

1984

## The State of Utah v. Efrain Rojas Haro : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
Plaintiff-Respondent, :  
vs. : Case No. 19069  
EFRAIN ROJOS HARO, :  
Defendant-Appellant. :

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/ BRIEF OF RESPONDENT  
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APPEAL FROM A CONVICTION AND JUDGMENT OF AGGRAVATED  
ASSAULT, FELONIES IN THIRD DEGREE, IN THE THIRD  
JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE  
OF UTAH, THE HONORABLE JAY E. BANKS, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
Plaintiff-Respondent, :  
vs. : Case No. 19069  
EFRAIN ROJOS HARO, :  
Defendant-Appellant. :

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BRIEF OF RESPONDENT  
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STATEMENT OF THE ISSUES

1. Whether defendant may challenge the exclusion of his hearsay testimony for the first time on appeal when he neither objected to the trial court's ruling, stating the grounds therefor, nor informed the trial court of any permissible purpose of the excluded testimony.

2. Whether the trial court abused its discretion by excluding defendant's hearsay testimony.

3. Whether defendant's hearsay testimony was admissible under the excited utterance exception to the hearsay rule.

4. Whether the exclusion of defendant's hearsay testimony constituted reversible error.

5. Whether the evidence was sufficient to establish that defendant committed aggravated assault within the meaning of § 76-5-103(1), Utah Code Ann. (1978).

CONSTITUTIONAL PROVISION, STATUTES, ORDINANCES  
RULES AND REGULATIONS

Utah Code Ann. § 76-5-102 (1978)

76-5-102. Assault.--(1) Assault is:  
(a) An attempt, with unlawful force or violence, to do bodily injury to another; or  
(b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another.  
(2) Assault is a class B misdemeanor.

Utah Code Ann. § 76-5-103 (1978)

76-5-103. Aggravated assault.--(1) A person commits aggravated assault if he commits assault as defined in section 76-5-102 and:

(a) He intentionally causes serious bodily injury to another; or

(b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.

(2) Aggravated assault is a felony of the third degree.

Utah Rule of Civil Procedure, Rule 61 (1977)

RULE 61  
HARMLESS ERROR

No error in either the admission or the exclusion of evidence, and no error or defect in any rule or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Utah Rules of Criminal Procedure, Rule 61 (1977)

77-35-20. Rule 20--Exceptions unnecessary. 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.

Utah Rules of Evidence, Rule 4 (1977)

#### RULE 4

##### EFFECT OF ERRONEOUS ADMISSION OF EVIDENCE

A verdict or finding shall not be aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding. However, the court in its discretion, and in the interests of justice, may review the erroneous admission of evidence even though the grounds of the objection thereto are correctly stated.

Utah Rules of Evidence, Rule 5 (1977)

#### RULE 5

##### EFFECT OF ERRONEOUS EXCLUSION OF EVIDENCE

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

Utah Rules of Evidence, Rule 63(4)(b)(1977)

#### RULE 63

##### HEARSAY EVIDENCE EXCLUDED--EXCEPTIONS

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

(4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, described or explains, or (b) which the judge finds was made while the declarant was under stress of a nervous excitement caused by such perception, or (c) subject to Rule 64, if the declarant is unavailable as a witness, a written statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;

#### STATEMENT OF THE CASE

Defendant, Efrain Rojas Haro, was charged by information with one count of Attempted Criminal Homicide - Second Degree Murder, a second degree felony, and one count of Aggravated Assault, a third degree felony. A jury trial was conducted on January 5-6, 1983, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding.

The jury convicted defendant of two counts of Aggravated Assault. Defendant was sentenced to serve two consecutive zero-to-five year terms in the Utah State Prison.

#### STATEMENT OF THE FACTS

Just after midnight, on August 31, 1982, defendant's neighbor, Phillip Tatum, was awakened by the sound of voices talking outside his bedroom window (T. 13). Mr. Tatum looked out the window and saw a group of about six people passing down the sidewalk (T. 13). Tatum sat back down on his bed; there was

silence for five or ten minutes and then Tatum again heard the voices of people passing on the sidewalk outside his window (T. 6-17). There was another lull, lasting about five minutes, followed by an explosion (T. 18). Mr. Tatum rushed to the window, and in the light of a street lamp (T. 15) Tatum observed defendant standing over Carlos and Miguel Ibarra from eight to ten feet directly in front of his window (T. 18).

