1999

Salt Lake City v. Roger J. Alires : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

SALT LAKE CITY,	:	
Plaintiff/Appellee	:	
vs.	:	
ROGER J. ALIRES,	:	Case No. 99 0483-CA
Defendant/Appellant	:	Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Telephone Harassment, a class B misdemeanor, in violation of Salt Lake City Code § 11.080.030, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, Judge, presiding.

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JURISDICTIONAL STATEMENT

This appeal is from a Judgment for the conviction of Telephone Harassment, entered after a jury trial by the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, judge presiding. Jurisdiction is conferred on this Court pursuant to Utah R. Crim. P. 26 (2)(a) and Utah Code Ann. § 78-2a-3(2)(f) (1996). See Addendum A (judgment and conviction).

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF APPELLATE REVIEW

The issues presented for review are as follows:

1. Whether the trial court erred in admitting, for "identification" purposes, Alires' attempt to break into Brimhall's apartment earlier in the evening and in finding

that the same evidence was more probative than prejudicial.

STANDARD OF REVIEW: Admission of prior crimes evidence is examined under an 'abuse of discretion' standard. See State v. Decorso, 370 Utah Adv. Rep 11 (1999). Clarifying this standard, the Utah Supreme Court has reasoned that "admissions of prior crimes evidence must itself be scrupulously examined by trial judges in the proper exercise of that discretion." Id.

2. Whether the trial court erred when it admitted Brimhall's statements, made to Officer Candland, in violation of Alires' right of confrontation under the Sixth Amendment of the United States Constitution and Article I, Section 12 of the Utah Constitution.

STANDARD OF REVIEW: An appellate court reviews a determination of constitutional admissibility of evidence under a "correctness" standard. See generally State v. Ramirez, 817 P.2d 774 (Utah 1991).

3. Whether the trial court erred when it admitted out-of-court statements Officer Candland overheard during a telephone conversation allegedly between Alires and Brimhall as "non-hearsay" ruling it was not offered for the truth of the matter.

STANDARD OF REVIEW: "To the extent that there is no pertinent factual dispute, whether a statement is offered for the truth of the matter asserted is a question of law, to be reviewed under a correction of error standard." State v. Olsen, 860 P.2d 332, 335 (Utah 1993)(citing Hansen v. Heath, 852 P.2d 977, 979 (Utah 1993)) .

PRESERVATION OF ARGUMENT

1. Alires' request to exclude evidence regarding his attempt earlier in the evening to break into Brimhall's apartment, on the basis that it is evidence of "other crimes" pursuant to Rule 404(b) and more prejudicial than probative pursuant to Rule 403 of the Utah Rules of Evidence, is preserved at R. 2-3.

2. Alires' request to exclude out-of-court statements made by Brimhall in violation of Alires' right of confrontation under the Sixth Amendment of the United States Constitution and Article I, Section 12 of the Utah Constitution is preserved at R. 20., 26-27, 61.

3. Alires' request to exclude out-of-court statements Officer Candland overheard during a telephone conversation allegedly between Alires and Brimhall as "hearsay" is preserved at R. 41, 53-54.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following statutes, rules, and constitutional provisions will be determinative of the issues on appeal:

Amendment VI, United States Constitution (See Addendum B)

Art. I, § 12, Utah Constitution, Rights of Confrontation (See Addendum B)

Rule 402, Utah Rules of Evidence

Rule 403, Utah Rules of Evidence

Rule 404(b), Utah Rules of Evidence

Rule 801, Utah Rules of Evidence

Rule 802, Utah Rules of Evidence

Rule 803(2), Utah Rules of Evidence

STATEMENT OF THE CASE, NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

In an Information dated August 7, 1998, Salt Lake City ("the City") charged appellant Roger Alires ("Alires") with Telephone Harrassment, a class B misdemeanor in violation of Salt Lake City Code § 11.08.030.

A jury trial was conducted on February 22, 1999. During the trial, against Alires' objections, the trial court allowed the City to introduce, for "identification" purposes, Alires' attempt earlier in the evening to break into Brimhall's apartment. R. 2-3. In addition, the trial court allowed into evidence, as "excited utterances", several out-of-court statements made by Brimhall who was not present at the jury trial. R. 7-8, 17-21. Finally, the trial court allowed into evidence, as non-hearsay, out-of-court statements Officer Candland overheard during a telephone conversation allegedly made between Alires and Brimhall. R. 41, 53.

The jury rendered a verdict convicting Alires of Telephone Harassment. Alires appeals from the Judgment entered on April 12, 1999.

STATEMENT OF THE FACTS

I. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE, FOR "IDENTIFICATION" PURPOSES, ALIRES' ATTEMPT EARLIER IN THE EVENING TO BREAK INTO BRIMHALL'S APARTMENT.

On July 19, 1998, at around 10:40 p.m., Tiffany Brimhall ("Brimhall") contacted the Salt Lake Police Department ("SLPD") and reported that Alires was trying to break into her apartment. Officer Gilbert Salazar ("Officer Salazar") of the SLPD was dispatched to Brimhall's apartment to investigate. R. 27.

