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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-v- : Case No. 19132

JAKE POTEET, a/k/a ELMER LAVERN :
POTEET,
:
Defendant-Appellant.

BRIEF OF RESPONDENT

AN APPEAL FROM CONVICTIONS OF AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 76-5-102 AND 76-5-103 (1978), AND BAIL JUMPING, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-8-312 (1978), IN THE SIXTH JUDICIAL DISTRICT COURT OF GARFIELD COUNTY, STATE OF UTAH, THE HONORABLE DON V. TIBBS, JUDGE, PRESIDING.

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FILED

MAR 5 1984

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19132
JAKE POTEET, a/k/a ELMER LAVERN POTEET,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Jake Poteet, appeals his convictions of Aggravated Assault, a third degree felony, in violation of Utah Code Ann. §§ 76-5-102 and 76-5-103 (1978), and Bail Jumping, a third degree felony, in violation of Utah Code Ann. § 76-8-312 (1978).

DISPOSITION IN THE LOWER COURT

In a jury trial held February 28, 1983 and March 1, 1983 in the Sixth Judicial District Court of Garfield County, State of Utah, the Honorable Don V. Tibbs, Judge, presiding, appellant was tried on charges of Aggravated Assault, Aggravated Robbery, and Attempted Criminal Homicide. The jury found appellant guilty of Aggravated Assault. In a separate jury trial held March 11, 1983 in the same court, appellant was found guilty of Bail Jumping. On March 31, 1983, appellant was sentenced for each of the above offenses to

serve consecutive terms of not more than five years in the Utah State Prison and to pay a fine of $5,000.00.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the convictions below.

STATEMENT OF THE FACTS

Appellant was convicted of Aggravated Assault for the brutal beating of Rodney Jones in a motel room in Escalante, Utah on Halloween weekend in 1981.

The victim, Rodney Jones, was a mechanic for Lamb Engineering & Construction Company, working near Escalante (Tl. 122, 277).[1] The victim received his weekly paycheck in the amount of $765.67 on the afternoon of Friday, October 30, 1981 and cashed the paycheck that same afternoon at the Bank of Iron County in Escalante (Tl. 123-129, 277-278, 391). Because his pickup truck was not running properly, Jones took a room at the Circle "D" Motel in Escalante instead of returning to his home in Arizona (Tl. 137, 280, 302-303).

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[1] The transcripts and records shall be referred to as follows: "Tl."--transcript of trial of case no. 2914 held February 28 and March 1, 1983; "T2."--transcript of trial of case no. 2985 held March 4, 1983; "T3." transcript of Arraignment and Preliminary Hearing for case no. 108 held December 9, 1982; "T4."--transcript of Arraignment and Preliminary Hearing for case no. 109 also held December 9, 1982; "T5."--transcript of Arraignment for case nos. 82-92 held November 25, 1981; "Rl."--record of case no. 2914; and "R2."--record of case no. 2985.

The next day, October 31, 1981, Jones apparently telephoned Larry Poteet, appellant's cousin (T2. 105), and asked Larry to help him repair his pickup truck (Tl. 292, 300, 315, 452). Larry was working as a mechanic at an Escalante gas station (Tl. 452). Larry testified that he went over to the Circle "D" Motel at approximately noon on Saturday, October 31, 1981 and worked on the victim's truck for an hour (Tl. 453-454). Larry related that after they finished, Jones invited him into his motel room for a few drinks (Tl. 454-455). As Larry was about to leave, appellant and his brothers Gary and Billy drove up, apparently having noticed Larry's pickup truck parked in the motel parking lot. Jones invited them in. Larry testified that they all drank beer and laughed. After a few minutes, Larry left. Appellant, Gary, and Billy left approximately ten minutes later (Tl. 456-457).

Appellant and his brothers went to the Apache Lounge, a bar, in Escalante just before 2:00 p.m. on October 31, 1981 (Tl. 236). Appellant's uncle, John Poteet, met them at the bar (Tl. 475). A few hours later, appellant and his brothers were involved in a disturbance at the bar (Tl. 237-238, 320). The owner of the bar, Joseph Schow, persuaded them to leave (Tl. 239).