Defendant was pointing a gun in the direction of the Ibarras, about a foot from Carlos (T. 21), and defendant was screaming at the Ibarras in a language Mr. Tatum could not understand (T. 8). Miguel was trying to drag Carlos away from defendant (T. 18). Neither of the Ibarras carried anything in their hands (T. 11), and they made no response to defendant's screams (T. 19).

Defendant concluded his attack and bolted into his apartment (T. 9), leaving Carlos lying on the sidewalk bleeding from a gunshot wound in the leg (T. 69). Mr. Tatum ran outside to help Carlos, whom he believed was bleeding to death (T. 10). Carlos' wife, C. T. Ibarra, arrived at the scene a couple of minutes later (T. 11). Carlos remained conscious at least until the police arrived (T. 74); he was taken by ambulance to the hospital and remained there for a week to receive treatment for his leg (Tr. 33).

Defendant lived in the apartment next to Mr. Tatum's apartment. Mr. Tatum was certain that it was defendant that he saw pointing a gun at the Ibarras (T. 12). Mr. Tatum knew the Ibarras on a casual basis, but he never had a conversation with

them since they could not understand his language nor could he understand theirs.

About ten minutes after the shooting, defendant crawled out of one of the apartment windows into the backyard of his neighbor, Leon Cunningham (T. 58). Mr. Cunningham asked defendant what he was doing. Defendant replied that he had caught his girlfriend "messing around" and had shot the guy (T. 60). Defendant proceeded over a fence and out of Cunningham's yard (T. 60). Mr. Cunningham went into his front yard where he saw the commotion around Carlos Ibarra. Mr. Cunningham gave a statement to the police at that time (T. 61).

At trial, Carlos Ibarra, the victim, testified that he knew defendant by sight and knew where he lived (T. 44). Carlos stated that shortly after midnight on August 31, 1982, he and his brother, Miguel, decided to take a walk. As they left their house, they saw defendant standing with three Cuban men. Carlos thought nothing of it, and Carlos and Miguel proceeded until they were about five feet in front of defendant. Defendant then pulled out his gun and shot Carlos. Neither Carlos nor Miguel attacked defendant prior to the shooting (T. 30-31). Carlos Ibarra fell to the ground and Miguel rushed to his aid. Defendant continued to point his gun at the Ibarras and began screaming at them asking if they "wanted more" (T. 32).

Defendant claimed, however, that at about 8:00 p.m. on August 30, 1982, while he was watching T.V. with his neighbor, Jesus Romero, he saw Carlos Ibarra peering in through his window (T. 89-91). Defendant then explained that Romero went outside to

alk to Carlos and when Romero returned he was "a little bit excited or something like that" (Tr. 92). The prosecutor objected to allowing defendant to repeat what Romero told him; the trial court sustained the objection. Defense counsel offered no proof (T. 92), but continued to instruct defendant that defendant could not relate the substance of the conversation because it was hearsay (T. 94).

Defendant claimed that as a result of his conversation with Romero he was afraid Carlos was planning either to "rob or assault" him when he left his house (T. 94). At about 12:00, defendant went out to purchase cigarettes and took a gun with him (T. 97-98). He claimed that while he was waiting for Romero to join him outside his apartment, he saw the Ibarra's at his back and knew they were going to jump him (T. 99). Defendant also claimed there was a lead pipe two feet long (T. 109) in Miguel Barra's right hand (T. 99). Defendant asserted that he reacted by shooting at the ground and that he did not intend to hit Carlos (Tr. 100). Defendant stated he then stepped back some distance, told the Ibarra's they got what they deserved, (T. 114-15) and walked into his apartment (T. 102). He testified that he initially intended to stay in his apartment, but he feared that the police would hurt him so he went out his back window into his neighbor's yard (T. 102-103). He claims he told the neighbor he had some trouble with some guys on the street and had shot one of them (T. 103).

There was testimony refuting virtually all of defendant's allegations. Carlos' wife testified that Carlos had

been home the entire afternoon, including around 8:00 p.m. on the 30th (T. 123). Carlos testified that he had not told Jesus Romero that he intended to rob defendant (T. 44). Miguel testified that he was not carrying anything when he and his brother were walking on the morning of August 31st (T. 48). Mr. Tatum testified that he did not see anything in Miguel's hands. A police officer, Merrill Stuck, testified that he specifically checked Carlos and Miguel for weapons, and he found no weapons either on their person or anywhere in their vicinity (T. 69-70). Both Miguel and Carlos testified that after the shooting defendant continued to point the gun in their direction and ask if "they wanted more" (Tr. 32, Tr. 48). Leon Cunningham testified that defendant stated he shot someone for "messing around" with his wife (T. 60).

