

2015

**State of Utah, Plaintiff/Appellee, v. James Raphael Sanchez,  
Defendant/Appellant :Reply Brief**

Utah Court of Appeals

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**Recommended Citation**

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,

Plaintiff/Appellee,

vs.

JAMES RAPHAEL SANCHEZ,

Defendant/Appellant.

Case No. 20140749-CA

Appellant is incarcerated.

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**REPLY BRIEF**

Appeal from a judgment of conviction for Murder, a first degree felony, in violation of Utah Code §76-5-203, and Obstructing Justice, a second degree felony, in violation of Utah Code §76-8-306(1), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Denise P. Lindberg presiding.

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UTAH APPELLATE COURTS

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**INTRODUCTION**

James's opening brief raises two issues. First, it argues that the trial court reversibly erred when it excluded evidence James proffered under Rule 106 of the Utah Rules of Evidence. Second, it argues that there was insufficient evidence to support James's conviction for obstructing justice. In response, the State contends that the trial court did not reversibly err when it denied James's Rule 106 proffer and that the evidence was sufficient to support the obstructing justice conviction. For the reasons set forth in the opening brief and in this reply brief, the State is incorrect. *See* Utah R. App. P. 24(c) ("Reply briefs shall be limited to answering any new matter set forth in the opposing brief.").

**ARGUMENT**

- I. Under Rule 106, the trial court was required to admit the part of James's statement to Reyes in which he explained why he assaulted Angela because it was necessary to qualify, explain, or place into context the part of the statement in which James admitted to the assault. The court's exclusion of the**



**evidence was prejudicial because it precluded James from presenting his theory of the case.**

James's opening brief explains that the trial court reversibly erred when, under Rule 106, it excluded the part of James's statement to Reyes in which he explained that he assaulted Angela because she repeatedly told him that she was cheating on him with his brother. Appellant's Br. 8-20. The State disagrees. It argues that Rule 106 is not an exception to the hearsay rule; that, even if Rule 106 is an exception to the hearsay rule, the trial court did not err in excluding the evidence; and that, even if the trial court erred, the error was not prejudicial. Appellee's Br. 17-46. The State is mistaken.

*A. Rule 106 is an exception to the hearsay rule.*

In Utah and many other jurisdictions, Rule 106 operates as an exception to the hearsay rule. In *State v. Leleae*, this Court held that "Rule 106 applied to allow introduction of defendant's entire statement . . . to put the prosecution's selected portions in context." *State v. Leleae*, 1999 UT App 368, ¶46, 993 P.2d 232. The defendant's entire statement in that case included parts that would have otherwise constituted inadmissible hearsay. *See id.* ¶39. Thus, under *Leleae*, Rule 106 operates as an exception to the hearsay rule. *Contra* Appellee's Br. 30.

Furthermore, the Utah Supreme Court has recognized that "Rule 106 codifies in part the common law 'rule of completeness,' which permits introduction *of an otherwise inadmissible statement* if the opposing party introduces a portion of the statement." *State v. Jones*, 2015 UT 19, ¶40, 345 P.3d 195 (emphasis added); *accord State v. Cruz-Meza*, 2003 UT 32, ¶9, 76 P.3d 1165; *Leleae*, 1999 UT App 368, ¶43. Rule 106 could not

partially codify the common law rule of completeness unless it also permitted evidence that would otherwise be inadmissible. *See Jones*, 2015 UT 19, ¶40; Utah R. Evid. 106. Similarly, the doctrine of oral completeness contained in Rule 611 operates as a hearsay exception, *Cruz-Meza*, 2003 UT 32, ¶¶1, 6-7, 9-15, and “the introduction of statements under the doctrine of oral completeness should be more narrowly confined than the introduction of statements under [R]ule 106.” *Id.* ¶13. It would stand to reason, then, that Rule 106 also operates as a hearsay exception. Finally, the Utah Supreme Court has indicated that the fairness standard of Rule 106 adequately addresses “any constitutional concerns with selective admission of [written or recorded] statements by criminal defendants.” *Id.* ¶17. This would not be possible unless Rule 106 allowed defendants to present otherwise inadmissible statements that are necessary to correct an unfair depiction of their statements.

