

1989

# Venus Ann Sherard v. State of Utah : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

R. Paul Van Dam; Attorney General; Christine F. Soltis; Assistant Attorney General; Attorneys for Respondent.

Joan C. Watt; Elizabeth Holbrook; Salt Lake Legal Defender Assoc.; Attorneys for Petitioner.

---

## Recommended Citation

Legal Brief, *Sherard v. Utah*, No. 890383 (Utah Court of Appeals, 1989).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/1992](https://digitalcommons.law.byu.edu/byu_ca1/1992)

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

APPEALS  
BRIEF

MENT

IN THE UTAH COURT OF APPEALS

890383  
VENUS ANN SHERARD,

Petitioner,

v.

STATE OF UTAH,

Respondent.

:

:

:

:

:

Case No. 890383-CA  
Priority No. 2

PETITION FOR REHEARING

Petition for rehearing of decision affirming judgment and conviction for criminal homicide, murder in the second degree, a first degree felony, in violation of Utah Code Ann. section 76-5-203, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, Judge, presiding.

JOAN C. WATT  
ELIZABETH HOLBROOK  
SALT LAKE LEGAL DEFENDER ASSOC.  
424 EAST 500 SOUTH, SUITE 300  
SALT LAKE CITY, UTAH 84111

Attorneys for Petitioner

R. PAUL VAN DAM  
ATTORNEY GENERAL  
CHRISTINE F. SOLTIS  
ASSISTANT ATTORNEY GENERAL  
236 STATE CAPITOL BUILDING  
SALT LAKE CITY, UTAH 84114

Attorneys for Respondent

FILED

SEP 30 1991

OF APPEAL

IN THE UTAH COURT OF APPEALS

---

VENUS ANN SHERARD,	:	
Petitioner,	:	
v.	:	
STATE OF UTAH,	:	Case No. 890383-CA
Respondent.	:	Priority No. 2

---

PETITION FOR REHEARING

Petition for rehearing of decision affirming judgment and conviction for criminal homicide, murder in the second degree, a first degree felony, in violation of Utah Code Ann. section 76-5-203, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, Judge, presiding.

JOAN C. WATT  
ELIZABETH HOLBROOK  
SALT LAKE LEGAL DEFENDER ASSOC.  
424 EAST 500 SOUTH, SUITE 300  
SALT LAKE CITY, UTAH 84111

Attorneys for Petitioner

R. PAUL VAN DAM  
ATTORNEY GENERAL  
CHRISTINE F. SOLTIS  
ASSISTANT ATTORNEY GENERAL  
236 STATE CAPITOL BUILDING  
SALT LAKE CITY, UTAH 84114

Attorneys for Respondent

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	ii
INTRODUCTION . . . . .	1
ARGUMENT	
I. THIS COURT SHOULD MODIFY THE LESSER INCLUDED OFFENSE ANALYSIS BY APPLYING THE PROPER STANDARD OF REVIEW. . . . .	1
II. THIS COURT SHOULD APPLY CRIMINAL STANDARDS IN COMPLETELY ASSESSING THE PRESERVATION OF THE VOIR DIRE ISSUE CONCERNING RUBY KELLY'S FAMILY MEMBERS. . . . .	4
III. THIS COURT SHOULD CORRECT TWO FACTUAL ASSERTIONS IN <u>SHERARD</u> WHICH CANNOT BE SUPPORTED BY THE RECORD IN THIS CASE. . . . .	8
CONCLUSION. . . . .	10

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES CITED</u>	
<u>Brown v. Pickard</u> , 11 P. 512 (Utah 1886) . . . . .	1
<u>Carpet Barn v. Department of Transp.</u> , 786 P.2d 770 (Utah App.), <u>cert. denied</u> 795 P.2d 1138 (Utah 1990) . . . .	1, 2
<u>Cummings v. Nielson</u> , 129 P. 619 (Utah 1913) . . . . .	1
<u>Doe v. Hafen</u> , 772 P.2d 456 (Utah App.), <u>cert. granted</u> 789 P.2d 33 (Utah Nov. 29, 1989) . . . . .	5
<u>Ramon v. Farr</u> , 770 P.2d 131 (Utah 1989) . . . . .	1, 2
<u>State v. Baker</u> , 671 P.2d 152 (Utah 1983) . . . . .	2, 3
<u>State v. Crick</u> , 675 P.2d 527 (Utah 1983) . . . . .	2
<u>State v. DeMille</u> , 756 P.2d 81 (Utah 1988) . . . . .	7
<u>State v. Jameson</u> , 800 P.2d 798 (Utah 1990) . . . . .	6
<u>State v. Miller</u> , 674 P.2d 130 (Utah 1983) (per curiam) . . . . .	7
<u>State v. Oldroyd</u> , 685 P.2d 551 (Utah 1984) . . . . .	2
<u>State v. Standiford</u> , 769 P.2d 254 (Utah 1988) . . . . .	2, 3
<u>State v. Velarde</u> , 734 P.2d 449 (Utah 1986) . . . . .	2, 3
<u>State v. Woolley</u> , 810 P.2d 440 (Utah App.), <u>cert. denied</u> (Utah Sept. 18, 1991) . . . . .	4

## RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Rule 12, Utah Rules of Criminal Procedure . . . . .	6
Rule 18, Utah Rules of Criminal Procedure . . . . .	4, 6
Rule 20, Utah Rules of Criminal Procedure . . . . .	5
Rule 46, Utah Rules of Civil Procedure . . . . .	5
Utah Code Ann. § 77-35-12 (1953 as amended) . . . . .	6

	<u>Page</u>
Utah Code Ann. § 77-35-18 (1953 as amended) . . . . .	7
Article I, § 7, Constitution of Utah . . . . .	6
Article I, § 10, Constitution of Utah . . . . .	6
Article I, § 12, Constitution of Utah . . . . .	6
Amendment V, Constitution of the United States . . . . .	6
Amendment VI, Constitution of the United States . . . . .	6

IN THE UTAH COURT OF APPEALS

---

VENUS ANN SHERARD,	:	
Petitioner,	:	
v.	:	
STATE OF UTAH,	:	Case No. 890383-CA
Respondent.	:	Priority No. 2

---

INTRODUCTION

Ms. Sherard requests rehearing of this case. See Brown v. Pickard, 11 P. 512 (Utah 1886) (explaining circumstances allowing rehearing); Cummings v. Nielson, 129 P. 619 (Utah 1913) (same).