#### SUMMARY OF ARGUMENTS

Defendant neither objected to the trial court's ruling excluding defendant's hearsay testimony nor informed the trial court of any permissible purpose of the excluded testimony. Instead, defense counsel acquiesced in the court's ruling and continued to instruct defendant that the substance of the out-of-court statement was hearsay. Under such circumstances, allowing defendant to now challenge the trial court's ruling would violate the well-settled principle that a party cannot raise an issue for the first time on appeal, since the trial court was not given an opportunity to address defendant's concerns.

The trial judge's decision to exclude the evidence will not be upset, unless it is clear that the trial court abused its

the discretion and it is shown that the defendant was unfairly prejudiced by the ruling. In the instant case, the trial court did not abuse its discretion because the evidence did not have the necessary indicia of reliability to qualify as an exception to the hearsay rule. In addition, defendant was not unfairly prejudiced by the exclusion because the essence of the statement was admitted under the "state of" mind exception, and therefore the self-defense theory that defendant sought to establish with the excluded statement was adequately placed before the jury..

The testimony was not admissible under the excited utterance exception to the hearsay rule. The statement was not made under the stress of nervous excitement brought about by the perception of an event. In the instant case, the only indication that the disturbing event ever occurred was defendant's testimony which was contradicted by other evidence. Therefore, the alleged out-of-court statement is inadmissible under the excited utterance exception to the Hearsay Rule.

Any error by the trial court in excluding defendant's hearsay testimony was harmless. Defendant sought to admit an out-of-court statement that he claims would establish that he acted reasonably in self-defense. Although the substance of the hearsay statement was inadmissible, defendant was allowed to testify that as a result of the statement he feared that the muggers were going to either assault or rob him. However, the alleged statement was made five hours before the shooting and there was substantial evidence negating defendant's claim that he acted in self-defense. Therefore there is no reasonable

likelihood that if the substance of the statement was admitted it would have altered the finding of the jury.

There is sufficient evidence to establish that defendant committed Aggravated Assault as defined in § 76-5-103(1) Utah Code Ann. (1978). First, the uncontradicted evidence establishes that defendant perpetrated the attack on the Ibarra using a gun, a deadly weapon. This, in itself, is enough to prove that defendant was guilty of aggravated assault under Utah Code Ann. § 76-5-103(1)(b). In addition, the jury need not believe that defendant's claim that he did not intend to shoot Carlos Ibarra and there was substantial evidence contradicting such a claim. In addition, there is substantial evidence in the record from which the jury could reasonably conclude that the gunshot wound in Carlos Ibarra's leg was a serious bodily injury. Therefore, there was sufficient evidence to support a conviction of Aggravated Assault under § 76-5-103(1)(a).

#### ARGUMENT

##### POINT I

THE TRIAL COURT PROPERLY EXCLUDED DEFENDANT'S HEARSAY TESTIMONY.

A. DEFENDANT CANNOT CHALLENGE ON APPEAL THE TRIAL COURT'S RULING.

Defense counsel at trial sought to elicit from defendant, on direct examination, the substance of a statement allegedly made by Jesus Romero at approximately 8:00 p.m. on the day before the shooting. The trial court sustained the prosecutor's objection to this hearsay testimony (T. 92). Defense counsel did not object to the trial court's ruling (T.

92) but continued to instruct defendant that defendant could not relate the substance of the conversation "because that's hearsay" (T. 93, 94). Defendant was allowed to testify that as a result of Jesus Romero's alleged statement he felt the Ibarras were planning to either rob or assault him as soon as he left his house (T. 94).

Defendant on appeal alleges for the first time that his testimony should have been admitted as an excited utterance, under an exception to the hearsay rule. Rule 63(4)(b), Utah Rules of Evidence (1977). (The new Utah Rules of Evidence did not become effective until September 1, 1983, after defendant's trial was completed.) Defendant speculates that in the absence of the trial court's ruling he would have established that he reasonably acted in self-defense and therefore the outcome of his trial would have been different.