Many other jurisdictions hold that their version of Rule 106 is a hearsay exception. *See, e.g., United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008) (“Peculiarly, the Government maintains that the purview of Rule 106 is limited to the order of proof. To the contrary, our case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.”); *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (“Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously.”); *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986) (holding that federal Rule 106 makes admissible “otherwise inadmissible evidence” that

is “necessary to correct a misleading impression”); *Pena v. State*, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011) (stating that “Texas Rule of Evidence 107, known as the rule of optional completeness,” is a “recognized exception to the hearsay rule”); *People v. Vines*, 251 P.3d 943, 968 (Cal. 2011) (describing California’s analogue to Rule 106 as a “hearsay exception”); *State v. Keith*, 618 A.2d 291, 293 (N.H. 1992) (“Although Rule 106 is not an automatic rule of admissibility, . . . we have held that a trial court may admit otherwise inadmissible evidence to counter a misleading advantage if a party has ‘opened the door’ to such evidence.”); *accord United States v. Lopez-Medina*, 596 F.3d 716, 735-36 (10th Cir. 2010) (“Even if the fact allocation would be subject to a hearsay objection, that does not block its use when it is needed to provide context for a statement already admitted.”); *Gov’t of Virgin Islands v. Archibald*, 987 F.2d 180, 187 (3d Cir. 1993) (“Nor was Williams’ hearsay testimony admissible under a related exception, sometimes referred to as the principle of completeness.”).

The D.C. Circuit has eloquently explained why federal Rule 106 is a hearsay exception, and that explanation is equally applicable to Rule 106. *See Sutton*, 801 F.2d at 1368. “The structure of the [Utah] Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof. Rule 106 is found not in Rule 611, which governs the ‘Mode and Order of Interrogation and Presentation,’ but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules. Moreover, every major rule of exclusion in the [Utah] Rules of Evidence contains the proviso, ‘except as otherwise provided by these rules,’ which indicates ‘that the draftsmen knew of the need to provide for relationships between rules and were familiar

with a technique for doing this.’ There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed.” *Id.* (citations and footnotes omitted). Therefore, “Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.” *Id.*

Relying heavily on quotes from non-Utah cases, the State gives a lengthy exposition on the *general* inadmissibility of exculpatory hearsay and then cursorily concludes that Rule 106 ought not operate as an exception to it. Appellee’s Br. 30-33. In essence, the State’s argument is that exculpatory hearsay statements aren’t trustworthy, so they shouldn’t be admissible under Rule 106. *Id.* But our supreme court has said that “trustworthiness” is a “consideration absent from [R]ule 106.” *Cruz-Meza*, 2003 UT 32, ¶14. Under Rule 106, fairness is the overriding concern: one party should not be able to gain an unfair advantage by taking words out of context. Indeed, fairness *must* be the overriding concern if Rule 106 is able to adequately prevent “any potential [due process] problem” with using a defendant’s written or recorded statements against him. *Id.* ¶17.

Furthermore, the State takes the quotes it relies on out of context. It creates the impression that the quotes come from cases explaining why Rule 106 is not a hearsay exception. *See* Appellee’s Br. 32-33. But they don’t. All of the quotes are actually from cases explaining why exculpatory hearsay statements are *generally* inadmissible. None of the quotes concerns whether Rule 106 is an exception to the general hearsay rule.

*Compare* Appellee's Br. 31-33, with *Lily v. Virginia*, 527 U.S. 116, 132 (1999), *Williamson v. United States*, 512 U.S. 594, 599 (1994), *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000), *State v. Brooks*, 909 S.W.2d 854, 863 (Tenn. Ct. Crim. 1995), and *State v. Fernandez*, 604 A.2d 1308, 1313 (Conn. Ct. App. 1992). The cases cited by the State holding that Rule 106 is not a hearsay exception do so without explanation. *United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014); *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996); *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1375-76 (2d Cir. 1988).