When Officer Salazar arrived at the apartment, he encountered Alires banging on one of the windows of Brimhall's apartment. R. 27-28 Officer Salazaar questioned both Alires and Brimhall and after verifying that Alires had no warrants allowed Alires to get some personal property from inside the apartment and then allowed Alires to leave. R. 28-31.

Officer Salazar was not present when Brimhall received the telephone call at issue. R. 31-32. Accordingly, Officer Salazar had no personal knowledge regarding who called Brimhall. R. 32. Moreover, Officer Salazar had no personal knowledge regarding what was said between the caller and Brimhall. R. 32.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED OUT-OF-COURT STATEMENTS MADE BY BRIMHALL IN VIOLATION OF ALIRES' RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12 OF THE UTAH CONSTITUTION.

Later that same evening, at around 12:30 a.m., Brimhall contacted the SLPD. R.

33. Officer Jill Candland ("Officer Candland") was dispatched to Brimhall's residence to investigate. R. 33. When Officer Candland arrived, she encountered Brimhall and noticed that she was tearful, her voice was shaking, and she was upset "to the point of being . . . [in] shocking disbelief". R. 36. Brimhall told Officer Candland that Alires had just telephoned and threatened her with a knife. R. 36-37.

While Officer Candland was questioning Brimhall, the telephone rang. R. 38. Brimhall answered it and stated to Officer Candland, "It's him". R. 38. Officer Candland put her ear to the telephone and listened to the conversation between Brimhall and the caller. R. 38.

Brimhall was not present at the jury trial to testify regarding these statements made to Officer Candland. R. 9, 44.

III. THE TRIAL COURT ERRED WHEN IT ADMITTED OUT-OF-COURT STATEMENTS OFFICER CANDLAND OVERHEARD DURING A CONVERSATION ALLEGEDLY BETWEEN ALIRES AND BRIMHALL AS "NON-HEARSAY"

During the conversation, Officer Candland overheard the caller tell Brimhall three times that "if she did not take him back, if he could not be with her and his daughter, he would kill her." R. 40. In addition, Officer Candland overheard the caller tell Brimhall "that she would need to watch the day care." R. 40-41. After hearing this, Officer Candland advised the caller that his threat was overheard and that he should stay away from Brimhall. R. 41. The caller hung up. R. 41 Brimhall had no caller identification. R. 45 However, the telephone call was traced to a public telephone. R. 46.

Officer Candland had not seen Alires since 1989. R. 43-44. In addition, Officer Candland had not heard Alires' voice since 1989. R. 43-44 Officer Candland was not a voice recognition expert and was not able to recognize the caller as that of Alires. R. 44. Moreover, the caller never identified himself as "Roger" or "Alires". R. 45

On August 7, 1998, Alires was charged with "Telephone Harassment" pursuant to § 11.08.030 of the Salt Lake City Code. During November 1998 a jury trial was scheduled. R. 2. However, Brimhall failed to appear to testify. R. 2. The jury trial was rescheduled to February. R. 2. On February 22, 1999, a jury trial was conducted and Alires was found guilty.

SUMMARY OF THE ARGUMENT

Alires was charged with Telephone Harassment. In connection with such charge, the City is required to prove each element of the offense, including identifying Alires as the individual committing the offense.

The trial court erred when it admitted, for "identification" purposes, Alires' attempt earlier in the evening to break into Brimhall's apartment. Although evidence of other crimes is admissible for "identification" purposes, "identification" evidence is evidence that evinces a similarity, i.e., a similar pattern or fashion between a wrong an individual has previously committed and a wrong an individual is presently accused of. Accordingly, since the City failed to show that Alires always broke into Brimhall's apartment prior to calling her, the Court misconstrued the "identification" exception and

allowed in excluded evidence.

The trial court also erred in admitting out-of-court statements made by Brimhall in violation of the Sixth Amendment to the United States Constitution and Article I, Section 12 of the Utah Constitution since Utah Supreme Court precedent requires a finding of witness "unavailability" before admitting hearsay evidence. Brimhall did not testify at trial and the Court made no determination that she was "unavailable".

Finally, the trial court erred in admitting out-of-court statements, overheard by Candland, that were made during a telephone conversation allegedly between Alires and Brimhall. The trial court ruled that these statements were non-hearsay since they were not admitted to prove the truth of the matter. However, the statements were not admitted for any specific purpose. In fact, these statements were admitted as substantive evidence. Accordingly, the statements are considered hearsay and should have been excluded. Even if non-hearsay, the statements are more prejudicial than probative.

ARGUMENT

POINT I: THE TRIAL COURT ERRED WHEN IT ADMITTED AS EVIDENCE, FOR "IDENTIFICATION" PURPOSES, ALIRES' ATTEMPT EARLIER IN THE EVENING TO BREAK INTO BRIMHALL'S APARTMENT AND IN FINDING THAT THE SAME EVIDENCE WAS MORE PROBATIVE THAN PREJUDICIAL.

A. The Trial Court Erred When It Admitted Evidence, For "Identification" Purposes, Alires' Attempt Earlier In The Evening To Break Into Brimhall's Apartment Since Evidence Did Not Show A Similar Fashion Or Pattern.

Pursuant to Rule 404(b) of the Utah Rules of Evidence:

> [e]vidence 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.