A copy of this Court's opinion is in Appendix 1.

ARGUMENT

I.

THIS COURT SHOULD MODIFY  
THE LESSER INCLUDED OFFENSE ANALYSIS  
BY APPLYING THE PROPER STANDARD OF REVIEW.

This Court's analysis of whether Ms. Sherard was entitled to a lesser included offense instruction is consistent with Utah law, with the exception of the standard of review applied. Following the State's argument on page 2 of Respondent's brief, this Court found that the lesser included offense instruction issue was to be reviewed for correctness. Sherard at 8, citing Carpet Barn v. Department of Transp., 786 P.2d 770, 775 (Utah App.), cert. denied 795 P.2d 1138 (Utah 1990) (citing Ramon v. Farr, 770 P.2d 131, 133

(Utah 1989)).

The Carpet Barn and Ramon cases relied on by this Court involve jury instructions in civil cases.

Lesser included offense instructions in criminal cases are different from jury instructions in civil cases, because the lesser included offense instructions are essential to the criminal defendants' constitutional rights to due process, to be tried by a jury, and to the full benefit of the beyond a reasonable doubt standard. E.g. State v. Velarde, 734 P.2d 449, 451 (Utah 1986); State v. Baker, 671 P.2d 152, 156-157 (Utah 1983); State v. Standiford, 769 P.2d 254, 266 (Utah 1988).

Because the lesser included offense instructions are essential to these constitutional rights, a very high standard of review applies. This Court must view all of the evidence and inferences to be drawn therefrom in the light most favorable to the defendant. E.g. State v. Velarde, 734 P.2d 449, 453 (Utah 1986); State v. Crick, 675 P.2d 527, 533 (Utah 1983); State v. Oldroyd, 685 P.2d 551, 555 (Utah 1984).

As the State conceded in its brief, the transcript of the police interview between Ms. Sherard and Officer Mendez supports the lesser included offense instruction in this case. See Respondent's brief at 31-33, included in Appendix 2 to this petition. While other evidence presented in this case may appear to contradict the police interview, id., conflicting evidence requires the jury's assessment of credibility and resolution through lesser included offense instructions. E.g. State v. Oldroyd, 685 P.2d 551, 555



(Utah 1984); State v. Baker, 671 P.2d 152, 159 (Utah 1983); State v. Velarde, 734 P.2d 449, 451 (Utah 1986).

This Court should rewrite the portion of the Sherard opinion indicating that the standard of appellate review is for correctness, and clarify that this Court will review lesser included offense instruction issues by viewing the evidence in the light most favorable to the defendant, and by leaving the credibility of conflicting evidence to the jury.

In the event that this Court agrees that the trial court violated Ms. Sherard's right to a lesser included offense instruction, this Court should then resolve whether the trial court's error was prejudicial.<sup>1</sup> The question from the jurors concerning how to distinguish between second degree homicide and manslaughter, and the trial court's inadequate response to that question, preclude a finding of harmless error in this case. See Ms. Sherard's reply brief at 16-18.

---

1. The Sherard opinion discusses the concept of harmless error in another case but appears to conclude that there was no error, rather than harmless error, in this case. The opinion states:

Lastly, in Standiford, the Utah Supreme Court, on similar facts, held that "since the jury convicted of second degree murder despite the fact that an instruction was given on the lesser included offense of manslaughter, failure to give a negligent homicide instruction was, at very best, harmless error." Standiford, 769 P.2d at 267. Accordingly, we hold that the trial court did not err in refusing to instruct the jury on negligent homicide.

Id. at 10.

II.  
THIS COURT SHOULD APPLY CRIMINAL STANDARDS  
IN COMPLETELY ASSESSING THE PRESERVATION OF  
THE VOIR DIRE ISSUE CONCERNING  
RUBY KELLY'S FAMILY MEMBERS.

This Court disposed of the issue concerning the trial court's failure to voir dire the prospective jurors about their contacts with Ruby Kelly's family members with the conclusion that defense counsel failed to preserve the issue. Sherard at 6.

This Court has yet to address whether the trial court should have asked the jurors concerning their contact with Ruby Kelly's family members, regardless of defense counsel's pursuit of the questions. The questions concerning Ruby Kelly's family members are based on statutory grounds for for-cause challenges. The trial court should have investigated this concern as part of a minimally sufficient voir dire in this court-conducted voir dire state. See State v. Woolley, 810 P.2d 440, 442-448 (Utah App.) (discussing trial court's duty to insure criminal defendants' right to an impartial jury), cert. denied (Utah Sept. 18, 1991); Utah Rule of Criminal Procedure 18 (discussing jury selection and bases for for-cause challenges). The trial courts' responsibility in criminal voir dires is discussed more fully at page 23 of Ms. Sherard's opening brief and at pages 2 through 7 of Ms. Sherard's reply brief.