The State argues that if Rule 106 is a hearsay exception, the “door would be thrown open to obvious abuse: an accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence.” Appellee's Br. 33 (quoting *Brooks*, 909 S.W.2d at 863 (explaining why exculpatory hearsay statements are generally inadmissible)). But Rule 106 allows a defendant to introduce his exculpatory statements only when they are “necessary to qualify, explain, or place into context” his inculpatory statements which have already been introduced by the State. *Cruz-Meza*, 2003 UT 32, ¶14. In other words, Rule 106 only allows defendants to prevent the State from unfairly using their words against them. Properly understood, Rule 106 carries no potential for abuse. The State ignores the immense potential for obvious abuse if Rule 106 were not a hearsay exception: the State could secure unfair and unreliable convictions by taking defendants' words out of context. Moreover, the Utah Supreme Court has already dismissed the State's notion of ““making evidence for himself”” as a “question-begging fallacy.” *State v. Johnson*, 671 P.2d 215, 216 n.1 (Utah 1983).

Again, it is telling that the Connecticut and Tennessee cases quoted by the State don't even address whether Rule 106 is a hearsay exception. *See* Appellee's Br. 32-33 (quoting *Brooks*, 909 S.W.2d at 863; *Fernandez*, 604 A.2d at 1313). Instead, they only address the *general* inadmissibility of exculpatory hearsay. *Brooks*, 909 S.W.2d at 863; *Fernandez*, 604 A.2d at 1313. What's more: both Connecticut and Tennessee hold that Rule 106 is a hearsay exception. *State v. Jackson*, 777 A.2d 591, 602 (Conn. 2001) ("Our cases have long held that, when one party to a litigation or prosecution seeks to introduce admissions that constitute only a portion of a conversation, the opposing party may introduce other relevant portions of the conversation, *irrespective of whether they are self-serving or hearsay.*" (emphasis added)); *State v. Keough*, 18 S.W.3d 175, 182 (Tenn. 2000) (holding that Tennessee's Rule 106 is a hearsay exception because "it would not be consistent with fundamental fairness to allow the prosecution to introduce only the most incriminating portions of a defendant's statement without regard to the overall context *or relevant exculpatory portions* found in the same statement" (emphasis added)). The State's reliance on cases from those jurisdictions is sorely misplaced.

The State also says that if Rule 106 is a hearsay exception, a defendant would "never want to testify" because he could "make evidence in his favor at his pleasure." Appellee's Br. 32. This statement implies that courts should interpret evidence rules with an eye toward pressuring defendants to waive their constitutional right not to testify. This implication obviously runs contrary to our system of justice. *See Schneekloth v. Bustamonte*, 412 U.S. 218, 229 (1973) ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.").

Moreover, as explained above, Rule 106 does not allow defendants to ““make evidence in [their] favor at [their] pleasure””; it only allows them to prevent the State from unfairly using their words against them. And again, the Utah Supreme Court has rejected the State’s ““question-begging fallacy about “making evidence for himself.”” *Johnson*, 671 P.2d at 216 n.1.

In asking this Court to hold that Rule 106 is not a hearsay exception, the State might be overlooking the fact that Rule 106 is available to all litigants in criminal and civil cases. *See* Utah R. Evid. 106. If there hasn’t already, there will likely come a case—whether civil or criminal—where the State wants to use Rule 106 as a means to introduce otherwise inadmissible hearsay. *See State v. Prasertphong*, 114 P.3d 828, 829-30 (Ariz. 2005). The State would do well to heed the old aphorism, “Be careful what you wish for.”