Rule 404(b), Utah Rules of Evid.; see also Decorso, WL 357192, at *4; State v. Shickles, 760 p.2d 291, 295 (Utah 1988); State v. Johnson, 748 P.2d 1069, 1075 (Utah 1987); State v. Saunders, 699 P.2d 738, 741 (Utah 1985). In Shickles, the Utah Supreme Court reasoned that the general rule prohibiting evidence of other crimes "was established, not because that evidence is logically irrelevant, but because it tends to skew or corrupt the accuracy of the fact-finding process." Shickles, 760 P.2d at 295. Accordingly, "evidence of other crimes is inadmissible unless it tends to have a special relevance to a controverted issue and is introduced for a purpose other than to show the defendant's predisposition to criminality." Id. In the present case, the trial court admitted, for "identification" purposes, Alires' attempt earlier in the evening to break into Brimhall's

apartment. However, the trial court misapplied the "identification" exception of Rule 404(b).

1. "Identification" Evidence is Evidence That Evinces A Similarity, i.e., A Similar Pattern Or Fashion, Between A Wrong An Individual Has Previously Committed And A Wrong An Individual Is Presently Accused Of.

In Johnson, the Utah Supreme Court held that evidence from an earlier prosecution of a defendant, that he forged a check drawn on the individual account of a "Cary Montoya", was admissible in a separate prosecution against him for burglary of church checks. Johnson, 748 P.2d at 1075. Specifically, the Court ruled that a store clerk's testimony that the defendant presented himself as "Cary Montoya" and cashed a check on "Cary Montoya's" account, was probative on the issue of "identity". Id. In reaching its decision, the Court reasoned that the evidence showed a "common scheme" where defendant forged both checks, on both accounts, on the same day, using the name of "Cary Montoya". Id.

Applying the above Utah case law, it is apparent that "identification evidence" is similar to a "fingerprint". "Identification" evidence is evidence that indicates an individual currently being prosecuted for a crime, is the individual who committed the crime, because he has committed other crimes in a similar fashion, manner, or pattern. For example, suppose there is an issue of identification in a rape case where the perpetrator tied the hands and legs of the victim with tape and left a note beside the victim, written in blue pen, and signed "Cassanova". Evidence that the defendant being

prosecuted for the crime has been convicted of a rape done in a similar fashion with a similar note could be admitted as evidence for "identification" purposes because of the similarities between the two crimes.

In this instance, the "identitity" of who called Brimhall was at issue. Applying the above, evidence that Alires always (or even sometimes) broke into Brimhall's apartment before calling Ms. Brimhall could constitute "identification" evidence. Similarly, evidence that Alires always (or even sometimes) called Brimhall a pet name, when addressing her on the phone, would constitute "identification" evidence. However, no such evidence was admitted at trial. Instead, the trial court admitted evidence of Alires' attempt to break into Brimhall's apartment earlier, under the "identification" exception, reasoning that because Alires was there earlier in the evening - it could be inferred that he must have been the one who called her later that evening. However, this evidence did not evince any similar fashion, pattern, or "common scheme". Since this evidence did not constitute "identification" evidence, it should have been excluded as evidence of other crimes pursuant to rules 402 and 404 (b).

B. Even Assuming That Evidence Was Admissible For "Identification" Purposes The Trial Court Still Erred In Admitting Evidence As More Probative Than Prejudicial

Even if evidence of other crimes is probative of a particular element of a crime and is not offered merely to show criminal predisposition, such evidence is not automatically admissible under Rule 404(b). See Rule 403, Utah Rules of Evid.; see also State v.

O'Neil, 848 p.2d 694, 701 (Utah Ct. App. 1993). Rule 403 of the Utah Rules of Evidence provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. Regarding the factors to be evaluated in the balancing process, the Utah Supreme Court has reasoned:

> The problem is not merely one of pigeonholing, but of classifying and then balancing. In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Shickles, 760 P.2d at 296.

In the present case, evidence of Alires' attempt earlier in the evening to break into Brimhall's apartment does not aid the prosecution in proving any of the elements needed to prosecute Alires for Telephone Harassment. There was no evidence presented at trial that Alires' had access to or used any telephone during the time of the attempted break in. Furthermore, there was no evidence presented at trial that Alires in anyway used threatening words toward Brimhall at this time. In fact, the only evidence presented at trial was evidence that Alires was trying to break into Brimhall's apartment window to

retrieve his personal belongings, was Brimhall's boyfriend, was the father of Brimhall's child, and that Brimhall was frightened by Alires' actions. Accordingly, this evidence was presented simply to appeal to the juror's sympathies, arouse their sense of horror, and provoke their interest in punishing Alires in violation of Rule 403. See Terry v. Zions Coop. Mercantile Inst., 605 p.2d 314 (Utah 1979), overruled on other grounds, McFarland v. Skaggs Cos., Inc., 678 P.2d 298 (Utah 1984).

