not part of a single criminal episode is meritless. Utah Code Ann. § 76-1-401 (1982) defines a single criminal episode as "conduct that is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective."

These two crimes are not only close in time, they are virtually inseparable. Defendant choked Roberto because Roberto witnessed the stabbing of his mother just moments before and kept insisting that he see if his mother was allright.

Defendant's assertion that the acts are "not necessarily closely related in time" is absurd. The evidence reveals that the child abuse followed the homicide almost immediately. The acts were not separated by as much as one day or the time it takes to drive 65 miles such as were the acts discussed in State v. Bair, 671 P.2d 203, 206 (Utah 1983). There is no question that the two crimes here were also closely related in time. Burglaries that were separated by the time it took for a defendant to move from a laundry room to an apartment in the same building were found to be close enough in time to be a single criminal episode. State v. Porter, 705 P.2d 1174 (Utah 1985).

Furthermore, these crimes arose from a single criminal objective. That objective was to kill Cindy Hernandez and to cover up the crime by making it appear that she was killed by someone who was robbing her and to cover up the murder further by eliminating the eye witness.

While State v. Cornish, 571 P.2d 577 (Utah 1977), superficially appears to support defendant's position, it is distinguishable. The Court there did not want to inextricably entangle crimes committed at later times to avoid apprehension for earlier crimes as always being part of a single episode. The Court did not, however, state that they are never part of a single criminal episode and should never be joined.

In Cornish, the two crimes that the prosecutor wished to join were vehicle theft and failure to stop when the police officer spotted Cornish the next day. These crimes were not close in time and were not necessarily related but only fortuitously so. If the officer had not spotted Cornish, the second crime would not have been committed and was only incidentally the result of the previous crime. Defendant urges a very broad reading of Cornish upon this Court in claiming that there was not a single criminal objective in this case. Defendant reads Cornish to say that crimes committed to avoid detection of another crime, even those committed nearly simultaneously with the first crime, are never part of a single criminal episode. On the contrary, all that Cornish says is that the crimes in that particular case were not part of a single criminal episode. The crimes in this case were, however, part of a single episode and were properly joined.

The final aspect of this issue is whether defendant was prejudiced by joinder of the offenses. Because a defendant is always prejudiced by the State's evidence in the sense that it tends to prove his guilt, the question is actually whether defendant was unfairly prejudiced by joinder of the child abuse charge. Cf. State v. Jamison, 767 P.2d 134, 137 (Utah 1989) (evidence that tends to prove element of crime admissible unless unfairly prejudicial). Defendant was not unfairly prejudiced by joinder of the two offenses because the child abuse was relevant to show defendant's state of mind at the time of the homicide.

Even if the State had not joined the two charges, the evidence would have been admissible under Utah R. Evid. 404(b) (1989), to show intent, knowledge, and absence of mistake or accident. Jamison, 767 P.2d at 137. The evidence was very probative of these factors where defendant claimed that he did not intend to kill Ms. Hernandez and did not recall the homicide because he was so upset at the time of the stabbing. One of the most highly probative aspects of Roberto's testimony was that while defendant was choking him, defendant stated that if Roberto told anyone what had happened, defendant would kill him. This evidence could not have been presented without also establishing the child abuse. Because "[i]ntent is an element that often can be proved only by means of circumstantial proof," State v. Valdez, 748 P.2d 1053 (Utah 1987) (citation omitted), the State needed Roberto's testimony to aid in establishing defendant's intent. Thus, defendant was not unfairly prejudiced by joinder because the State would have introduced the evidence of child abuse in any event.