*B. Rule 106 required the trial court to admit the exculpatory portions of James’s statement to Reyes to qualify, explain, and put into context the inculpatory portions of the statement.*

“If a party introduces all or part of a writing or recorded statement,” Rule 106 permits “the adverse party” to “require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.” Utah R. Evid. 106. In other words, Rule 106 allows a party to introduce parts of a written or recorded statement that are “relevant and necessary to qualify, explain, and place into context” parts that have been introduced by the opposing party. *Leleae*, 1999 UT App 368, ¶43 (internal quotation marks omitted). James gave a statement to Reyes in which he admitted committing the assault that caused Angela’s death (admission) and

explained that he did it because she told him she was cheating on him with his brother and refused to say she would end the affair (explanation). The State introduced James's admission, but the trial court excluded his explanation. The admission, without the explanation, created the misleading impression that James admitted to conduct that constituted murder. But with the explanation, the jury may have found that James admitted committing extreme emotional distress manslaughter rather than murder. Therefore, James's explanation was obviously "necessary to qualify, explain, and place into context" his admission. *Leleae*, 1999 UT App 368, ¶43 (internal quotation marks omitted). The State's claim to the contrary is without merit. *See* Appellee's Br. 33-41.

This case presents precisely the type of situation Rule 106 contemplates. Nobody—not the State, not a criminal defendant, not a civil litigant—should be able gain an unfair advantage by taking statements out of context. It is especially repugnant when the State gains an unfair advantage by taking words out of context in a criminal case, as the result is an unfair and unreliable conviction. *See State v. Akok*, 2015 UT App 89, ¶13, 348 P.3d 377 ("In our judicial system, the prosecution's responsibility is that of a minister of justice and not simply that of an advocate, which includes a duty to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."); *United States v. Walker*, 652 F.2d 708, 714 (7th Cir. 1981) ("[I]t is axiomatic that the Government has a duty to conduct a fair trial. . . . [T]he Government's efforts to execute this obligation should be at least as active as its zeal to secure convictions."). "An admission depicts the party in its own words; [James] was entitled to have the jury see those words rather than a precis that the [State] thought



would depict [him] in the worst light.” *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 187 (7th Cir. 1993).

The State seems to believe that an explanation for conduct does not qualify, explain, or place into context an admission to the conduct. *See* Appellee’s Br. 36 (arguing that James’s statements “regarding *why* he engaged in the conduct” were not necessary to “‘qualify, explain, or place into context’ Detective Reyes’[s] testimony concerning *what* [James]’s conduct was”). This is obviously incorrect where, as here, the explanation could affect the legal significance of the admitted conduct. For example, imagine a defendant said to a detective, “I punched the alleged victim because he attacked me with a knife.” On the State’s view, the part of the statement about the alleged victim’s knife attack does not qualify, explain, or place into context the part about the defendant’s punch. *See* Appellee’s Br. 36. But this is clearly wrong. With the part about the knife attack, the defendant admitted to acting in self-defense, whereas without it, it would misleadingly appear that he confessed to assault. Thus, the part of the statement about the knife attack changes the legal significance of the part about the punch. The State’s position is that it would be free to present the part about the punch while keeping out the part about the knife attack. This position runs contrary to longstanding legal precedent and fundamental notions of fairness. *See State v. Dunkley*, 39 P.2d 1097, 1109 (Utah 1935) (“[W]here the statement contains both disserving and self-serving statements, the whole must be admitted and considered by the jury.”); *Keough*, 18 S.W.3d at 182 (“Indeed, it would not be consistent with fundamental fairness to allow the prosecution to

introduce only the most incriminating portions of a defendant's statement without regard to the overall context or relevant exculpatory portions found in the same statement.").

The State argues that Rule 106 did not require the admission of James's explanation because the explanation was "self-serving," "unreliable," and "hearsay." Appellee's Br. 33-39. But reliability, i.e., "trustworthiness," is a "consideration absent from [R]ule 106."<sup>1</sup> *Cruz-Meza*, 2003 UT 32, ¶14. Under Rule 106, the reliability of an exculpatory statement is a consideration for the jury, not the court. *See id.*; *Dunkley*, 39 P.2d at 1109; *State v. Martin*, 300 P. 1034, 1038 (Utah 1931). Moreover, as explained above, Rule 106 is an exception to the hearsay rule. *See supra* Part I.A. And "[t]here is no legal principle which excludes statements or conduct of a party solely on the ground they are self-serving. If otherwise admissible, a party has as much right to his own evidence as to the evidence of any other witness." *State v. Johnson*, 671 P.2d 215, 216 (Utah 1983). Rule 106 requires the admission of "self-serving" hearsay statements in limited circumstances that apply here. *See Dunkley*, 39 P.2d at 1109; *supra* Part I.A; *see also* Utah R. Evid. 106 ("If a party introduces all or part of a writing or recorded statement, *an adverse party may require* the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." (emphasis added)).