In fact, there was a real possibility of a different outcome if the evidence had not been admitted. Had the evidence not been admitted, the only evidence presented in this case would have been hearsay evidence introduced through Officer Candland's testimony. However, Officer Candland had no personal knowledge regarding who the caller was and never identified Alires as the caller. With the introduction of the evidence of Alires breaking into the apartment the jury was allowed to make inferences, i.e., Alires lived at Brimhall's apartment - Alires was Brimhall's boyfriend - boyfriends and girlfriends fight - Alires was trying to break into the apartment - thus Alires and Brimhall must have been fighting (otherwise he would not have had to break in) - Brimhall called the police because Alires was trying to break into the apartment - Alires was mad that Brimhall called the police - so Alires called to threaten her. It was these compounding inferences that allowed the jury to infer Alires was the caller. It was these compounding inferences that convicted Alires.

POINT II ADMISSION OF BRIMHALL'S STATEMENTS VIOLATED ALIRES' RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 12 OF THE UTAH CONSTITUTION.

In this matter, the City sought to introduce Brimhall's statements, made to Officer Candland, under Rules 802 and 803 of the Utah Rules of Evidence. Rule 802 provides that "[h]earsay is not admissible except as provided by law or by these rules." Rule 802, Utah Rules of Evid. However, rule 803 provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule." Rule 803, Utah Rules of Evid.

In the present case, Officer Candland testified that when she first encountered Brimhall she was tearful, her voice was shaking, she was very upset, and she was in shock or disbelief. R. 36. Over Alires' objections, the trial court ruled that these statements were "excited utterances". Assuming Brimhall's out-of-court statements are "excited utterances", admission of the statements must comport with the confrontation clauses under the Sixth Amendment to the United States Constitution and the Utah Constitution, Article I, Section 12.

A. Admission of Brimhall's Statements Violated Alires' Right Of Confrontation Under The Sixth Amendment Since The United States Supreme Court And Utah Supreme Court Precedent Still Requires A Finding Of "Unavailability" And Brimhall Was Not An "Unavailable" Witness.

The Confrontation Clause of the Sixth Amendment, made applicable to the States

through the Fourteenth Amendment, provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." see Idaho v. Wright, 497 U.S. 805, 813 (1990); Coy v. Iowa, 487 U.S. 1012, 1015 (1988). The United States Supreme Court has reasoned that "[i]f a court were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial." Ohio v. Roberts, 448 U.S. 56, 63 (1980). Therefore, in interpreting this phrase, the Court has reasoned that the Confrontation Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant. Idaho, 497 U.S. at 813.

In 1980, in Ohio v. Roberts, 448 U.S. 56 (1980), the United States Supreme Court set forth a "general approach" implying that all hearsay is subject to some limitations under the Confrontation Clause. Id. at 65. The Court laid down a two-step inquiry to determine whether admission of hearsay statements met the requirements under the Confrontation Clause:

> [i]n sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability'. Reliability can be inferred without more in a case where the evidence [fell] within a firmly rooted hearsay exception.

Id. at 66; see also State v. Webb, 779 P.2d 1108, 1112 (1989). The two-step inquiry was followed in subsequent cases raising Confrontation Clause and hearsay issues. Idaho v. Wright, 497 U.S. 805, 815 (1990).

However, in 1986, in United States v. Inadi, 475 U.S. 387 (1986), the Court limited the scope of Roberts reasoning that Roberts did not stand for the "radical proposition that no out of court statement can be introduced by the government without a showing that the declarant was unavailable." Inadi, 475 U.S. at 394. Specifically, the Court held that the unavailability requirement set forth in Roberts did not apply to incriminating out-of-court statements made by a non testifying co-conspirator. Id. at 399-400.

Following Inadi, the Court in White v. Illinois, 497 U.S. 805 (1990), held that the Confrontation Clause does not require a finding of witness "unavailability" before admitting testimony under the spontaneous declaration hearsay exception. White, 502 U.S. at 356-357. In making its decision, the Court reasoned that:

> while an unavailability rule would therefore do little to improve the accuracy of factfinding, it is likely to impose substantial additional burdens on the factfinding process. The prosecution would be required to repeatedly locate and keep continuously available each declarant, even when neither the prosecution nor the defense has any interest in calling the witness to the stand

White, 497 U.S. at 355 (citing Inadi, 475 U.S. at 398-399).

Lower state courts have criticized the holdings in Inadi and White. In State v. Ortiz, 845 P.2d 547 (Hi. 1993), the Hawaii Supreme Court, rejecting the holding of Inadi, declined to admit excited utterances without a showing of the declarant's unavailability. The Hawaii Supreme Court reasoned that:

> [a] showing of the declarant's unavailability is necessary to

> promote the integrity of the fact finding process and to ensure fairness to defendants. Although excited utterances have certain guarantees of reliability, we also recognize that the right to confront an accuser should not be abandoned simply because the alleged incriminating statement was made spontaneously.

Ortiz, 845 P.2d at 556. Moreover, in State v. Storch, 612 NE 2.d 305 (Ohio 1993), Ohio's Supreme Court observed that:

> White has met with criticism because it limits the right to confrontation to situations in which the extrajudicial statements are not covered by well-established exceptions to the hearsay rule. If the statement falls within one of the well-established exceptions to the hearsay rule, no right to confrontation with the declarant exists, if White is to be read literally.
>
> Although White acknowledges the extreme value of cross-examination to a reliable fact-finding process, the opinion states, as if it is obvious fact, that cross-examination would aid the process of arriving at the truth very little in those circumstances involving a well-established exception to the hearsay rule. This statement is not obvious fact to many who have litigated such cases.