Rule 5, Utah Rules of Evidence, provides that a party may challenge on appeal the exclusion of evidence only if the record shows that the party made known the substance of the evidence or indicated the substance of the anticipated evidence by questions indicating the desired testimony. In the instant case, the substance of the excluded testimony was adequately indicated by the questions asked. However, this Court in Bradford v. Alvey & Sons, Utah, 621 P.2d 1240 (1980), expanded the requirements of Rule 5 by affirming the trial court's exclusion of hearsay testimony on the grounds that at trial the Plaintiff-appellant "did not make any offer of proof as to what evidence would be adduced, nor the purpose it would serve, as

required by Rule 5 Utah Rules of Evidence." Id. at 1243 (emphasis added).

In the case at bar, defendant was given ample opportunity to point out to the court that he believed Romero's statement was admissible under "the excited utterance exception" to the hearsay rule and that it was considered central to establishing that defendant acted in self-defense. Instead, defendant acquiesced to the judge's exclusion ruling and repeatedly admitted that the statement was inadmissible hearsay and inferred that the purpose of the excluded testimony could be accomplished by relating the effect that Romero's statement had on defendant's state of mind (T. 92-94). For defendant now to challenge the trial court's ruling violates the well-settled rule in this jurisdiction that absent exceptional circumstances a party cannot raise an issue for the first time on appeal. State v. Steggell, Utah, 660 P.2d 252 (1983); Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702 (1971). Since defendant has not alleged any exceptional circumstances justifying his failure to take advantage of the ample opportunities presented at trial to raise this claim, he is precluded from challenging the trial court's ruling.

This Court's language in Bradford, indicating that a party cannot challenge on appeal the trial court's exclusion of testimony unless that party informed the trial court of the purpose to be served by the testimony, is supported by Rule 20, Utah Rules of Criminal Procedure (Utah Code Ann. § 77-35-20 (1982)), which provides:

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 therefore. If a party has no opportunity to object to a ruling or order, the absence of an objection shall not therefore prejudice him.

us, although Rule 5, Utah Rules of Evidence, did not expressly require a contemporaneous objection to a trial court's ruling including testimony as did Rule 4, Utah Rules of Evidence (1977), cases involving the admission of evidence, under Rule 20, Utah Rules of Criminal Procedure, and this Court's ruling in Bradford, party has a duty at trial to raise the legal grounds supporting the admissibility of excluded testimony and to inform the court of the purpose to be served by the excluded testimony.

The application of Rule 20, Utah Rules of Criminal Procedure, to this case is clear. Because defendant had ample opportunity to object to the trial court's exclusion of his hearsay testimony on the grounds that the testimony was inadmissible as an excited utterance and was central to defendant's claim of self-defense, defendant's failure to do so precludes him from now raising the issue on appeal.

This result is supported by solid policy considerations. The court in Rice v. State, 567 P.2d 525 (Okla. 1977), outlined several important reasons for such a rule. In ce, the prosecutor objected to testimony which the defendant ought to elicit on direct examination from her own witnesses. In Rice court stated:

The court, rightfully or wrongfully, sustained the State's motion. Defendant thereupon took no exception to the

court's ruling. An exception here would have been no mere formality for by not taking it defendant apparently acquiesced in the court's ruling. Had an exception been taken argument could have been had with the chance of changing the court's mind. Since the exception was not taken, the trial court was denied an opportunity to correct itself. A prosecutor's objection to evidence introduced by the defendant does not preserve the record for defendant when the court rules adversely to defendant.

Id. at 530.<sup>1</sup>

These considerations are similar to those supporting the contemporaneous objection rule applied to cases in which the admission of evidence is challenged on appeal. This Court recently in State v. McCardell, Utah, 652 P.2d 942 (1982), endorsed the following statement of the Kansas Supreme Court in State v. Moore, 218 Kan. 450, 543 P.2d 923, 927 (1975):

The contemporaneous objection rule long adhered to this state requires timely and specific objection to admission of evidence in order for the question of admissibility to be considered on appeal. The rule is a statutory procedural tool serving a legitimate state purpose. By making use of the rule, counsel gives the trial court the opportunity to conduct the trial without using the tainted evidence, and thus avoid possible reversal and a new trial. Furthermore, the rule is practically one of necessity if litigation is ever to be brought to an end.

<sup>1</sup> Under Rule 20, Utah Rules of Criminal Procedure, a party would object rather than take exception to a trial court's ruling. In light of Rule 20's objection requirement, the elimination of any requirement to except to a trial court's rulings is obviously intended to leiminate superfluous exceptions when a timely and specific objection has already been interposed and not to relieve a party of the duty to raise his or her concerns for the trial court's consideration.