The State claims that Rule 106's fairness standard allowed the trial court to consider whether it would have been fair to the State and Angela to admit James's

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<sup>1</sup> In the context of out-of-court statements, the words "reliable" and "trustworthy" are synonymous. *State v. Tulipane*, 596 P.2d 695, 696 n.1 (Ariz. 1979); *see also* Utah R. Evid. 807(a)(1).

explanation. Appellee's Br. 37. The trial court never considered fairness to the State and Angela, so this claim is irrelevant. In any event, fairness to the State and an alleged victim are not considerations under Rule 106. The only question is whether the proffered parts of the statement are "relevant and necessary to qualify, explain, or place into context the" admitted parts. *Leleae*, 1999 UT App 368, ¶43. In other words, the question is whether the proffered parts are necessary for a *fair understanding* of the admitted parts. Utah R. Evid. 106. The State "opened the door" for James's explanation to come in when it unfairly tried to prove its case against him by taking his words out of context. *Keith*, 618 A.2d at 293; *see also People v. Melillo*, 25 P.3d 769, 775 (Colo. 2001) ("[T]he rule of completeness is similar to the concept of 'opening the door,' which is also based on principles of fairness and completeness."). It is unfair for the State to cherry-pick a defendant's words. There is nothing unfair in preventing the State from doing it. If the State didn't want the jury to see James's explanation, it shouldn't have introduced his admission.

The State suggests that James seeks to "thwart hearsay rules and admit his entire statement without being subject to cross-examination." Appellee's Br. 34. To reiterate, Rule 106 is a hearsay exception. *See supra* Part I.A. And James does not seek to present his entire statement to Reyes. *See* Appellant's Br. 14-15. He seeks only to present his explanation for why he assaulted Angela, as it is "relevant and necessary to qualify, explain, and place into context" his admission to the assault. *Leleae*, 1999 UT App 368, ¶43.

In sum, James's explanation was relevant to his theory of extreme emotional distress and it was necessary to qualify, explain, and place into context his admission. Thus, the explanation and admission "in fairness" ought to have been "considered at the same time." Utah R. Evid. 106. Therefore, the trial court erred when it excluded James's explanation under Rule 106.

*C. The trial court's erroneous exclusion of James's explanation was prejudicial because it precluded James from presenting his theory of the case.*

James's opening brief explains that the trial court's erroneous exclusion of his explanation deprived him of his due process right to present a complete defense, so the harmless-beyond-a-reasonable-doubt prejudice standard applies. Appellant's Br. 17-20. The State contends that the erroneous exclusion did not deprive James of his right to present a defense because he could have testified at trial. Appellee's Br. 24-28. But, as explained, the trial court erroneously ruled that Angela's statements about cheating on James were inadmissible hearsay.<sup>2</sup> Appellant's Br. 8-9; R.750:6 (trial court ruling that James's explanation, which contained Angela's statement about cheating on him with his brother, constituted "double hearsay, none of which falls under an exception"). An extreme emotional distress defense requires "extreme emotional distress *for which there is a reasonable explanation or excuse.*" Utah Code §76-5-205.5(1)(b) (emphasis added). Although James may have been able to testify to his belief that Angela was cheating on him, the trial court's erroneous exclusion of Angela's statement precluded James from

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<sup>2</sup> As the opening brief explains, Angela's statements weren't inadmissible hearsay because they weren't hearsay at all. Appellant's Br. 8-9. They were not offered to show that Angela was cheating on James; they were only offered to show why James believed she was cheating on him. Appellant's Br. 8-9.