Because the State would have attempted to introduce the evidence under Rule 404(b) if the charges were severed, the balancing of probativeness against prejudicial effect was relevant to Judge Rokich's determination. Although the Judge did not articulate this clearly, it is logical that he would consider the harmlessness of the joinder where the evidence would be admissible in any event. No doubt, Judge Rokich was simply thinking about whether he would likely admit the evidence under 404(b) when he indicated his inclination to weigh the pobative

value against the prejudicial effect. Consequently, even though probativeness versus unfair prejudice balancing is not expressly a part of the § 77-35-9 severance determination, it was a factor that the Judge needed to consider in determining the question of whether defendant would suffer unfair prejudice from joinder in this case and it was not error for Judge Rokich to engage in the balancing test. See State v. Johnson, 748 P.2d 1069, 1075 (Utah 1987) (severance of charge did not make it inadmissible in trial of other charge if admissible under Rule 404(b)).

Although the fact that defendant choked Roberto is probative of his mental state at the time he killed Ms. Hernandez, defendant claims that it was irrelevant to the second degree murder charge. He relies on State v. Bolsinger, 699 P.2d 1214 (Utah 1985), for the proposition that events occurring after a homicide are not to be considered in establishing the mens rea for the homicide. Bolsinger does not stand for this proposition. The language quoted by defendant does not state such a rule.[1] All the court in Bolsinger indicated was that other evidence of intent to kill in that case was so lacking, that the evidence that defendant afterward stole a stereo from the decedent did not

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[1] Defendant quotes the following passage:

> The jury may well have been swayed by the reprehensible conduct of the defendant subsequent to her death. But that conduct is not before us for review. The evidence is undisputed that [the victim] was dead when defendant arose from the bed. He himself covered her face with a sheet, a universal gesture acknowledging death. At that moment the conduct which subjected him to a charge of criminal homicide came to an end.

persuade the court that there was sufficient evidence of intent to kill.

In fact, if defendant's misstatement of the law were the rule, then defendant's testimony that he kissed Ms. Hernandez on the cheek and closed her eyes after he stabbed her was also irrelevant to his mental state at the time of the homicide. As was his testimony about how his father tied him up and returned him to the apartment to determine what had occurred because defendant was nonresponsive to his father's inquiries. Surely defendant does not suggest that he should have been precluded from presenting such testimony.

A rule that acts committed after a homicide are irrelevant to the crime would be inconsistent with the holdings in other cases that certain activities of a defendant after a crime are relevant to the crime. For example, flight after a crime can be used by a jury to infer that a defendant is guilty of the crime charged. See State v. Bales, 675 P.2d 573 (Utah 1983). Also, a defendant's confession or inconsistent statements made after the crime are relevant to prove the crime, Utah R. Evid. 801; his possession of recently stolen property may be used by the jury to infer that he stole the property, Utah Code Ann. § 76-6-402(1) (1978); State v. Smith, 726 P.2d 1232 (Utah 1986); and his alteration of the appearance of a stolen vehicle corroborates the charge that he stole it, State v. Clayton, 658 P.2d 621 (Utah 1983). Evidently, defendant's acts occurring after a crime are not per se irrelevant to the crime.

Defendant acknowledges in his brief that the jury might have used the strangling of Roberto to infer that defendant intended to kill Ms. Hernandez. He claims, however, that this was improper. Defendant's argument on this point is weak. Certainly the jury would have had less evidence from which to infer intent without Roberto's testimony of the abuse, but that fact supports the State's desire to use the evidence rather than defendant's desire to exclude it. Agreeably, defendant was prejudiced by the evidence, but he was not unfairly prejudiced by it.

Defendant also asserts that doubts about prejudice from joinder of offenses should be resolved in favor of the defendant. The cases he cites, however, do not stand for this proposition. State v. McCumber, 622 P.2d 353, 356 (Utah 1980) states nothing of the sort. State v. Velarde, 734 P.2d 440, 444-45 (Utah 1986), stands for the rule that doubts about severance of defendants should be resolved in favor of the defendants rather than the State. There is no indication that such a rule is applicable to severance of counts in an information that are properly joined as part of a single criminal episode. Indeed, joinder is wholly within the discretion of the trial court and that discretion will not be overturned lightly. State v. Saunders, 699 P.2d 738, 740 (Utah 1985).