Cardell, 652 P.2d at 947. After noting that defendant McCardell failed to make a specific objection to the admission of the alleged evidence, this Court further stated:

This is clearly a case where a timely and specific objection would have afforded the trial court the opportunity to address [the defendant's] concerns and at the same time permit the State to proceed with the evidence most relevant to its case. A new trial should not be the result of [the defendant's failure to provide the trial court that opportunity.

The considerations outlined by the Rice court and this court in McCardell, supra, apply to the instant case. By failing to raise this claim at trial, and by repeatedly asserting that the statement was indeed hearsay, defendant acquiesced in the trial court's exclusion of the testimony. The prosecutor's objection could not preserve the issue for defendant because the prosecutor's position was at odds with defendant's position and a prosecutor's objection did not provide the trial court with the opportunity to address defendant's concerns. Defendant's failure to provide the trial court with such an opportunity should not result in a new trial at the expense of finality. These considerations and the conservation of already extended judicial resources.

Also, the opportunity to conduct a trial using all admissible evidence is just as important as the opportunity to conduct a trial without using tainted evidence. Finally, all of these considerations are in harmony with the previously cited rule that a party cannot raise an issue for the first time on appeal.

Therefore, in compliance with Rule 20, Utah Rules of Criminal Procedure, and this Court's ruling in Bradford v. Alvey & Sons, Utah, 621 P.2d 1240 (1980), defendant is precluded from now challenging the exclusion of his hearsay testimony because he neither objected to the trial court's ruling stating the grounds therefor nor informed the trial court of any permissible purpose of the excluded testimony.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING THE HEARSAY TESTIMONY.

This Court has consistently held that the trial court's rulings on the admissibility of evidence will not be disturbed unless there is a clear showing that the judge abused his discretion and that a party has been unfairly prejudiced. In Interest of S---J---, Utah, 576 P.2d 1280 (1978); In re Baxter's Estate, 16 Utah 2d 2984, 399 P.2d 442 (1965); See also State v. Carlson, Utah 635 P.2d 72 (1982) ("clear showing" requirement.)

Defendant has made no clear showing that the trial court abused its discretion by excluding his hearsay testimony or that defendant was unfairly prejudiced thereby defendant cites a passage from May v. Wright, 381 P.2d 601, 603-04 (Wash. 1963) inferring the passage stands for the proposition that unless the trial court specifically addresses the excited utterance exception when excluding hearsay testimony the reviewing court may forgo any deference to the trial court's discretion. However, defendant's reliance on May, supra is misplaced. In May v. Wright, the Washington Supreme Court upheld the trial court's admission of hearsay evidence. The court stated that merely because the

evidence was not admissible as a prior inconsistent statement, the grounds upon which the trial court had admitted the evidence, did not preclude the upholding of the admission if the evidence was properly admissible on another ground. The court then found that the evidence was admissible under the excited utterance exception to the hearsay rule. In determining whether the statement was made soon enough after the event in question to qualify as an excited utterance the court recited the passage quoted by defendant. The passage, in whole, reads:

We realize that the Washington cases have permitted fluctuation as to the time element with regard to excited utterances. Fluctuation as to the time element is both proper and necessary, since the related requirements for establishing the admissibility of an excited utterance are quite flexible in nature. In the normal situation the trial court has exercised its discretion by either permitting or rejecting the admission of statements on the basis of their being excited utterances (often referred to by the label *res gestae*); and on appeal this court has exercised some deference to the exercise of discretion by the trial court in applying a flexible standard. In the instant case, however, the comments of the trial court do not indicate a reliance upon the concept of excited utterance in ruling upon the question of admissibility. So consideration and deference to an exercise of discretion by the trial court are not within the purview of this case.

. at 603-604. The court concluded that a statement made twenty minutes after a fatal auto-pedestrian accident satisfied the time requirement for an excited utterance. *Id.* Thus, the passage quoted by defendant stands only for the proposition that if the trial court does not address the time requirement of the excited

utterance exception at all the reviewing court may not defer to the trial court's decision on that matter. The May court does not suggest that the reviewing court should not defer to the trial court's decision on the admissibility of evidence, absent a clear showing of abuse of discretion.