testifying about the “reasonable explanation” for his belief. *See id.* Consequently, James could not have presented a complete extreme emotional distress defense even if he had testified. The trial court’s erroneous ruling deprived James of the ability to present his theory regardless of whether he had taken the stand.<sup>3</sup>

Hence, the State is wrong that this case is like *Cruz-Meza*. Appellee’s Br. 25-27. *Cruz-Meza* held that the defendant’s right to present a complete defense was not violated by an evidentiary exclusion where the defendant could have taken the stand and presented his theory of the case through his testimony. *Cruz-Meza*, 2003 UT 32, ¶¶16-17. But here, as explained, the trial court’s erroneous ruling that Angela’s statement was inadmissible hearsay precluded James from testifying to his theory of the case. So, *Cruz-Meza* is inapposite. Rather, this case is like *McCullar*, where this Court held that the trial court’s erroneous exclusion of out-of-court statements violated the defendant’s right to present a defense. *State v. McCullar*, 2014 UT App 215, ¶¶53-59, 335 P.3d 900, *cert. denied*, 343 P.3d 708 (Utah 2015). Thus, the harmless beyond a reasonable doubt standard applies. But regardless of the applicable prejudice standard, the trial court’s error was prejudicial. Appellant’s Br. 17-20.

The State claims that there is no prejudice because James would not have been entitled to a jury instruction on extreme emotional distress even without the trial court’s error. Appellee’s Br. 43-45. The State misapprehends a defendant’s “‘relatively low’” burden for obtaining an instruction on extreme emotional distress. *Ross v. State*, 2012 UT

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<sup>3</sup> Indeed, it’s likely that James opted not to testify precisely because the trial court’s erroneous ruling would have prevented him from testifying to his theory of the case.

93, ¶29, 293 P.3d 345. A trial court must give an instruction on extreme emotional distress if “a rational jury could find a factual basis in the evidence to support the defense.” *State v. White*, 2011 UT 21, ¶22, 251 P.3d 820; *see also State v. Campos*, 2013 UT App 213, ¶29, 309 P.3d 1160 (“Each party is . . . entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it.”). In making this determination, the trial court must “view the evidence and the inferences that can be drawn from it in the light most favorable to the defense.” *State v. Spillers*, 2007 UT 13, ¶10, 152 P.3d 315, *abrogated on other grounds by State v. Reece*, 2015 UT 45, ¶39, 349 P.3d 712. The court must not concern itself with “questions of credibility and choices between differing versions of the facts,” for they “belong properly to the jury.” *State v. Brown*, 694 P.2d 587, 590 (Utah 1984).

Without the erroneous exclusion of James’s explanation, James would have been entitled to an extreme emotional distress instruction. A reasonable jury could have believed James’s explanation for the assault and found that he committed it “under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.” Utah Code §76-5-205.5(1)(b); *State v. Shumway*, 2002 UT 124, ¶13, 63 P.3d 94; *Ross*, 2012 UT 93, ¶33; *cf. Spillers*, 2007 UT 13, ¶16; *Campos*, 2013 UT App 213, ¶32. Indeed, there was no evidence, let alone overwhelming evidence, that contradicted James’s version of events. *Cf. State v. Kell*, 2002 UT 106, ¶¶24-25, 61 P.3d 1019.

Furthermore, there is a reasonable probability—and therefore a reasonable doubt—that without the erroneous exclusion of James’s explanation, the jury would have convicted James of manslaughter instead of murder. Appellant’s Br. 19-20. The State

says no reasonable jury would have found that James acted under the influence of extreme emotional distress in light of the length and severity of James's assault on Angela. Appellee's Br. 45. But the jury could have reasonably interpreted the length and severity of the assault to *support* a finding that James acted under extreme emotional distress. *See Shumway*, 2002 UT 124, ¶13. Extreme behavior bespeaks extreme emotion. *See White*, 2011 UT 21, ¶26. In any event, the evidence was wholly consistent with James's extreme emotional distress theory. *See id.*<sup>4</sup>