This Court has yet to address the plain error question. The trial court was aware of the history of threats from Ruby Kelly's family members and was approached by one of the prospective jurors, who indicated that his contact with Ruby Kelly's family members precluded his service as a juror in this case. In these

circumstances, regardless of counsel's pursuit of the questions, and regardless of whether the trial courts have a duty to investigate the statutory grounds for for-cause challenges in every case, the trial court should have asked the potential jurors concerning their contacts with Ruby Kelly's family members. The plain error argument is discussed further at pages 20 through 23 of Ms. Sherard's opening brief and is also supported by pages 6 through 8 of the reply brief.

This Court's conclusion that defense counsel failed to preserve the issue concerning Ruby Kelly's family members is based on Utah Rule of Criminal Procedure 20,<sup>2</sup> and on a civil case, Doe v. Hafen, 772 P.2d 456, 458 (Utah App.), cert. granted 789 P.2d 33 (Utah Nov. 29, 1989). Sherard at 6.

---

2. Utah Rule of Criminal Procedure 20 states:

Exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party state his objections to the actions of the court and the reasons therefor. If a party has no opportunity to object to a ruling or order, the absence of an objection shall not thereafter prejudice him.

(Emphasis added).

This Rule of Criminal Procedure does not require criminal defense attorneys to object to omissions of the trial courts, such as the failure to ask necessary voir dire questions. The parallel Rule of Civil Procedure 46 requires civil attorneys to bear the burden of objecting to omissions of the trial courts. The civil rule states:

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his (continued)

As explained at pages 17 through 19 of Ms. Sherard's opening brief, voir dire in criminal cases is essential to the constitutional rights to a fair trial provided by article I sections 7, 10 and 12 of the Utah Constitution, and the fifth and sixth amendments to the United States Constitution.<sup>3</sup> As explained at pages 2 through 4 of Ms. Sherard's reply brief, the constitutional rights at stake have been recognized in Utah Rule of Criminal Procedure 18, which places the burden for adequate voir dire on the trial courts in criminal cases.

Previous Utah criminal cases discussing the preservation of issues concerning the adequacy of voir dire have been decided under Utah Code Ann. section 77-35-12(d). Utah Rule of Criminal Procedure 12(d) is identical to that statute and provides:

Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

Comparison of the facts of this case with the Utah criminal cases decided under the language of this rule demonstrates that the

---

(footnote 2 continued)

grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

(Emphasis added).

3. See e.g. State v. Jameson, 800 P.2d 798, 802-803 (Utah 1990) (appellate courts are obliged to address the merits of constitutional issues if raised for first time in appellate court, if liberty interest is at stake).

issue concerning the trial court's failure to inquire about juror contacts with Ruby Kelly's family members is preserved for this Court's review.

In State v. DeMille, 756 P.2d 81 (Utah 1988), the defendant tried to impeach the verdict with juror affidavits reflecting discussions during deliberations about juror bias against accused child abusers. Id. at 83. The Utah Supreme Court upheld the trial court's refusal to accept the juror affidavits, and indicated that defense counsel waived the issue concerning juror bias during voir dire of the jurors. The court stated:

During voir dire, the jurors were not asked about experiences they may have had with child abuse or about biases they might have against one accused of harming a child. This is true despite the fact that DeMille's counsel was given an opportunity to question the jurors, an opportunity he declined. . . . We therefore hold that DeMille's failure to voir dire the jurors on this quite foreseeable issue or object to the trial court's failure to cover the issue constitutes a waiver and bars inquiry into the bias question.

Id. at 83.

In State v. Miller, 674 P.2d 130 (Utah 1983) (per curiam), the appellants' brief indicates that voir dire questions were requested "in camera." Miller appellants' brief at 3. The State's brief in Miller indicates that "[t]here is no evidence in the record (a) that appellants' counsel requested that such questions be incorporated into voir dire or (b) that appellants' counsel objected to voir dire at any time prior to the presentation of evidence." Miller Respondent's Brief at 8. The Utah Supreme Court concluded

that the issue concerning the adequacy of the voir dire was waived, stating, "Counsel neither objected, reminded the judge of the oversight, made a new request, nor asked permission personally to voir dire the jury under U.C.A., 1953, §77-35-18(b)." Id. at 131.

In this case, defense counsel submitted a motion for counsel-conducted voir dire, which was denied without prejudice. When defense counsel tried to participate in the voir dire, the trial court ordered counsel to address the voir dire question to the court (T. 53). Defense counsel submitted written proposed voir dire questions and written amended proposed voir dire questions, both of which specifically addressed juror acquaintance and/or contact with Ruby Kelly's family members. Defense counsel requested questions at an unrecorded bench conference, reserved objections to all questions omitted by the trial court and requested by counsel, and explicitly attempted to mention each question omitted by the trial court. Opening brief of Ms. Sherard at 15-17.

Under the preservation standards of criminal law, the issue concerning the inadequacy of the voir dire on juror contact with Ruby Kelly's family members is preserved.

III.  
THIS COURT SHOULD CORRECT  
TWO FACTUAL ASSERTIONS IN SHERARD  
WHICH CANNOT BE SUPPORTED BY  
THE RECORD IN THIS CASE.

Ascertaining the actual facts of this case is extremely difficult because of the numerous inconsistent accounts provided by the witnesses. Opening brief of Ms. Sherard at 3.

However, to the best knowledge of counsel, there is no record support for this Court's factual statements which follow:

When Sherard reached the front yard of Salazar's house, she met one of her friends whose face was bloody. The friend said that Kelly had hit her. In response, Sherard said that she wanted to fight Kelly, and subsequently a fight broke out between the two women.

Sherard at 2.

The State's assimilation of the evidence indicates that prior to Ms. Sherard's first fight with Ruby Kelly, Ms. Sherard had a fist fight with another young woman, either in the living room or outside the house. Respondent's brief at 8.