In the instant case, defendant does not demonstrate that the trial court abused its discretion in excluding the defendant's hearsay testimony. The trial court did not abuse its discretion in excluding defendant's testimony because, as discussed infra, the evidence lacked the indicia of reliability necessary to qualify it under the "excited utterance" exception. Also, defendant was not unfairly prejudiced by the exclusion of the testimony since any error was harmless in view of the evidence admitted in support of the defendant's claim of self-defense and the overwhelming evidence adduced at trial establishing defendant's guilt.

C. THE TESTIMONY WAS NOT ADMISSIBLE UNDER AN EXCEPTION TO THE HEARSAY RULE BECAUSE IT LACKED THE INDICIA OF RELIABILITY.

Hearsay testimony generally is excluded because the credibility of testimony is best tested when the witness testifies under oath in open court and is subject to cross-examination. State v. Sanders, 27 Utah 354, 496 P.2d 270 (1972); People v. Dement, 661 P.2d 675 (Colo. 1983); McCormick on Evidence § 245 (2d ed. 1972).

However, testimony that is otherwise hearsay may be admitted into evidence if it falls under an exception having circumstantial guarantees of trustworthiness, and absent such

arantees, the testimony is inadmissible. State v. Martin, 686  
2d 937, 949 (N.M. 1984); State v. Robinson, 94 N.M. 693, 616  
2d 404 (1980); People v. Howard, 198 Colo. 317, 599 P.2d 899  
979); cf. Rule 803(24), Utah Rules of Evidence (Supp. 1983).  
Hearsay statements are covered by this "catchall" exception only  
if they have "circumstantial guarantees of trustworthiness"  
(equivalent to those of the other exceptions.)<sup>2</sup> The Robinson court  
stated unequivocally: "Guarantees of reliability are and must be  
the key to open the door to the exceptions." 616 P.2d at 411.  
The court in Howard equally emphatically stated: "The trier of  
fact will only be permitted to receive hearsay testimony as  
evidence only in those limited circumstances where the inherent  
reliability of the hearsay clearly outweighs the strong policy  
reasons for excluding it." 599 P.2d at 899. The exceptions dealt  
with in both Robinson and Howard were, as here, established  
statutory exceptions to the hearsay rule.

The statutory exception involved in the instant case,  
the excited utterance exception, is premised upon the theory that  
a statement made while the declarant is under the influence of the  
event to the extent that his statement could not be the result of  
fabrication, intervening actions, or in the exercise of choice or

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The new Rules of Evidence, though not in effect at the time of  
defendant's trial, reflect this Court's acknowledgement of the  
fact that exceptions to the hearsay rule depend on circumstantial  
guarantees of reliability that substitute for the oath and cross-  
examination. Although under the new rules a prior inconsistent  
statement is not hearsay, under the prior rules governing this  
proceeding, such a statement was admissible only as an exception  
to the hearsay rule and as such must have circumstantial  
guarantees of reliability.

judgment, has the necessary indicia of reliability to justify making an exception to the hearsay rule. State v. McMillan, Utah, 588 P.2d 162, 163 (1978). In order to establish that the necessary indicia exist, the judge must find that the statement was made while the declarant was under the stress of a nervous excitement caused by the perception of some event. Rule 63(4)(b) Utah Rules of Evidence (1977). In the instant case, the only evidence that would support a finding that Romero's statement was made under the stress of a nervous excitement is the defendant's testimony that Romero went outside to talk to Carlos and when he came back he was "a little bit excited or something like that" (T. 92). Indeed, there was evidence adduced indicating that Jesus Romero may not have seen or talked with Carlos Ibarra and the defendant's story might be nothing, but a self-serving fabrication (e.g. T. 44, 123).

Romero's alleged comment to defendant clearly does not have the indicia of reliability contemplated by the exceptions to the hearsay rule; and the trial judge would have been justified in concluding that even if the alleged conversation had occurred, Romero was not sufficiently under the stress of nervous excitement to allow his statements as an exception to the hearsay rule under the excited utterance provision of Rule 63.

D. ANY ERROR IN THE EXCLUSION OF THE  
HEARSAY TESTIMONY WAS HARMLESS.

Rule 5, Utah Rules of Evidence, provided that the exclusion of evidence shall not result in a reversal of a conviction unless the proponent of the evidence makes an adequate offer of proof and the reviewing court determines that "the

cluded evidence would probably have had a substantial influence  
'bringing about a different verdict or finding.'" Rule 61, Utah  
les of Civil Procedure, also provides:

No error in either the admission or the exclusion of evidence, and no error in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

This Court in State v. Urias, Utah, 609 P.2d 1326, 1329

980) further stated:

The mandate of our statute and the policy firmly established in our decisional law, is that we do not upset the verdict of a jury merely because some error or irregularity may have occurred, but will do so only if it is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result.

emphasis added.)