Storch, 612 NE.2d at 313. Accordingly, the Ohio Supreme Court reasoned that White's abandonment of the unavailability finding "provide[d] less protection for the accused than the protection provided by the Sixth Amendment as traditionally construed and by the express words of Section 10, Article I of the Ohio Constitution." Id.

In addition, it appears that the Utah Supreme Court has implicitly rejected the holdings of Inadi and White. See State v. Carter, 888 P.2d 629 (Utah 1995); State v. Menzies, 889 P.2d 393 (Utah 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 910 (1995);

State v. Moosman, 794 P.2d 474 (Utah 1990). In Moosman, decided after Inadi, the Utah Supreme Court, appearing to ignore the holdings of Roberts, Inadi, and White, fashioned its own two-part test when evaluating the extent of a violation of the right of confrontation under the Sixth Amendment. See Moosman, 794 P.2d at 480. According to Moosman, a determination must be made regarding whether the presentation of hearsay testimony of extrajudicial statements or occurrences is "crucial" to the prosecution's case or "devastating" to the defendant. Id. at 480. Then, a court must look at the availability of the declarant and whether the presence of the declarant will add any probative value to the evidence by allowing the trier of fact to observe the demeanor of the witness. Id.

Moreover, in Carter, decided after Inadi and White, the Utah Supreme Court, apparently ignoring Moosman, reaffirmed the two-part test set forth in Roberts. Specifically, the Court held that testimony from a prior sentencing proceeding was admissible at a later proceeding if witnesses were "unavailable" and prior testimony had sufficient indicia of reliability. Carter, 888 P.2d at 646.[1]

Applying the above, it appears that the Utah Supreme Court, following other state courts, has implicitly rejected the holdings in Inadi and White - deciding instead to fashion its own test and reaffirm the two-step test laid out in Roberts. Accordingly, it is

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[1] The Tenth Circuit Court of Appeals also appears to continue to use Roberts, ignoring the holdings set forth in Inadi and White. See Crespin v. State of N.M., 144 F.3d 641 (10th Cir. 1998)(holding that non-testifying accomplice's confession did not qualify for admission against defendant as statement against accomplice's penal interest).

these two precedents - these two frameworks - that the Utah Court of Appeals must adhere to when making their decision.

1. Applying Moosman, Brimhall's Testimony Was Crucial To The Prosecution's Case and Devastating To Alires.

In the present case, the most crucial aspect of the prosecution's case was proving that Alires was the telephone caller. However, Brimhall had no caller identification and the telephone call was traced to a public telephone. R. 45-46. Furthermore, Officer Candland, who testified regarding the statements Brimhall made, had not seen Alires or heard his voice since 1989. R. 43-44. In addition, Officer Candland was not a voice recognition expert and was not able to recognize the voice of the caller as Alires. R. 43-44 Accordingly, Brimhall's testimony was crucial to the prosecution case. Brimhall's testimony would not have been cumulative evidence. See Ecker v. Scott, 69 F.3d 69 (C.A.5 (Tex. 1995)(reasoning that testimony providing cumulative evidence, or addressing a portion of the prosecution's case that the defense has not disputed or does not intend to dispute or does not intend to dispute, might be admitted more readily than testimony not sharing these characteristics). She was the only individual that could recognize Alires' voice and affirmatively establish that it was Mr. Alires making the phone call.

2. Applying Moosman and Ohio, Brimhall Was Not An "Unavailable" Witness

Following the holding in Roberts, the Utah Supreme Court has reasoned that, for purposes of the Confrontation Clause, "a witness is 'unavailable' if a good faith effort

was made to secure the witness' presence at trial." Carter, 888 P.2d at 646 (citations omitted).[2] This requirement is characterized as "stringent". Id. Specifically, the Utah Supreme Court has held that "in order for a witness to be constitutionally unavailable, it must be practically impossible to produce the witness in court." Id. (citations omitted).

In State v. Drawn, 791 P.2d 890 (Utah Ct. App.), cert. denied, 804 P.2d 1232 (Utah 1990), this Court determined that a search consisting of successfully serving subpoenas on each witness, attempting to make personal contact with each witness, and questioning police informants, searching police files, and working with investigators to locate each witness complied with the hearsay exception unavailability requirements.

Conversely, in State v. Case, 752 P.2d 356 (Utah Ct. App. 1987), cert. denied, 765 P.2d 1277 (Utah 1988), overruled on other grounds, State v. Lovell, 758 P.2d 909, 912, 914 (Utah 1988). this Court stated that although the state sent a subpoena to the witness, which she acknowledged receiving, had personal contact with her "approximately eight times" before trial, and attempted to keep close contact with her, the state's efforts were not sufficient to show unavailability when the witness failed to appear for trial. Case, 752 at 356. This Court reasoned that "[a]t [the prosecutor's] disposal was the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings . . .

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[2] Roberts' second inquiry, whether or not evidence had "sufficient indicia reliability", is not addressed in this appeal since pursuant to Roberts "sufficient indicia of reliability" can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. Alires does not dispute, for the purposes of this appeal, the trial court's ruling that, under current Utah law, the evidence could fall under the excited utterance exception.

[which] was not used." Id. at 357. Without use of the Uniform Act, "the prosecutor did not make use of the 'reasonable means' required to meet the definition of 'unavailability.'" Id. at 357. See also State v. Chapman, 655 P.2d 1119 (Utah 1982) ("The state, having had advance notice of the unwillingness of a witness to appear voluntarily, and having made no effort to secure his attendance by means of the Uniform Act, did not demonstrate sufficient good faith to meet the unavailability test").[3]

In the present case, the trial court determined that Brimhall was available, stating "[i]t's clear, . . . she's no[t] an unavailable witness, she's available, she's just not here." R. 9. Indeed, the City had "clear indications that the witness would not attend". Case, 752 P.2d at 357. First, Brimhall's victim advocate, who had contact with her over the course of several months, had been under the impression that Brimhall was fearful of testifying against Alires. R. at 1. Second, Brimhall had not shown up for the original jury setting. R. 2 Knowing this, the City's efforts in securing Brimhall's attendance at trial were cursory and limited to a telephone call the week prior to the trial. R. 1. Applying Chapman and Case, the City's efforts were not sufficient enough to indicate a good faith effort was made to ensure Brimhall would be present at trial.

Moreover, Alires was prejudiced. Because Brimhall did not attend the trial to

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[3] It should be noted that in Drawn, Case, and Chapman, the courts were defining the term unavailability pursuant to Rule 804(a)(5) of the Utah Rules of Evidence. However, these cases are applicable since the Confrontation Clause appears to require an even stronger showing of unavailability and reliability than does Rule 804. See Ecker v. Scott, 69 F.3d 69 72 n.3 (5th Cir. 1995)(considering "unavailability" under the confrontation clause of the federal constituiton).

testify, the City's case was easier and cleaner. The City was not required to put Brimhall on the stand to testify, and did not have to run the risk of possibly presenting an unsympathetic, perhaps offensive witness to the jury. Rather, the City was allowed to have a poised officer in uniform testify on Brimhall's behalf, a possible preferable alternative to Brimhall. Furthermore, since this case involves a domestic dispute, the City did not run the risk of having the jury hear any ulterior motives Brimhall might have had for making the statements. In addition, the City did not run the risk of having the jury hear evidence regarding the relationship between the two, i.e., other prior domestic disputes that Brimhall may have begun. Brimhall "may [have felt] quite differently when [she had] to repeat [her] story looking at the man whom [she would] harm greatly by distorting or mistaking the facts." See Coy, 487 U.S. at 1019.

Finally, the trial court's admittance of Brimhall's out-of-court statements were not harmless beyond a reasonable doubt. Brimhall's testimony was in dispute and the jury was prevented in the fact-finding process from evaluating her demeanor. The omission of Brimhall's live testimony tipped the balance against Alires by allowing the city to build a case against him around hearsay testimony and preventing Alires from confronting a controversial witness. Accordingly, the conviction should be reversed and the case should be remanded for a new and fair trial, omitting use of the unconstitutional hearsay testimony.

B. Admission Of Brimhall's Statements Violated Alires' Right Of Confrontation Under Article I, Section 12 Of The Utah Constitution Since The Utah Constitution Requires A Finding Of Unavailability And Brimhall Was Not An "Unavailable" Witness

Article I, Section 12, provides that "[i]n criminal prosecutions the accused shall have the right . . . to be confronted by the witnesses against him . . ." State v. Anderson, 612 P.2d 778, 782 (Utah 1980). In 1981, prior to the Inadi and White decisions, the Utah Supreme Court held that Utah's Confrontation Clause should be construed the same as the Federal Constitutional provision . . ." State v. Brooks, 638 P.2d 537, 542 (1981). Specifically, the Court reasoned that the two-pronged test set forth in Roberts was a reasonable standard in determining the admission of prior testimony in relationship to confrontation considerations. Brooks, 638 P.2d at 539; see also Webb, 779 P.2d at 1112.

Notwithstanding the above, the Utah Supreme Court left open the possibility that "[a] state may construe its own constitution more narrowly than the federal constitution even though the provisions involved may be similar." Brooks, 638 P.2d at 539.[4] Thus, assuming that Inadi and White are controlling authority under federal constitutional law, this Court may construe the Utah constitution as affording more protection. Specifically,

[4] Interpreting even textually similar state constitutional provisions in a manner different from federal interpretations of the United States Constitution is entirely proper. See e.g. State v. Hygh, 711 P.2d 264, 272-73 (Utah 1985); State v. Brooks, 638 638 P.2d 537, 539 (Utah 1981); see also State v. Watts, 750 P.2d 1219 n.8 (Utah 1988)("choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating the state's citizens from the bagaries of inconsistent interpretations given to the fourth amendment by the federal courts").

this Court may hold that under the Utah Constitution, a finding of "unavailability", as originally envisioned by the Utah Supreme Court when it first adopted the test in Roberts, is required prior to admitting any out-of-court statements.