Ms. Sherard's assimilation of the evidence indicates that prior to Ms. Sherard's first fight with Ruby Kelly, Ms. Sherard was jumped by two young women in the living room and then fought a young woman outside. Opening brief of Ms. Sherard at 5-13.

In discussing the sufficiency of the evidence, this Court indicated that several witnesses testified that Ms. Sherard approached the second fight with Ruby Kelly:

As to the third element, although Sherard testified that she acted in self-defense, several witnesses testified that Sherard returned to Kelly, and without justification, resumed the fight.

Sherard at 5.

Of the six witnesses who were asked about how the second fight between Ms. Sherard and Ruby Kelly began, only one indicated that Ms. Sherard ran toward the second fight (T. 321). Two

witnesses indicated that Ruby Kelly ran toward Ms. Sherard for the second fight (T. 249; 299). One witness indicated that Ruby Kelly and one other person ran to fight Ms. Sherard for the second fight (T. 463, 492). One witness indicated that Ruby Kelly and the crowd ran to the second fight with Ms. Sherard (T. 195-196). One witness indicated that the second fight started after unidentified people ran toward Ms. Sherard (T. 525).

**CONCLUSION**

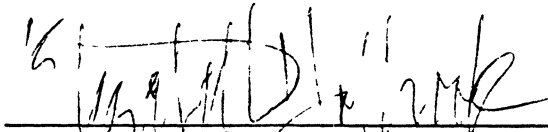
Ms. Sherard requests rehearing of this case.

RESPECTFULLY SUBMITTED this 20th day of September, 1991.



---

JOAN C. WATT  
Attorney for Petitioner



---

ELIZABETH HOLBROOK  
Attorney for Petitioner

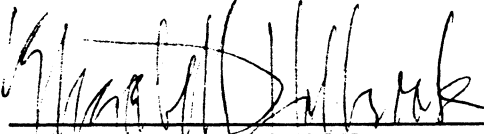


CERTIFICATION

I, Elizabeth Holbrook, do hereby certify the following:

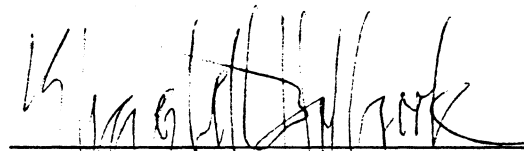
(1) I am the attorney for Petitioner in this case;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

  
\_\_\_\_\_  
ELIZABETH HOLBROOK

CERTIFICATE OF DELIVERY

I, Elizabeth Holbrook, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 30th day of September, 1991.

  
\_\_\_\_\_  
ELIZABETH HOLBROOK

DELIVERED by \_\_\_\_\_ this \_\_\_\_\_ day  
of September, 1991.

\_\_\_\_\_

**APPENDIX 1**

**Sherard Opinion**

Rec'd  
9/12/91

FILED

SEP 19 1991  
*Mary T. Noonan*  
Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

State of Utah,	)	OPINION
	)	(For Publication)
Plaintiff and Appellee,	)	
	)	
v.	)	Case No. 890383-CA
	)	
Venus Ann Sherard,	)	
	)	F I L E D
Defendant and Appellant.	)	(September 10, 1991)

-----

Third District, Salt Lake County  
The Honorable David S. Young

Attorneys: James C. Bradshaw, Joan C. Watt, and Elizabeth  
Holbrook, Salt Lake City, for Appellant  
R. Paul Van Dam and Christine F. Soltis, Salt Lake  
City, for Appellee

-----

Before Judges Billings, Orme, and Russon.

RUSSON,, Judge:

Venus Ann Sherard appeals her conviction of criminal  
homicide, murder in the second degree, a first degree felony in  
violation of Utah Code Ann. § 76-5-203 (1990). We affirm.

FACTS

We review the facts in the light most favorable to the  
jury's verdict. State v. Pascual, 804 P.2d 553, 554 (Utah App.  
1991).

At approximately 10:00 p.m. on March 7, 1987, Sherard,  
with friends, went to a party at Vikki Salazar's home. The  
party had started around 7:00 p.m. When Sherard arrived, about  
thirty to forty people were present, most of whom were drinking.

A short time after Sherard's arrival, Ruby Kelly, the  
victim in this case, arrived at the party with two friends,

Kristi Bray and Tanya Benms. Sherard did not know Kelly, but did know Benms, who was a member of a rival gang. Benms began arguing with Sherard and others, and in response, Salazar asked Kelly and her friends to leave. Despite Salazar's protestations, Sherard offered to leave instead.

When Sherard reached the front yard of Salazar's house, she met one of her friends whose face was bloody. The friend said that Kelly had hit her. In response, Sherard said that she wanted to fight Kelly, and subsequently a fight broke out between the two women. Kelly had the better of the fight, and eventually Sherard conceded. As Sherard walked away, Benms taunted her to continue the fight. According to one witness, Eloy Esquibel, before resuming the fight, Sherard asked him for a knife, which he gave her. Additionally, at least two witnesses heard someone shout that Sherard had a knife; another testified that he actually saw the knife in Sherard's hand. Sherard testified that Esquibel put "something" into her hand, which she did not look at, but believed was a knife.

Sherard returned, and the fight resumed, moving into the street. According to several witnesses, Sherard delivered several uppercuts to Kelly's torso. Jeff Salazar, one witness to the fight, testified that he saw Sherard uppercut Kelly with the knife in her hand. Todd Kingston, another witness to the fight, testified that after the fight he took a knife from Sherard and threw it away; several other witnesses saw him do so. Additionally, Tommy Quintana, a friend of Sherard, testified that Sherard told him that she had stabbed Kelly. Kelly died from nine stab wounds.