Because essence of the hearsay testimony of self-defense that defendant sought to elicit was subsequently admitted to evidence, and because defendant's claim of self-defense was contradicted by substantial evidence adduced at the trial, there no reasonable likelihood that the admission of defendant's hearsay testimony would have resulted in defendant's acquittal.

Defense counsel's questions were clearly intended to elicit from defendant testimony regarding an alleged statement

made by Jesus Romero at about 8:00 p.m. on August 30th, indicating that the Ibarras intended to rob or assault defendant if he left his house. The trial court allowed defendant to testify that as a result of Romero's statement he feared such an attack by the Ibarras. Significantly, however, in the intervening five hours, until he left his house, defendant did nothing to protect against an attack. Instead, he chose to leave his house armed with a gun.

In further support of his claim of self-defense, defendant claimed that the Ibarras approached him from behind, intending to jump him, and that Miguel was armed with a two-foot lead pipe. However, Mr. Tatum testified that, immediately after the shooting, he saw nothing in Miguel Ibarra's hands. The investigating officers also searched in vain for any weapon on the Ibarras or in their vicinity. Therefore, in light of the time lapse between Romero's alleged statement and defendant's assault and because the Ibarras were unarmed at the time of the shooting there is no reasonable likelihood that if Romero's hearsay testimony would have led the jury to conclude that defendant's conduct was in self-defense.

Therefore, any error in the trial court's exclusion of the hearsay was harmless, and defendant's conviction should be affirmed.

#### POINT II

THE EVIDENCE ADDUCED AT TRIAL WAS  
SUFFICIENT TO SUPPORT APPELLANT'S  
CONVICTION OF AGGRAVATED ASSAULT.

This Court has stated that a conviction will not be reversed for insufficient evidence unless the evidence, when

viewed in the light most favorable to the verdict, "is  
sufficiently inconclusive or inherently improbable that reasonable  
jurors must have entertained a reasonable doubt that the defendant  
committed the crime." State v. Royball, Utah, 689 P.2d 1338  
(1984). State v. Petree, Utah, 659 P.2d 443, 444 (1983) (emphasis  
added).

Defendant claims that the evidence presented against  
him at trial was insufficient to support his conviction of two  
counts of aggravated assault.

Section 76-5-103(1) of the Utah Code Ann. (1978)  
provides, in pertinent part:

A person commits aggravated assault  
as defined in section 76-5-102 and:

- (a) He intentionally causes  
serious bodily injury to another; or
- (b) He uses a deadly weapon or  
such means or force likely to produce  
death or serious bodily injury. . . .

(emphasis added). Defendant does not contend that the evidence  
is insufficient to prove the elements of simple assault which are  
set out in Utah Code Ann. § 76-5-102 (1978) as follows:

Assault is:

- (a) An attempt, with unlawful force  
or violence, to do bodily injury to  
another; or
- (b) A threat, accompanied by a show  
of immediate force or violence, to  
do bodily injury to another. . . .

Instead, defendant argues that the evidence was  
sufficient to support the jury's verdict under the two  
subsections of the aggravated assault statute. Defendant claims  
the evidence could not support a finding of aggravated assault  
because the evidence "clearly indicates" that the defendant did

not intentionally shoot Carlos Ibarra and because no evidence was introduced to indicate that defendant's use of force was likely to produce death or serious bodily injury.

Contrary to defendant's arguments there is substantial and credible evidence to support the jury's verdict under either subsection of the aggravated assault statute. Defendant's argument fails because, in addition to the fact that subsections (a) and (b) read in the disjunctive, subsection (b) is itself composed of two disjunctive elements. Under that subsection a person is guilty of aggravated assault either if he uses a deadly weapon or such means or force likely to produce death or serious bodily injury. Utah Code Ann. § 76-5-103(b) (1978). In the instant case, the evidence is uncontradicted, and defendant admits, that he used a gun to shoot Carlos Ibarra. Defendant's gun was certainly a deadly weapon within the statutory definition of Utah Code Ann. § 76-10-501(1) (1953), as amended. Therefore, there was a sufficient showing to support a conviction of Aggravated Assault under § 76-5-103(b).