The four Poteets then returned to the Circle "D" Motel (Tl. 201, 212, 369-370, 475). Appellant parked his pickup truck in front of Room 1, narrowly missing the open door of a pickup truck owned by Gary Bruno (Tl. 212-213). The

Poteets got out of their pickup truck and began harrassing Bruno and his friends Terry Thayne and Dennis Barnes (Tl. 201, 213). Appellant did most of the talking, calling Bruno "gay" and "queer" because Bruno had long hair (Tl. 213-214, 220-222). Appellant said they were looking for some construction guy staying at the motel. Appellant also said something about harming a local policeman named Mosier (Tl. 215). Thayne and Barnes testified that appellant and the other Poteets appeared to have been drinking (Tl. 203, 214).

Appellant and the other Poteets then drove down to the other end of the motel and parked their pickup truck out in the middle of the parking lot in front of Room 12, which was Jones's room (Tl. 136, 139, 206-207, 216-217, 404). The Poteets got out of the pickup truck, left both truck doors open, and went into Room 12 and brutally assaulted Jones (Tl. 140, 218-219, 322-323, 367). Jones testified at trial that he only remembers lying on his bed and seeing four men standing over him, beating him (Tl. 281, 298, 305). One of the assailants told Jones, "We'd better not hear any more about this or we'll get you" (Tl. 286). The assault left Jones unconscious (Tl. 282, 363, 422).

Shortly thereafter, at approximately 5:15 p.m. on October 31, 1981, Officer Donald Mosier saw the Poteets parked in front of the Apache Lounge (Tl. 323). Officer Mosier had been informed of the earlier disturbance in the bar involving the Poteets (Tl. 320-321). He told the Poteets that the

barmaid did not want them in the bar anymore (Tl. 322-323, 373). Appellant replied, "I have a 30-30 which will take care of you" (Tl. 324). Officer Mosier testifed that the Poteet's appeared to be intoxicated (Tl. 324).

Approximately an hour and half later, Joseph Schow, the owner of the bar saw appellant, his two brothers, and his uncle standing in front of their pickup truck outside the bar and overheard appellant say to his uncle, "We God Damn sure tore that room up, TV and all" (Tl. 240-248). Schow went to find Officer Mosier to report what he had heard (Tl. 247).

At approximately the same time on the evening of October 31, 1981, the owners of the Circle "D" Motel, Joy and Danny Reid, noticed on the switchboard that the telephone light for Room 12 was on, indicating that the phone was off the hook (Tl. 142, 156, 170, 192-196). The telephone in Room 12 did not work for outside calls (Tl. 137, 192). Joy Reid looked out and saw that Room 12 was dark (Tl. 143). The Reids decided to wait until the next morning to check into the matter further, thinking that Jones was either out of his room or asleep (Tl. 143, 170-171).

The next day, Sunday, November 1, 1981, at approximately 11:00 a.m., the cleaning girls told Joy Reid that they were unable to clean Room 12 since Jones was still inside (Tl. 144). Joy walked down to Room 12 and knocked. There was no response. She knocked again. This time she heard a mutter. She opened the unlocked door and saw Jones

lying on the bed covered with blood. She also saw that the television set was on the floor and that the bed had been broken (Tl. 144, 159). Frightened, Joy ran back to the motel's office to get her husband, Danny (Tl. 148, 160, 166, 171).

Danny Reid went to Room 12 with his wife Joy, and saw Jones lying on the bed with blood all around (Tl. 149, 171-172).[2] Danny returned quickly to the office to get his Kodak Instamatic to take photographs for insurance purposes (Tl. 146-147, 150, 172-173). After Danny took the photographs, Jones told Danny that he, Jones, knew who had assaulted him, but Jones did not tell Danny who it was (Tl. 179, 182-183). Danny went to get Officer Mosier (Tl. 149, 184). Joy had gone to telephone an Emergency Medical Technician ("E.M.T.") (T2. 149, 188, 328, 408).