Echoing the trial judge, the State speculates that the admission of James's explanation would have opened the door to evidence of James's prior assault on Angela. Appellee's Br. 46. This was never litigated in the trial court and it is certainly subject to dispute. The State never explains how James's explanation would have opened the door to evidence of the prior assault, and the trial judge never did, either. All that is required for extreme emotional distress is that the defendant acted "under the influence of extreme emotional distress for which there is a reasonable explanation or excuse." Utah Code §76-5-205.5(1)(b). It is hard to see how the prior assault could show that James did not have an extreme emotional reaction to discovering that his lover was cheating on him with his brother. Furthermore, the State never provided the requisite "reasonable notice" that it intended to introduce evidence of the prior assault to rebut James's explanation. *See Utah R. Evid. 404(b)(2)* (requiring "reasonable notice" to the defendant if the State

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<sup>4</sup> Twice the State falsely claims that it took six hours for James to come out of Roger's house after the police arrived. Appellee's Br. 17, 45. In truth, as the State's own fact section recognizes, it took approximately three and a half hours. Appellant's Br. 4; Appellee's Br. 8.

intends to introduce prior act evidence). During trial, the prosecutor said he intended to introduce the prior assault only if the defense put on unexpected evidence that brought the identity of Angela's assailant or James's character into question. R.748:18-19. The record shows the prosecutor was expecting the defense to proffer James's explanation. R.300-02. Thus, it is doubtful that the admission of James's explanation would have allowed the State to introduce evidence of the prior assault.<sup>5</sup>

Even if the prior assault had come in, there is still a reasonable probability that the jury would have found that James acted under the influence of extreme emotional distress. First, discovering that a lover has been unfaithful is the "paradigmatic" extreme emotional distress scenario. *Baze v. Parker*, 371 F.3d 310, 325 (6th Cir. 2004). In this case, James not only discovered that Angela was unfaithful, he also discovered that her paramour was his brother. This kind of double betrayal would cause anyone to have an extreme emotional response. *See White*, 2011 UT 21, ¶26. Second, the prior assault is consistent with James acting under extreme emotional distress in this case. It doesn't show that James did not have an extreme emotional reaction to learning that his lover was cheating on him with his brother. Third, the assault in this case was far longer and more severe than the prior assault—indeed, it resulted in Angela's death—indicating that

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<sup>5</sup> It seems inappropriate for a trial judge to exclude a party's proffered evidence and then sua sponte declare that the excluded evidence would have opened the door to other evidence that would have undercut the proffering party's case. Given the exclusion, the door-opening issue is moot. And it's unfair for a judge to make such a declaration—which is something like a conditional ruling—without input from the parties. The only conceivable reason a judge would have to make such a declaration is to attempt to insulate him or herself from reversal on appeal. In the interests of fairness, appellate courts ought not consider such sua sponte moot declarations by trial judges.



James was under the influence of unusual emotional distress. Thus, even if evidence of the prior assault had been admitted, there is still a reasonable likelihood the jury would have found that James acted under extreme emotional distress this time.

For reasons given above and in the opening brief, the erroneous exclusion of James's explanation was prejudicial.

**II. The evidence was insufficient to support James's conviction for obstructing justice because no reasonable jury could have found beyond a reasonable doubt that James concealed, removed, or destroyed evidence specifically intending to hinder the investigation of Angela's murder.**

James's opening brief explains that the evidence supporting his obstructing justice conviction suffers from a fatal timing problem. Appellant's Br. 28-30. Specifically, in order for the jury to reasonably infer that James altered, destroyed, concealed, or removed evidence specifically intending to hinder the investigation of Angela's murder, the State needed to produce evidence that James altered, destroyed, concealed, or removed evidence *after* Angela died. Appellant's Br. 28-30. But the State failed to produce any such evidence, so the jury could not reasonably infer the requisite specific intent. Appellant's Br. 28-30.