Additionally, the evidence was sufficient to establish that defendant either intended to shoot Carlos Ibarra, or that he intended to shoot both the Ibarras. The testimony of either Carlos or Miguel Ibarra, or from eyewitness accounts of defendant's actions and words, establish that defendant certainly possessed the requisite intent at the time of the assault.

Defendant testified, however, that he did not intend to shoot Carlos, but only reacted to a perceived threat by shooting at the ground. There was sufficient evidence supporting the exact

posite conclusion that the Ibarra brothers (Miguel and Carlos) were unarmed and made no attempt to assault defendant prior to his assault upon them. The evidence also indicated that after the provoked shooting defendant stood over Carlos and continued to wave the gun at the Ibarras asking if they wanted more. The existence of conflicting testimony in the instant case does not render the evidence pointing towards defendant's guilt insufficient. It is the jury's prerogative to weigh the credibility of the witnesses and determine who to believe. The jury is not obligated to believe the evidence most favorable to the defendant rather than that presented in opposition by the State, and the existence of contradictory evidence does not warrant this Court's reversal of the verdict. State v. Howell, 649 P.2d 91, 97 (1982). This Court has maintained that its function upon review is not to determine the "weight to give conflicting evidence, the credibility of the witnesses or the weight to be given defendant's testimony." State v. Romero, Utah, P.2d 216, 218 (1976).

In the instant case, the jury simply chose not to believe defendant's version of what transpired but instead believed the evidence and reasonable inferences that could be drawn therefrom which established defendant's guilt. Therefore, the evidence which the jury accepted indicated that defendant, provoked, pulled a gun on the Ibarras, shot Carlos Ibarra and continued to wave the gun at his victims while screaming threats at them. Certainly this evidence is not so insufficient that reasonable minds must have concluded that defendant did not intend to shoot Carlos Ibarra.

Finally, defendant challenges the sufficiency of the evidence on the grounds that the state failed to establish by medical evidence that defendant's action was likely to produce death or serious bodily injury. However, expert testimony is unnecessary to establish matters clearly within the comprehension of a jury of laymen. All reasonable persons may, without the aid of an expert, comprehend that when one points a gun at another, and indeed shoots that gun, they are likely to cause death or serious bodily injury. In addition there is substantial evidence apart from any expert testimony, that the defendant caused Carlos Ibarra serious bodily injury. Utah Code Ann. § 76-1-601(9) defines serious bodily injury as:

injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death.

Evidence adduced at trial indicates that Carlos Ibarra received a gunshot wound in the leg which bled so profusely that Mr. Tatum believed Carlos was bleeding to death. As a result of that wound, Carlos spent a week in the hospital receiving medical treatment. The jury, without the instruction of an expert, reasonably inferred from the evidence that such a wound could result in protracted impairment of Carlos' leg and posed a substantial risk of death. Thus, there is sufficient evidence to establish that defendant was guilty of intentionally causing serious bodily injury.

The evidence was sufficient to support defendant's conviction of aggravated assault on any one of three grounds.

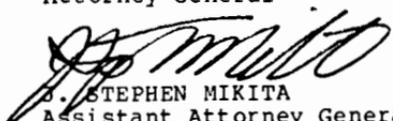
irst, the evidence was sufficient to establish that defendant  
sed a deadly weapon and is therefore guilty of two counts of  
ggravated assault under § 76-5-103(1)(b). Next, because  
efendant wielded a gun he used such means or force likely to  
roduce death or bodily injury and is therefore guilty of two  
ounts of aggravated assault under § 76-2-103(1)(b). And,  
inally, the evidence was sufficient to establish that defendant  
ntentionally caused serious bodily injury to Carlos Ibarra.

CONCLUSION

Based upon the foregoing arguments, the trial court  
roperly excluded defendant's hearsay testimony and the evidence  
as sufficient to support the jury's verdict of two counts of  
ggravated assault. Therefore, the judgment of the lower court  
ould be affirmed.

Respectfully submitted this 12<sup>th</sup> day of February,

DAVID L. WILKINSON  
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S. STEPHEN MIKITA  
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid, to William Albright, attorney for appellant, Salt Lake Legal Defendant Association, 33 South 200 East, Salt Lake City, Utah 84111 this 12<sup>th</sup> day of February, 1985.

A handwritten signature in cursive script, written over a horizontal line. The signature is highly stylized and difficult to decipher, but appears to consist of several overlapping loops and curves.