Danny located Officer Mosier at church at approximately 11:45 a.m., November 1, 1981 and told him of the assault (Tl. 150, 186, 325, 376). Mosier went home and put on his uniform, and Danny returned to the motel (Tl. 326). When Danny arrived back at Jones's room, Jones was on his hands and knees looking for a $100.00 bill he had hidden in the zippered compartment of his money belt (Tl. 186-187, 198, 282-284).

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2 There was blood on the television set, the mirror, the carpet, the bedding, the pillows, the air conditioner, the walls, and the ceiling as well as on the victim (T2. 144-145. 150-151, 162-163, 166, 171-172, 191, 255, 327, 384-386). Before the assault, Room 12 had been neat and orderly (Tl. 145, 158, 200, 211-212)

Danny helped Jones back onto the bed (Tl. 187). The money belt was offered into evidence at trial (Tl. 283). The stitching around the zippered money compartment had been ripped apart (Tl. 284). The $100.00 bill was never found (Tl. 187).

Officer Mosier arrived at the motel just before noon, November 1, 1981 (Tl. 376). Mosier, a certified E.M.T. (Tl. 408), entered Jones's blood-splattered room and examined Jones. Mosier testified at trial that Jones's pulse was weak and his breathing was shallow. Mosier further testified that Jones had a deep cut over his left eye, a bloody nose, and dried blood in his mouth, ears, hair, and beard (Tl. 327, 345, 406). Mosier asked Jones if he knew who had assaulted him. Jones replied affirmatively. Mosier asked Jones to tell him who it was. Jones was reluctant (Tl. 328). Jones faded in and out of consciousness (Tl. 328-329, 345). When Jones became coherent again, Mosier repeated his questions (Tl. 329). Jones again was reluctant but finally told Mosier that the Poteets had assaulted him and robbed him of $600.00 to $650.00 (Tl. 329, 349, 360). Mosier found Jones's empty wallet in Jones's pants pocket (Tl. 316, 360, 400).

Officer Mosier went immediately to the Poteet's rented home. He did not obtain a warrant for their arrest because he feared that Jones would soon die or lose consciousness from his injuries (Tl. 343-345). Mosier's fear was based on his observation of Jones's shallow breathing,

weak pulse, and vacilating coherence, and on the amount of blood splattered throughout Jones's motel room (Tl. 330, 343-345, 386, 406). Officer Mosier also believed that appellant and the other Poteets were transients living in Escalante only temporarily and that as such they might leave town before he could obtain a warrant (Tl. 343-345; T5. 11).

Mosier arrived at the Poteet residence between 12 noon and 12:30 p.m., Sunday, November 1, 1981, and asked appellant, his uncle John, and his brothers Gary and Billy to come outside to answer some questions (Tl. 330-333, 349-350, 478). Mosier read them their Miranda rights and each individually responded that he understood and was willing to talk (Tl. 333-336, 351-352). Mosier informed them of Jones's accusation. The Poteets denied involvement, but agreed to go with Officer Mosier to the Circle "D" Motel to see whether Jones could identify them (Tl. 337, 352-354). Mosier arrested the four men for questioning then drove them to the motel (Tl. 338, 340-343, 403).

While Officer Mosier was at the Poteet residence, Carl Davis, an E.M.T. and a Peace Officer Catagory II (Tl. 252-253, 270-272, 410) arrived at the Circle "D" Motel to attend to Jones's injuries (Tl. 149, 191, 254, 355). Davis, at trial, described Jones as "one bloody mess" (Tl. 254). Davis cleaned the dried blood from Jones's mouth, nose, and eyes with a warm towel to help Jones's breathing (Tl. 255-256).