The protections offered in the Utah constitution are more expansive than that of the federal constitution. This difference arises from the historical circumstances surrounding the adoption of the Utah Constitution. At that time, Utah suffered federal persecution of polygamists and their families. See Bradley, Hide and Seek; Children on the Underground, 51 Utah Hist. Q. 133, 142 (1983). Because of this, Utah courts have interpreted some Utah constitutional rights more broadly than similar rights under the federal constitution. Thus, the provisions of article 1, section 12 of the Utah Constitution have not always been interpreted in lockstep with the federal constitution. See e.g., State v. Lafferty, 749 P.2d 1239, 1247 & n.5 (Utah 1988)(suggesting that the right of self representation may be interpreted differently in Utah constitution than in federal constitution); In re Criminal Investigation, 7th Dist. Ct. No. CS-1, 754 P.2d 633, 645 & n. 14 (Utah 1988)(stating that holding was based independently on state constitution).

Moreover, under the Utah Constitution, the right to confrontation has been specifically protected by Utah Courts. See State v. Villarreal, 889 P.2d 419 (Utah 1995); State v. Kendrick, 538 P.2d 313 (Utah 1975) ("the rule has been laid down that the right of a defendant to confront the witnesses against him is a fundamental right and is essential to a fair trial."); see also State v. Bullock, 791 P.2d 155, 180 (Utah 1989)

(dissent reasoned that "[t]he right of confrontation under . . . [the Utah Constitution] insures not only that defendant can confront his accuser's face to face, *but also that the jury can see and hear the witnesses in person to assess their credibility.*"); State v. Mannion, 57 P. 542 (1899) ("We take it that the word 'confront' does not simply secure to the accused the privilege of examining witnesses in his behalf, but is in affirmance of the rule of the common law, that in trial by jury *the witnesses must be present before the jury and accused, so that he may be confronted, that is, put face to face.*").

In State v. Anderson, 612 P.2d 778 (1980), the Utah Supreme Court expressly articulated the scope of the right pursuant to Article I, section 12 of the Utah Constitution:

> [w]hen confrontation is available the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor and the manner in which he gives his testimony whether he is worthy of belief. Encompassed in this right of confrontation is the procedural right of cross-examination. . .

Anderson, 612 P.2d at 785; see also Webb, 779 P.2d at 1111. Moreover, in State v. Leonard, 707 P.2d 650 (Utah 1985), the Utah Supreme Court reasoned:

> [T]he right to test the believability of a witness on cross-examination includes the right to show a witness possible bias or interest. The exposure of a witness motivation in testifying is a proper and important function of the constitutionality protected right of cross-examination.

Leonard, 707 P.2d at 656.

Finally, as previously discussed, it appears that the Utah Supreme Court has implicitly rejected the holdings of Inadi and White and have sought to provide more protection. See Moosman, 794 P.2d at 480; Carter, 888 P.2d at 646.

With the above in mind, Article I, section 12 of the Utah Constitution should be interpreted as providing more protection than it's federal counterpart. Specifically, it should be interpreted as requiring a finding of "unavailability". As discussed previously, the trial court determined that Brimhall was not unavailable, stating "[i]t's clear, . . . she's no[t] an unavailabe witness, she's available, she's just not here." R. 9. Accordingly, for the reasons already discussed, Alires' conviction should be reversed and the case should be remanded for a new and fair trial, omitting use of the unconstitutional hearsay testimony.

POINT III: THE TRIAL COURT ERRED WHEN IT ADMITTED OUT-OF-COURT STATEMENTS OFFICER CANDLAND OVERHEARD DURING A TELEPHONE CONVERSATION ALLEGEDLY BETWEEN ALIRES AND BRIMHALL AS "NON-HEARSAY".

A. Out-Of-Court Statements Officer Candland Overheard During A Telephone Conversation Allegedly Between Alires And Brimhall Was Hearsay Since It Was Not Offered For Any Purpose Other Than As Substantive Evidence

Utah Rules of Evidence 801 (c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Utah Rules of Evid. However, if an out-of-court statement is "offered simply to prove that it was made, without regard to whether it is true, . . [it is not] proscribed by the hearsay rule." State v. Olsen, 860 P.2d 332, 335

(Utah 1993). Accordingly, the definition of hearsay requires that the statement be offered for the truth of the matter asserted.

1. Not Offered For The Truth Of The Matter Asserted If Offered For Another Specific Purpose

To be admitted evidence "not offered for the truth of the matter" must be offered for some other purpose. The other purpose must be specific and proper. See e.g. State v. Bryant, 965 P.2d 539 (Utah App. 1998) (victim's statements as reported by the officer were admissible to explain why the officer took the investigative steps that he did); State v. Olsen, 860 P.2d 332 (Utah 1993)(holding that trial court did not err when it allowed statements made by co-conspirators since statements were offered to prove that the co-conspirators were at the site of the robbery under unusual circumstances and that one of the co-conspirators acted in an unusual manner prior to the robbery); See State v. Morgan, 813 P.2d 1207, 1211 (Utah 1991) (holding that witness' testimony did not constitute hearsay in rape trial since testimony was not offered as proof that the defendant had raped victim, but to show chronology of events leading to specific incidents at issue); State v. Sorenson, 617 P.2d 333, (Utah 1980) (holding that out-of-court statement is admissible if to support a defense of good faith); State v. Hayes, 572 P.2d 368, 371 (Utah 1977) (no error to admit statements made in defendant's presence to show defendant's knowledge of facts stated); Williams v. Barney, 224 P.2d 1042, 1049-51 (Utah 1942) (no error to admit statement offered to show inducement to act); see also Frank v. United States, 220 F.2d 559 (10th Cir. 1955) (evidence of a statement by a third person is

therefore admissible if offered to support a defense of good faith).