Sherard was subsequently tried by a jury and convicted of murder in the second degree. Sherard appeals that conviction, raising the following four points: (1) Was there sufficient evidence presented at trial to sustain her conviction for murder in the second degree? (2) Did the trial court abuse its discretion in limiting the voir dire of the prospective jurors? (3) Did the trial court properly deny her request for a jury instruction on negligent homicide? (4) Did the trial court commit reversible error in its instructions to the jury on self-defense and mutual combat?

## I. SUFFICIENCY OF THE EVIDENCE

Sherard argues that the evidence presented at trial was insufficient to sustain a conviction for murder in the second

degree.<sup>1</sup> On appeal, we review the evidence and reasonable inferences therefrom in the light most favorable to the jury's verdict. State v. Harman, 767 P.2d 567, 568 (Utah App. 1989) (citing State v. Petree, 659 P.2d 443, 444 (Utah 1983)). We do not weigh conflicting evidence, nor do we substitute our own judgment on the credibility of the witnesses for that of the jury. State v. Hopkins, 782 P.2d 475, 477 (Utah 1989); see also State v. Lactod, 761 P.2d 23, 28 (Utah App. 1988). On appeal, we will reverse only if the evidence "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt" that the defendant committed the crime of which she was convicted. State v. Johnson, 774 P.2d 1141, 1147 (Utah 1989) (citations omitted); see also Petree, 659 P.2d at 444; State v. Jonas, 793 P.2d 902, 903-04 (Utah App. 1990).

---

1. Subsequent to the appeal in this case, another panel of this court clarified our marshaling requirement and applied it to criminal jury trials. State v. Moore, 802 P.2d 732, 738-39 (Utah App. 1990). Moore held that in order for an appellant's sufficiency of the evidence claim to be reviewed on the merits, the appellant must marshal the evidence in support of the jury's verdict and demonstrate that, even when viewed in the light most favorable to that verdict, the evidence is insufficient to support the verdict below.

In the case at bar, Sherard has neither marshaled the evidence in support of the jury's verdict, nor shown that, in spite of this evidence, the verdict below is unsupportable. Appellant's brief contains no references whatsoever to the evidence presented at trial. In an apparent effort to respond to the marshaling requirement in Moore, appellant's reply brief contains a matrix that lists various witnesses and their testimony on a number of issues. However, upon examination, this matrix amounts to no more than an outline of transcript citations. The reply brief contains no indication as to what evidence supports the jury's verdict or what evidence opposes it, simply leaving it to us to decipher the chart. Nor does the reply brief contain any argument as to why the evidence is insufficient to support the jury's verdict in this case. In other words, Sherard has plainly failed to present a record for us to review for sufficiency.

However, since Moore, by its own terms, is meant to apply only prospectively, *id.* at 739, and since this appeal was filed prior to the court's decision in Moore, we review Sherard's sufficiency of the evidence claim on the merits.

The jury was instructed on second degree murder as follows:

Before you can convict the defendant, Venus Ann Sherard, of the crime of Criminal Homicide - Murder in the Second Degree, as charged in the Information on file in this case, you must find from all of the evidence beyond a reasonable doubt, all of the following elements of that offense.

1. That on or about the 7th day of March, 1987, in Salt Lake County, State of Utah, the defendant, Venus Ann Sherard, caused the death of Ruby Kelly; and

2. That said defendant then and there did so: (a) intentionally or knowingly; or (b) intending to cause serious bodily injury to another, she committed an act clearly dangerous to human life; or (c) knowingly acting under circumstances evidencing a depraved indifference to human life, she engaged in conduct which created a grave risk [of] death to another;

3. That said defendant caused the death in an unlawful manner and without justification.

If you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of the offense of Criminal Homicide, Murder in the Second Degree as charged in the Information.

If, on the other hand, you find that the State has failed to prove any of these elements beyond a reasonable doubt then you must find the defendant not guilty.

Viewing the evidence and inferences therefrom in the light most favorable to the jury's verdict, it is sufficiently conclusive to support the said verdict. As to the first element, all witnesses' accounts of the fight support the conclusion that Sherard caused the death of Kelly. As to the second element, Sherard's own testimony that Eloy Esquibel gave her something "heavy and . . . real cold and real hard like metal or something," which she believed was a knife, and that she punched Kelly with it numerous times, evidences, at the

very least, a depraved indifference to human life. This conclusion is further supported by the testimony of numerous witnesses who recounted Sherard's desire to fight Kelly, Eloy Esquibel's testimony that Sherard asked him for a knife before resuming the fight, and various witnesses' accounts of the second fight, including Jeff Salazar's testimony that he actually saw Sherard uppercut Kelly with a knife in her hand. As to the third element, although Sherard testified that she acted in self-defense, several witnesses testified that Sherard returned to Kelly and, without justification, resumed the fight. Given the amount of evidence which supports the State's case, we cannot say that reasonable minds must have entertained a reasonable doubt that Sherard was guilty of second degree murder, and therefore conclude that the evidence was sufficient to support the jury's verdict.

## II. VOIR DIRE

Sherard next claims that the trial court erred in limiting the voir dire of the prospective jurors. Specifically, she objects to the extent of the trial court's inquiry as to: (1) the relationship or contact between prospective jurors and Ruby Kelly's family, (2) group affiliations, (3) experience with and attitude toward alcohol, (4) experience with and attitude toward violence, and (5) exposure to publicity.