The State counters that the jury could reasonably infer that, at some point, James realized that he had killed Angela, perhaps even before she actually died. Appellee's Br. 50-51. Even if this is true, it does not solve the State's timing problem. The State still needed to produce some evidence that James altered, destroyed, concealed, or removed evidence *after* he realized that he had killed Angela. But the State points to no such evidence on appeal, and it didn't present any at trial.

Although the State never made the argument at trial, on appeal it suggests that James's obstructing justice conviction could be based on the evidence that Angela's arm was elevated off the ground after rigor mortis had set in. Appellee's Br. 49, 52. But the State produced no evidence of the circumstances in which her arm became elevated. Thus, there was no evidence from which the jury could reasonably infer that James raised her arm with the specific intent to hinder the investigation of her murder. Furthermore, there are many more plausible explanations for Angela's elevated arm. For example, James fell asleep next to Angela after asphyxiating her with his forearm, but he didn't know she was dead. When he awoke, he may have lifted her arm in an attempt to wake her up. *See* R.749:91-92 (Reyes testifying that James said he tried "to arouse [Angela] or awaken her" after he awoke but before he called Roger). Or perhaps Angela's elevated arm was the result of a cadaveric spasm, "a state where muscles or group of muscle, instead of going under primary relaxation after death, go into a sudden state of stiffening." Rajesh Bardale, *Principles of Forensic Medicine and Toxicology* 150 (2011). The cause of cadaveric spasms "is not known" but they are "usually associated with violent deaths coupled with emotional disturbances at the time of death." *Id.* A cadaveric spasm "continues through the stage of rigor mortis of the body and disappears with the onset of secondary relaxation." *Id.* In short, the State needed to produce some evidence that James moved Angela's arm with the specific intent to hinder the investigation of her murder. It failed.<sup>6</sup>

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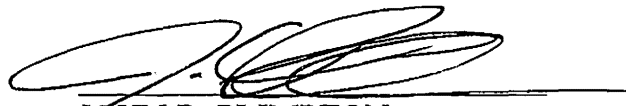
<sup>6</sup> The State also suggests that James committed obstruction of justice by "call[ing] the police anonymously." Appellee's Br. 53. This suggestion is plainly absurd. Calling the

The State is correct that “[k]nowledge or intent is a state of mind generally to be inferred from the person’s conduct viewed in light of all the accompanying circumstances.” *State v. Kihlstrom*, 1999 UT App 289, ¶10, 988 P.2d 949; Appellee’s Br. 52. “But there should be some facts or circumstances from which an inference can logically be drawn before the defendant can be required to mount a defense and prove his lack of knowledge or intent.” *Id.* “[T]he evidence must be clear enough that the jury does not have to guess.” *State v. Harman*, 767 P.2d 567, 569 (Utah Ct. App. 1989). In this case, the State failed to produce evidence of facts or circumstances from which the jury could reasonably infer that James altered, destroyed, concealed, or removed evidence specifically intending to hinder the investigation of Angela’s murder.

### CONCLUSION

For the reasons given above and in the opening brief, James asks the Court to reverse his conviction for murder and remand for a new trial on that charge. He further asks the Court to reverse his conviction for obstructing justice and dismiss that charge for insufficient evidence.

SUBMITTED this 22<sup>nd</sup> day of July, 2015.

  
JOHN B. PLIMPTON  
Attorney for Appellant

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police to give a truthful report, even if anonymously, cannot reasonably be construed to constitute altering, destroying, concealing, or removing evidence. And no one gives a truthful report to police with the intent to hinder an investigation. A person does not commit obstruction of justice merely by not turning himself in immediately after committing a crime.

CERTIFICATE OF DELIVERY

I, JOHN B. PLIMPTON, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Court of Appeals, 450 South State, 5<sup>th</sup> Floor, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 22<sup>nd</sup> day of July, 2015.

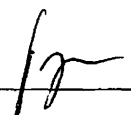
  
JOHN B. PLIMPTON

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 5,792 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

  
JOHN B. PLIMPTON

DELIVERED this 22 day of July, 2015.

  
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