In the present case, the trial court admitted several out-of-court statements, through the testimony of Officer Candland, allegedly made by Alires and Brimhall during a telephone conversation between the two. Specifically, the trial court admitted the statements allegedly made by Alires that "if she did not take him back, if he could not be with her and his daughter, he would kill her." and that "she would need to watch the day care." The trial court determined that these statements were not being offered for "the truth of the matter asserted", i.e., that he would actually kill her. However, the trial court made no determination regarding what "other purpose" these statements were admitted for. In fact, these statements were admitted as substantive evidence. Characterized as threats by Officer Candland, i.e., "he threatened", the jury most likely took these statements at their "face-value", as substantive evidence, rather than using them to determine a side issue in the case. Accordingly, these statements were offered for the truth of the matter, were hearsay, and should have been excluded pursuant to rule 801 (c).

B. Even Assuming That Evidence Was Admissible As Non-Hearsay Since Not Offered For Truth Of The Matter Asserted The Trial Court Erred In Admitting Evidence Since It Was Unfairly Prejudicial.

Furthermore, even if offered for some "other purpose", the evidence may be excluded because it is unfairly prejudicial. For example, in Shepard v. United States, 290 U.S. 96, 103-106 (1933), the court excluded a decedent's statement "Dr. Shepard has poisoned me". Id. at 103-106. In making it's determination, the Court concluded that the

statement was relevant to show a non-suicidal state of mind since suicide was a possible explanation for death. Id. However, the Court reasoned that the jury was sure to use the statement as one of belief, for its truth. Id. But see, State v. Carlson, 638 P.2d 512 (Utah 1981).

In this instance, applying the above caselaw, it is possible that the jury inferred from these statements that Alires, the alleged caller, actually intended to kill Brimhall. Essentially, regarding these statements as "one of belief", "as truth", punishing him, not because he harrassed Brimhall on the telephone, but because the jury believed Alires was a "bad" individual in need of punishment.[5] Had these statements not come in there would have been no evidence indicating that Alires, the alleged caller, had made any "threatening statements". Accordingly, the city would not have met its burden to prove each element of the crime beyond a reasonable doubt.

CONCLUSION

Alires respectfully requests that if this Court determines that the trial court erred in admitting 1) evidence for identification purposes, Alires attempt earlier in the evening to break into Brimhall's apartment, 2) statements made by Brimhall against Alires in violation of Alires confrontation rights under the Sixth Amendment of the United States

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[5] It should be noted that these out-of-court statements could not have been admitted under the "admission of a party opponent" exception to the hearsay rule since Officer Candland testified that she was not a voice recognition expert and was not able to recognize Alires voice as the caller. Thus no foundation was laid that the Alires was the caller.

and Article I, Section 12 of the Utah Constitution, and; 3) statements, overheard by Officer Candland, made during a telephone conversation allegedly between Alires and Brimhall, this Court should enter an order reversing the conviction and remanding this case for a new trial.

Submitted this 18th day of January, 2000.

KRISTEN R. ANGELOS
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I Kristen E. Angelos, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to the **prosecutor,** this 19th day of January, 2000

Brian Watson
Kristen Angelos

DELIVERED to the Utah Court of Appeals and the prosecutor as indicated above this _____ day of _____, 2000

_____

ADDENDA

ADDENDUM A

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 981916939 MO
ROGER ALIRES, Defendant.	:	Judge: JUDITH S ATHERTON Date: April 12, 1999

PRESENT
Clerk: chrisc
Prosecutor: FISHER, T LANGDON
Defendant
Defendant's Attorney(s): ANGELOS, KRIS

DEFENDANT INFORMATION
Date of birth: March 11, 1970
Video
Tape Number: 1 Tape Count: 11.13

CHARGES

1. TELEPHONE HARASSMENT - Class B Misdemeanor
Plea: Not Guilty - Disposition: 02/22/1999 Guilty

SENTENCE JAIL

Based on the defendant's conviction of TELEPHONE HARASSMENT a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s) The total time suspended for this charge is 49 day(s).

Commitment is to begin immediately.

Credit is granted for time served.
Credit is granted for 49 day(s) previously served.

Case No: 981916939
Date: Apr 12, 1999

Defendant is given 6 months jail cts, to clear case.

Dated this 12th day of April, 1999.

JUDITH S ATHERTON
District Court Judge

By _____

ADDENDUM B

The sixth amendment to the United States Constitution provides:

[Rights of Accused]

In all criminal prosecutions, the accused shall enjoy the right to a speed trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Article I, section 12 of the Utah Constitution provides:

Section 12. [Rights of the Accused]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determinating whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.