Voir dire exists to detect bias justifying a challenge for cause and to assist counsel in the intelligent use of peremptory challenges. Doe v. Hafen, 772 P.2d 456, 457 (Utah App.), cert. granted 789 P.2d 33 (Utah 1989) (citing State v. Worthen, 765 P.2d 839, 844 (Utah 1983) and Hornsby v. Corporation of the Presiding Bishop, 758 P.2d 929, 932 (Utah App.)); cert. denied sub nom. Hornsby v. LDS Church, 773 P.2d 45 (Utah 1988)). The extent of voir dire is within the discretion of the trial judge, as long as counsel is given adequate information with which to evaluate prospective jurors. Id. Moreover, "whether the judge has abused that discretion is determined, not by considering isolated questions, but 'considering the totality of the questioning.'" Id. at 457-58 (quoting State v. Bishop, 753 P.2d 439, 448 (Utah 1988)).

Sherard's first voir dire issue, concerning the relationship or contact between prospective jurors and Ruby Kelly's family, was not properly preserved for appeal. When asked to pass the jury for cause, defense counsel objected to

the omission of several requested areas of inquiry, including the other matters raised on appeal herein. However, defense counsel did not object to the lack of inquiry into the relationship or contact between prospective jurors and Ruby Kelly's family. Utah Rule of Criminal Procedure 20 provides that counsel "state his objections to the actions of the court and the reasons therefor." See also Doe v. Hafen, 772 P.2d at 458. Since defense counsel failed to do so as to this issue, it was not properly preserved for appeal.

Sherard's second claim of inadequate voir dire, group affiliations of the prospective jurors, also fails. The two requested questions in this area that were not asked by the trial court were:

Do you belong to any clubs or organizations? Which ones?

What kinds of hobbies and leisure time activities do you enjoy?

On appeal, Sherard claims that this area of inquiry would have revealed whether potential jurors could relate to the lifestyle of gang members or find such lifestyle opprobrious. However, she fails to support this blanket claim with any argument or analysis as to how either of the requested questions is probative of prospective jurors' opinions on the lifestyle of gang members. Moreover, this was never given as a reason for requesting these questions below. Since the trial courts have been instructed not to allow "inordinately extensive or unfocused questioning," id. at 457, we find no abuse of discretion on behalf of the trial court in refusing to ask these questions either.

On the issue of alcohol, the trial court asked the potential jurors:

There may be evidence during the course of this case that there were alcoholic beverages being consumed by the defendant, the victim and maybe others in their surroundings. Do any of you believe that it is simply morally wrong to consume alcoholic beverages in all cases and under all circumstances, if so, would you raise your hand?



There were no affirmative responses to this question. Sherard claims that this question was insufficient because it failed to address potential jurors' attitudes toward and experiences with alcohol. As to the former, we are of the opinion that this is precisely the sort of question which is designed to elicit potential jurors' attitudes toward alcohol. As to the latter, it is the trial court's duty to "protect juror privacy." State v. Ball, 685 P.2d 1055, 1060 (Utah 1984). To that end, it is the trial court's duty to forbid defense counsel to "conduct an inquisition into the private beliefs and experiences of a venireman." Id. On the facts of this case, it was sufficient for the trial court to inquire on the attitudes of the potential jurors as to alcohol, without specifically inquiring as to their experiences with it. Accordingly, we find no abuse of discretion on this matter.

Next, Sherard complains as to the inadequacy of investigation into the potential jurors' experiences with and attitudes toward violence. With respect to this issue, the trial court asked four questions: "[H]ave any of you been involved in a fist fight before?"; "Have any of you been in a fist fight or in a fight where weapons have been used?"; "[Have] any of you [] been witnesses to a serious injury as a result of a fight involving weapons . . . ?"; and "Do any of you believe that there is no circumstance or that it is morally wrong to be in a fight at all situations . . . ?" Taken as a whole, these questions were designed to and did elicit responses on the prospective jurors' experiences with and attitudes toward violence. Thus, the trial court's refusal to inquire further was not an abuse of discretion.

The final issue with regard to voir dire is Sherard's claim that the jurors were not adequately questioned as to their exposure to publicity. The judge conducted the following inquiry:

Have any of you heard anything about this case, if so, would you raise your hand?  
You can say yes or no to the question.  
Have you heard about this case?

. . . .

All right. Would your familiarity with the reporting cause you any reason to

believe you could not be fair and  
impartial in this case?

. . . .

If you read something in the newspaper  
would you be caused to believe that this  
would be true simply because it's in the  
newspaper?

. . . .

If you heard testimony here in conflict  
with that which you read in the newspaper  
would you be willing to follow that which  
you believed from the courtroom that you  
heard in testimony rather than that which  
you read in the newspaper?

Sherard's objection to exposure to pre-trial publicity concerns the court's failure to ask about specific magazines which the jurors read or to which they subscribed. However, defense counsel presented no argument to connect specific magazines with pre-trial publicity below, nor does counsel present such argument here. It is abundantly clear that the questions asked, in fact, revealed more about jurors' familiarity with pre-trial publicity than a vague question about specific magazines subscribed to and read could possibly have elicited. Therefore, again we find no abuse of discretion.

In conclusion, the trial court's decision to limit voir dire did not prevent detection of bias, nor did it limit defense counsel's ability to intelligently use peremptory challenges. Accordingly, we find no abuse of discretion in the limitation of voir dire by the trial court in this case.

### III. NEGLIGENT HOMICIDE

Sherard next asserts that the trial court erred in failing to give her requested jury instruction on negligent homicide. We review a trial court's refusal to give a requested instruction under a correction of error standard, granting no particular deference to the trial court's ruling. Carpet Barn v. Department of Transp., 786 P.2d 770, 775 (Utah App.), cert. denied 795 P.2d 1138 (Utah 1990) (citing Ramon v. Farr, 770 P.2d 131, 133 (Utah 1989)).