When Mosier arrived back at the motel with the Poteets, Davis told Mosier that Jones needed to be taken to the hospital.[3] Mosier asked Davis to stay a minute (Tl. 258-259). Mosier had the Poteets line up in front of the motel's swimming pool fence directly across from Room 12, handed his backup revolver to Davis, and went to assist Jones to the door of his motel room (Tl. 152-153, 165, 189, 259-260, 266-267, 287-288, 338, 355-356, 396, 479). Officer Mosier asked Jones if he recognized any of the men as his assailants. Jones said, "yes", and pointed to Billy Poteet. Mosier asked Jones if any of the others were involved. Jones replied, "those two," pointing to appellant and Gary. Jones said he recognized only those three (Tl. 287-289, 292-294, 339, 356-358, 397-399, 403).[4] Mosier asked Jones whom he recognized as his assailants several times in different ways in an effort to confuse Jones. Jones's identification of appellant, Billy, and Gary was consistent throughout the questioning (Tl. 339-340, 359, 398-399).

Officer Mosier arrested appellant, Billy, and Gary for assault, advising them again of their Miranda rights, and released John Poteet (Tl. 154, 190, 359-360, 399, 479).

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[3] David did not call for an ambulance. He assumed that the E.M.T.'s who drove the ambulance were unavailable, otherwise he would not have been called to the scene (Tl. 257).

[4] Jones stated at trial that he remembers four assailants in his room at the time of the assault but remembers only the three persons at the emergency field identification by the pool fence (Tl. 292-294).

Davis arranged for a co-worker of Jones to take Jones to the hospital in Panguitch, Utah just before 3:00 p.m. November 1, 1981 (T1. 155, 262-264, 429-430).

Dr. E. Terry Henrie was Jones's attending physician at the Garfield Memorial Hospital in Panguitch, Utah (T1. 419-420). He testified that when Jones was admitted to the emergency room, Jones was in a serious state. He had blood on his face, hair, and beard. His face and left eye were bruised. Both of his ears were bruised and very tender. He had a small skull fracture, and he was somnolent--he had difficulty concentrating (T1. 420-421, 428, 431-432). Jones knew who he was, but not where he was or what the date was (T1. 422, 439).

Dr. Henrie diagnosed Jones as having suffered a concussion and a contusion of the brain (T1. 423). Dr. Henrie testified at trial that Jones was in danger of death by aspiration of his vomit while unconscious (T1. 424). Dr. Henrie further testified that Jones's injuries were blood trauma caused by a beating with a fist, foot, or knee rather than a sharp object, and that these injuries were compatible with, and in his opinion caused by, an assault such as the one alleged by Jones (T1. 427-428).

During the first week of November, 1981, several of Jone's co-workers were very upset by the assault and threatened to take the law into their own hands (T2. 81). There was talk of "blanket parties " (restraining a person in

a blanket while beating him) and of running the Poteets out of Escalante (T2. 80-82, 105-106, 109, 112-113). Significantly, however, it appears from the record that none of the Poteets were ever directly threatened (T2. 107, 109-110, 114). Moreover, Officer Mosier testified that the intense feelings in the community soon subsided when it was seen that he was taking care of the matter (T2. 82).

Jones was discharged from the hospital on November 10, 1981 (T1. 286, 425-426). Dr. Henrie testified that upon release Jones was free of pain but his mentation and memory were still impaired. Jones was unable upon release to compute correctly "serial sevens" (successive subtraction of the number "7" from the resulting difference of the previous calculation, beginning with the number "100"). Jones also was unable to remember events prior to November 1, 1981 (T1. 426). At trial, Jones testified that his memory was still "spotty" (T1. 287).

At the December 10, 1981 Preliminary Hearing, appellant, Gary, Billy, and John Poteet[5] were all bound over for trial and ordered to appear for arraignment on January 7, 1982 (T2. 74-75, 90-91, 99; T3. 8-9, 14). All four were out on bail of $10,000.00 each (T2. 75; T5. 26). Just prior to Christmas 1981, Officer Mosier learned that appellant had moved his family from Escalante, ostensibly in response to

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[5] John Poteet was later rearrested after his release at the emergency field identification (T1. 480).

the rumors of "blanket parties" which had circulated in early November (T2. 75-77, 87, 92-93; T3. 15-19, 23; R1. 45). Appellant failed to appear at the January 7, 1982 arraignment hearing as ordered and his bail was reset at $200,000.00 (T2. 92-93, 98-99; T3. 10,16; R1. 20-21). The Garfield County Sheriff's Department subsequently received an anonymous telephone tip that appellant was in Los Sanchus, California (T2. 77, 88, 93; T3. 10, 20-21). Appellant was arrested in San Luis Obisbo, California on January 13, 1982 (T2. 88, 94; T3. 10). He refused to waive extradition and was not returned to Utah until April 27, 1982 (T2. 78,88, 95; T3. 12).