Because the evidence was admissible even if the counts had been severed, the trial court did not abuse its discretion in finding that defendant was not unfairly prejudiced by joinder. Judge Rokich's ruling should, therefore, be affirmed.

POINT II

DEFENDANT WAIVED ANY CLAIM THAT THE JURY SHOULD HAVE BEEN GIVEN A CURATIVE INSTRUCTION ON THE PROSECUTOR'S MISSTATEMENT OF THE LAW AND THE JURY WAS, IN ANY EVENT, PROPERLY INSTRUCTED.

Defendant complains that the prosecutor misstated the law of manslaughter when he told the jury that a reasonable man would not have killed Ms. Hernandez. He links his motion for a mistrial based upon this misstatement with his earlier request for an additional paragraph in the manslaughter instruction that explained that the killing need not be reasonable, only the extreme emotional disturbance need be reasonable, and urges reversal of his conviction of manslaughter.

Defendant's argument amounts to a request for the first time on appeal that the jury be given a curative instruction on the correct law of manslaughter. A request that was waived by his failure to make it at trial. State v. Hales, 652 P.2d 1290, 1292 (Utah 1982). When defense counsel objected to the prosecutor's misstatement, she herself gave a correct statement of the law and the court agreed with her. She did not request at that time that the court give a further curative instruction.

Later, she stated for the record her earlier objection to the failure to give the jury instruction that had been requested prior to closing arguments when the jury instructions were initially developed. She separately requested a mistrial based only upon the prosecutor's misstatement of the law but did not request that the court give a curative instruction. Instead, she stopped with the request for a mistrial. She did not say

that her explanation of the correct law was insufficient to apprise the jury of the prosecutor's mistake but, instead, claimed that the mistake was so egregious, the fact that it occurred should result in a mistrial. In these circumstances, defendant cannot argue that he requested a curative jury instruction that the trial court improperly denied.

Most important is that the jury, nevertheless, heard a correct statement of the law of manslaughter and were given written instructions that correctly stated the law. The trial court read these instructions to the jury before closing arguments and defense counsel interjected the correct law at the time of the misstatement. Thus, defendant cannot complain that the jury was not fully apprised of the prosecutor's error and of the correct law.

Even if this Court considers defendant's claims separately as an erroneous denial of a jury instruction and an erroneous denial of a mistrial, his conviction should be affirmed. Considering first the issue of the jury instruction, the trial court did not err in refusing to give the instruction even though it was an accurate statement of the law because the jury was properly and sufficiently instructed on the law of manslaughter. Jury Instruction 23 describing the elements of manslaughter reads, in pertinent part:

> 2. That Juan Jose Lopez, Jr., caused said death under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.

(R. 124). Jury Instruction 28 further states, in pertinent part:

> In determining whether or not the defendant acted under the influence of extreme emotional disturbance, you should consider all of the circumstances surrounding the death of Cindy Hernandez. If you find that the defendant, JUAN LOPEZ, caused the death of Cindy Hernandez while under the influence of extreme emotional disturbance, you must next determine whether or not there was a reasonable explanation for such disturbance. The reasonableness of the explanation or excuse for the extreme emotional disturbance is to be determined from the viewpoint of a reasonable person under the then existing circumstances.

(R. 129). These instructions make it clear that it is the extreme emotional disturbance that must be reasonable and not the killing. The manslaughter statute provides that

> (1) Criminal homicide constitutes manslaughter if the actor:
> . . .
>
> (b) causes the death of another under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse . . .

Utah Code Ann. § 76-5-205 (Supp. 1989). The paragraph defendant wanted to include was accurate, but it was unnecessary because the instructions given were also an accurate reflection of the law. There is no error in refusing to give instructions that are merely repetitive of principles adequately explained in other instructions. State v. Reedy, 681 P.2d 1251, 1253 (Utah 1984). Normally, instructions worded in the statutory language are considered to be correct and sufficient. State v. Maestas, 652 P.2d 903, 907 (Utah 1982). In fact, the jury in State v. Bishop, 652 P.2d 439, 468 (Utah 1988), was instructed with nearly identical language. The Supreme Court held that this language

did not require the jury to find that the killings were reasonable and refused to reverse Bishop's conviction on this basis. Because the jury was accurately instructed on manslaughter, it was not reversible error for the trial court to refuse to give defendant's requested additional instruction.