Although "a defendant's requested lesser included offense must be given when there is some evidence which supports the theory asserted by defendant," State v. Standiford, 769 P.2d 254, 266 (Utah 1988) (citing State v. Baker, 671 P.2d 152, 157-59 (Utah 1983)), there must also be a "'rational basis for a verdict acquitting the defendant of the offense charged and convicting [her] of the included offense.'" State v. Larocco, 794 P.2d 460, 462 (Utah 1990) (quoting Baker, 671 P.2d at 159). Thus, we must examine: (1) if there is sufficient evidence to support Sherard's request for a negligent homicide instruction, and (2) whether there is a rational basis for a verdict acquitting Sherard of murder in the second degree and manslaughter, on which the jury was also instructed, but still convicting her of negligent homicide.

Negligent homicide and reckless manslaughter are related concepts, both requiring that defendant's conduct be "'a gross deviation' from the standard of care exercised by an ordinary person." Standiford, 769 P.2d at 267. The only difference is that manslaughter requires that the defendant was actually aware of the risk of death, while in negligent homicide, the defendant was not, but should have been aware of such risk. Id. (citing Boggess v. State, 655 P.2d 654, 656-58 (Utah 1982) (Stewart, J., concurring)).

Our review of the evidence indicates that Sherard's request for a negligent homicide instruction is unsupportable. Sherard's own testimony was that Eloy Esquibel gave her something "heavy and . . . real cold and real hard like metal or something," which she believed was a knife, and that she punched Kelly with it several times. Additionally, after the fight, she told Tommy Quintana, "I stabbed her, I think I stabbed her." This testimony is inconsistent with negligent manslaughter's requirement that the defendant be unaware of the risks associated with her conduct. In fact, Sherard offers no evidence from which a jury could conclude that she was unaware of the risks involved. Without such evidence, we cannot justify an instruction on negligent homicide.

Moreover, as noted in Section I above, the evidence presented at trial was sufficient to convict Sherard of the greater offense, second degree murder. We, therefore, find that there was no rational basis for a verdict acquitting Sherard of second degree murder and manslaughter and convicting her of negligent homicide.

Lastly, in Standiford, the Utah Supreme Court, on similar facts, held that "since the jury convicted of second degree murder despite the fact that an instruction was given on the lesser included offense of manslaughter, failure to give a negligent homicide instruction was, at very best, harmless error." Standiford, 769 P.2d at 267. Accordingly, we hold that the trial court did not err in refusing to instruct the jury on negligent homicide.

#### IV. JURY INSTRUCTIONS

Sherard also contends that the trial court committed reversible error in instructing the jury on self-defense and mutual combat. Specifically, she argues that one of the instructions concerning self-defense erroneously stated that the test of the reasonableness of her actions was an objective, not subjective, test; and that the mutual combat instruction was irrelevant and confusing.

"[B]eyond the substantive scope, correctness, and clarity of the jury instructions, their precise wording and specificity is left to the sound discretion of the trial court." State v. Aly, 782 P.2d 549, 550 (Utah App. 1989) (citations omitted). However, the said instructions must not incorrectly or misleadingly state material rules of law. Id.

Sherard argues that Jury Instruction Number 26 erroneously stated that self-defense is governed by an objective, not subjective, standard. Instruction Number 26 reads:

The reasonableness of a belief that a person is justified in using force that would cause death or serious bodily injury against another shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

Utah Code Ann. § 76-2-402(1) (Supp. 1991) provides that, in order to successfully assert a claim of self-defense, a defendant must "reasonably believe[] that such force is necessary to defend [herself] . . . against such other's imminent use of unlawful force." We have previously stated that reasonable in the context of section 76-2-402(1) means

"objectively reasonable." State v. Duran, 772 P.2d 982, 985 (Utah App. 1989) (quoting In re R.J.Z., 736 P.2d 235, 236 (Utah 1987)). This instruction plainly complies with the objective standard requirement; therefore, the trial court did not err in giving the said instruction.

Secondly, Sherard argues that the mutual combat instruction that was given was irrelevant and confusing. The instruction in question, Jury Instruction Number 18, provides:

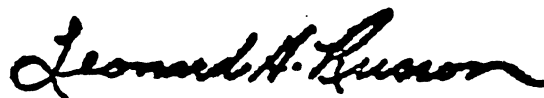
If you find that either party was a party to mutual combat, or other consensual altercation, and that during the course of the combat or altercation, either party used a deadly weapon, then you must not consider the consent of the victim in the encounter as a defense to the crime of Criminal Homicide.

Almost every account of the fight between Sherard and Kelly indicates that it was, indeed, mutual combat. It was therefore entirely appropriate for the trial court to clarify by means of instruction that even if Kelly had mutually agreed to fight Sherard, this did not excuse Sherard's use of a deadly weapon in that fight. This is true, even if Kelly is viewed as the initial aggressor. See State v. Starks, 627 P.2d 88, 90 (Utah 1981) and cases cited therein. Since the precise wording of jury instructions is left to the sound discretion of the trial court, Lopez, 789 P.2d at 45, we hold that it was proper for the trial court to give the mutual combat instruction in question.

#### CONCLUSION

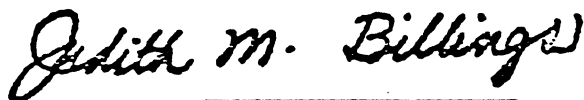
- In conclusion, we hold that: (1)- the evidence presented at trial was sufficient to sustain Sherard's conviction for murder in the second degree; (2) The trial court did not abuse its discretion in limiting the voir dire of the prospective jurors; (3) the trial court properly denied defendant's request for a jury instruction on negligent homicide; and (4) the trial

court did not err in instructing the jury on self-defense and mutual combat. Accordingly, we affirm.