Meanwhile, Billy and Gary Poteet had jumped bail (R1. 77-96). They did not appear at their May 6, 1982 arraignment (R1. 31, 36-37). At appellant's arraignment on the same day, appellant pled not guilty to charges of Aggravated Assault, Aggravated Robbery, and Attempted Criminal Homicide and to the newly added charge of Bail Jumping (R1. 34). Billy and Gary were eventually arrested in Prosser, Washington, and were returned to Utah on May 25, 1982 (R1. 79).

On May 12, 1982, appellant filed a petition for a writ of habeas corpus, claiming, among other things, that he had been arrested without a warrant at his home, that he had not been afforded a Preliminary Hearing within the statutory 30-day period (R1. 41-47, 196-198). Appellant's petition was

denied June 10, 1982 (R1. 190, 195).[6] On June 13, 1982, appellant escaped from jail (T4. 6-7, 10-12).

On July 12, 1983, Billy, Gary, and John Poteet all pled guilty to Attempted Aggravated Assault, a class A misdemeanor, pursuant to a plea bargain agreement (R1. 99-106). In addition, Billy and Gary also pled guilty to Bail Jumping, a third degree felony (R1. 99, 101, 103). All three were placed on probation (R1. 113-118). One of the conditions of probation was that they would return voluntarily to Utah to testify against appellant upon appellant's apprehension and trial (R1. 114, 116, 118).

Appellant was subsequently arrested in Montana, and after fighting extradition was finally returned to Utah on October 20, 1982 (T4. 10, 23). Since appellant's original counsel had withdrawn after negotiating the plea bargaining agreement for Billy, Gary, and John Poteet (R1. 121-126), appellant appeared at the November 4, 1982 hearing without counsel (R1. 125). At that hearing the law firm of Labrum and Taylor was appointed as appellant's new counsel (R1. 125-126). On December 9, 1982, a Preliminary Hearing was held on the charges of Bail Jumping, Escape, and Injury to a Jail, and appellant was bound over for trial on each of the charges (T3. 1-26; T4. 1-28).

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[6] Appellant's subsequent appeal to this Court was "dismissed for failure to state a cause for relief under Rule 65B(f)(1), no unlawful restraint having been alleged." Poteet v. Garfield County Attorney, Utah, (Case No. 18883, filed December 17, 1982)(Minute Entry).

On January 6, 1983, Appellant filed a motion to dismiss the Bail Jumping charge on the basis that a preliminary hearing on that count had not been held (Rl. 158-159). The trial court denied the motion on January 16, 1983, ruling that the motion was moot since a preliminary hearing had been held on the Bail Jumping on December 9, 1982 (Rl. 163-164).

On January 26, 1983, appellant, through new counsel, again moved to dismiss for failure to hold a preliminary hearing within thirty days (Rl. 178). Appellant also filed a motion to suppress the emergency field identification on the basis that appellant had been arrested without a warrant (Rl. 179-180).

In addition, appellant sought to have the State bear the expense of transporting to trial appellant's brothers, Gary and Billy Poteet, residing in Grandview, Washington, and appellant's wife, Darliss Poteet, residing in Missoula, Montana (Rl. 185-188). In February of 1983 appellant prepared an affidavit of impecuniosity to the effect that he was unable to pay the per diems and mileage of his relatives, that counsel advised him that the evidence of his brothers was material to his defense of self-defense, and that he could not safely proceed to trial without them (Rl. 192-193). This affidavit, however, was not filed with the court until the day of trial and had not been subscribed before a notary public (Tl. 25).