The second aspect of defendants claim is that the prosecutor engaged in misconduct when he stated in closing argument: ". . . would a reasonable man that night have stabbed Cindy Hernandez to death? . . . But a reasonable man would not kill Cindy Hernandez because she had another boyfriend." The prosecutor did misstate the law in these comments to the jury, however, defendant was not prejudiced by the misstatements because defense counsel correctly stated the law in her immediate objection and because the jury was properly instructed on the definition of manslaughter.

So, even though it was misconduct for the prosecutor to misstate the law, this Court should not reverse defendant's conviction because the jurors were probably not influenced by the remarks. See State v. Troy, 688 P.2d 483, 486 (Utah 1984). It is unlikely that defendant would have received a more favorable result even if the prosecutor had not made the inaccurate remarks and confidence in the verdict is not undermined, see State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988), because there was overwhelming evidence of intent along with evidence making defendant's theory incredible. For these reasons, Judge Rokich did not abuse his discretion in denying the motion for mistrial. State v. Hodges, 30 Utah 2d 367, 527 P.2d 1322 (1974) (court will

reverse denial of motion for mistrial only where is was clear abuse of discretion).

Defendant sold drugs to his friends in Ms. Hernandez' apartment on the night of her death. When Ms. Hernandez came home and demanded that his customers leave and attempted to call the police, defendant became angry and began pushing her around. Defendant retrieved the knife from the kitchen and then used it on Ms. Hernandez. Immediately after stabbing Ms. Hernandez to death, defendant began rifling through her purse. He tried to cover up the murder by strangling her son with his hands and with a vacuum cleaner cord after Roberto asked about his mother's well-being and noted the blood on defendant's clothing. Defendant told Roberto he would kill him if Roberto told anyone what had happened.

Defendant's theory that he suffered from an extreme emotional disturbance is implausible. He admitted to selling drugs that night and asserted that he never sold drugs in bars, only in his home. He said that he was disturbed by Ms. Hernandez selling drugs in bars. Every witness who was there that night testified that Ms. Hernandez was angry when she came home and found defendant's customers there. Roberto said that she started to call the police and his story is corroborated by the fact that the telephone was off the hook on the floor near the body. Thus, the evidence points to some sort of disagreement about the drug sale, rather than defendant's claim that it was about Ms. Hernandez' new boyfriend.

Even if the argument was about the new boyfriend and defendant's refusal to leave the apartment, it is unlikely that a jury would find that this created an extreme emotional disturbance that was reasonably explained or justified. This is especially true since defendant claimed at trial that he was so upset he did not know what he was doing and could not recall the stabbing but had told inconsistent stories to police officers. First he denied any knowledge of the stabbing, whatsoever. He also said that he believed Chito stabbed her and that he was in Idaho looking for Chito because of her death. Then he said that Ms. Hernandez accidentally stabbed herself and that he mercifully finished her off. Having heard these stories, it is unlikely that the jury believed that defendant could not recall stabbing Ms. Hernandez or strangling Roberto or that defendant was under the influence of an extreme emotional disturbance.

It is also unlikely that they thought the disturbance was reasonably explained or justified by ingestion of drugs and alcohol or by an ethnic reaction to the term "mother-fucker" or to being told that Ms. Hernandez had a new boyfriend, or by any combination of these things. For these reasons, defendant was not prejudiced by the prosecutor's inaccurate remarks and defendant's convictions should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests this Court to affirm defendant's convictions.

DATED this 19th day of September, 1989.

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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Respondent was mailed, postage prepaid, to Lisa J. Remal, Candice A. Johnson and Richard G. Uday, Salt Lake Legal Defender Assoc., 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 22nd day of September, 1989.