Leonard H. Russon, Judge

-----  
I CONCUR:



Judith M. Billings, Judge

-----  
I CONCUR IN THE RESULT:



Gregory K. Orme, Judge

COVER SHEET

<sup>u</sup>  
CASE TITLE:

State of Utah,  
Plaintiff and Appellee,  
v.  
Venus Ann Sherard,  
Defendant and Appellant.

Case No. 890383-CA

Sept. 10, 1991. OPINION (For Publication).

Opinion of the Court by LEONARD H. RUSSON, Judge; JUDITH M. BILLINGS, Judge, concurs. GREGORY K. ORME, Judge, concurs in the result.

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of September, 1991, a true and correct copy of the foregoing OPINION was hand-delivered to a personal representative of the Attorney General's Office and the Legal Defender's Office, to be delivered to the each of the parties listed below:

✓ James C. Bradshaw  
Joan C. Watt  
Elizabeth Holbrook (Argued)  
Salt Lake Legal Defender Association  
424 East 500 South, Suite 300  
Salt Lake City, UT 84111

R. Paul Van Dam  
Attorney General  
Christine F. Soltis (Argued)  
Assistant Attorney General  
B U I L D I N G M A I L

and a true and correct copy of the foregoing OPINION was deposited in the United States mail to the district court judge listed below:

The Honorable David S. Young  
District Court Judge  
240 East 400 South, Room 504  
Salt Lake City, UT 84111

  
Deputy Clerk

TRIAL COURT:

**APPENDIX 2**

**State's Brief Concerning Evidence  
Supporting Lesser Included Offense Instruction**



was not sufficient evidence, in fact, no evidence, that would sustain that" (T. 626-627). Later the court stated, "The Court found there was no factual basis to sustain presenting [the negligent homicide instruction] to the jury and, thus, it would have been inappropriate to present that to the jury" (T. 631). Defendant objected to this refusal (T. 630).

While negligent homicide is statutorily a lesser included offense of murder in the second degree, this does not mandate its inclusion in all homicide cases.<sup>9</sup> State v. Crick, 675 P.2d 527, 529-30 (Utah 1983); State v. Velarde, 734 P.2d at 453; State v. Dyer, 671 P.2d 142, 148 (Utah 1983). Under the facts of defendant's case, a negligent homicide instruction could only be justified if defendant, in stabbing the victim, was "unaware but should have been aware of a substantial and unjustifiable risk, or that [she] failed to perceive the nature and degree of the risk." Bogges v. State, 655 P.2d 654, 655 (Utah 1982) (citing the statutory definition of criminal negligence, Utah Code Ann. § 76-2-103(4)). Defendant does not dispute this legal issue or the lower court's determination of the appropriate law, but challenges the factual application made by the court.

Defendant's only factual support for the negligent homicide instruction is defendant's statement to the police at the time of her arrest. In the statement given on March 7, 1987, defendant stated that Todd Kingston gave her something in her

---

<sup>9</sup> The statutory texts for the pertinent offenses are contained in the introduction of this brief, at pages 2-3.

left hand as she was fighting the victim, Ruby Kelly (R. 288). At the same time she heard him say "go with what you got" (R. 286, 287, 288). The object she received "fit right in [her] hand. and [sic] it was heavy, and it was real cold and real hard like metal or something" (R. 288). Being right handed, she switched it to her right hand (R. 288). She did not state that she knew it was a knife but was not "completely positive that [she] didn't have anything" (R. 287).

After the state introduced defendant's statement at trial, defendant took the stand and testified that her memory was better at the time of trial than when she gave the statement (T. 549). She stated that she had been confused and scared when she talked to the police (T. 567). Defendant testified that in the two intervening years she had come to terms with the killing and the events were "a lot clearer" to her now (T. 549). In relation to her use of the knife, she remembered at trial that it was not Troy Kingston but Eloy Esquibel who gave her the knife (T. 523, 567). She testified that while she did not look at the knife, common sense told her it was a knife and she believed it was a knife (T. 523-524). She stated that she did not think about not swinging with the knife because she was scared and just thinking of protecting herself (T. 525-26). Her defense at trial was not that she was unaware of the knife, but that either its use was justified based as self-defense, or that she had recklessly had it in her hand while fighting but without any intent to use it. Thus, the trial court properly instructed the jury on defendant's theories of the case when it instructed the jury on the lesser

included offense of manslaughter and the justification of self-defense. See State v. Neeley, 748 P.2d 1091, 1093 (Utah 1988).

The only evidence which could possibly be construed as constituting criminal negligence, i.e., that defendant did not know she had a knife in her hand, was her original statement to the police. But, even defendant refuted the validity of that statement by claiming that her trial testimony was more accurate and detailed than her prior statement. While a court should not judge the credibility of the evidence offered in support of a requested lesser included offense, the court must still determine if a "sufficient quantum" of evidence has been offered. Where defendant admits that she was aware that she had a knife while fighting the victim hand-to-hand, there exists no factual basis to conclude that defendant's conduct merely constituted criminal negligence. State v. Velarde, 734 P.2d at 453 (a defendant is not entitled to an instruction on negligent homicide where no rational view of the evidence supports it); Boggess v. State, 655 P.2d at 655 (an instruction on negligent homicide is not justified where a defendant, knowing the danger of a gun, points what he mistakenly believes is an unloaded gun at a person and pulls the trigger). See also State v. Standiford, 769 P.2d 254, 267 (Utah 1988) (a defendant's knowledge of the risk of death from the use of a weapon can be derived from the nature of the wounds themselves).

Even if this Court were to find error in the lower court's refusal to instruct on negligent homicide, the error would be harmless. The jury was instructed on both the charged