On February 18, 1983, appellant filed an Affidavit of Bias and Prejudice against the Honorable Don V. Tibbs on the ground that Judge Tibbs had denied appellant's petition for a writ of habeas corpus in a hearing held June 10, 1982 (R1. 194-199). The Honorable Allen B. Sorenson found the affidavit insufficient in several particulars and denied the application for disqualification of Judge Tibbs (T1. 10; R1. 200).

Appellant's trial was held February 28, 1983 and March 1, 1983 on the charges of Aggravated Assault, Aggravated Robbery, and Attempted Criminal Homicide (T1. 5-6). Before trial proceedings began, the trial court ruled on appellant's pretrial motions. The trial court denied appellant's motion to dismiss for failure to hold a preliminary hearing within thirty days, ruling that the issue was moot (T1. 17).[7] The trial court also denied appellant's motion to suppress, ruling that exigent circumstances existed, justifying the warrantless arrest of appellant (T1. 18, 346-349).

The trial court also refused to transport appellant's out-of-state relatives to trial at State expense because appellant's brothers had agreed as a condition of probation to return voluntarily to testify at appellant's trial that appellant had been the instigator of the assault (T1. 20-25, 489-492). The trial court also noted that

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[7] Appellant made the same motion at the March 11, 1983 Bail Jumping trial, and the trial court again denied the motion (T2. 4-6).

appellant had not established that the testimony of his wife and brothers was material to his defense and that since they were relatives of appellant, appellant should arrange for their presence if their testimony was material (T1. 23-24). After the trial court had denied the motion, appellant submitted his affidavit of impecuniosity relating to the motion for compulsory process for his out-of-state relatives. The trial court ordered the affidavit filed, but let stand his order denying the requested compulsory process on the ground that the filing of the affidavit was not timely (T1. 25).

The jury found appellant guilty of Aggravated Assault (T1. 547; R1. 244-246, 260, 262). In a separate jury trial held March 11, 1983, appellant was found guilty of Bail Jumping (T2. 136; R2. 64). For each of the above convictions, appellant was sentenced on March 31, 1983 to serve consecutive terms of not more than five years in the Utah State Prison and to pay a fine of $5,000.00 (R1. 268; R2. 37).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR COMPULSORY PROCESS TO SECURE, AT STATE EXPENSE, THE ATTENDANCE OF APPELLANT'S RELATIVES WHO WERE RESIDING OUT OF STATE.

Appellant claims the trial court erred in refusing to secure, at State expense, the attendance at trial of appellant's brothers Billy and Gary Poteet, who were residing

out of state. Appellant contends that their testimony was essential to establish appellant's defense of self-defense and the community atmosphere that ostensbily lead to appellant's jumping bail.

It must be noted at the outset that appellant never filed a proper motion under the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings" (Utah Code Ann. § 77-21-1 through 5 (1953), as amended) which is the process by which out-of-state witnesses are obtained to testify in criminal trials. He merely filed what was captioned a "Motion for Subpoenas" under Utah Code Ann. § 77-35-14 (1953), as amended, which is the local subpoena rule of the Code of Criminal Procedure which, of course, is limited to compelling" the attendance of a witness <u>from anywhere in the state</u>." (Section 77-35-14(e)) (emphasis added) (Rl. 185-188). This motion made no request that the defense witnesses be obtained at State expense. After this motion was denied, appellant waited until the first day of trial and filed an affidavit pursuant to Utah Code Ann. § 21-5-14 (1953), seeking an order of the court to subpoena his defense witnesses at State expense (Rl. 192-193; Tl. 25). Again, this statute is not the procedural vehicle for securing the attendance of out-of-state witnesses. Moreover, appellant's affidavit lacked a specific date and was not notarized (Rl. 192-193). Thus, appellant's own failures to properly and timely apply for an order to obtain the attendance of his out-of-state witnesses, and to obtain them

at State expense justifies the action of the lower court denying appellant's request.

A defendant has a constitutional right to compulsory process, but that right is not absolute. State v. Peyton, 8 Or. App. 479, 493 P.2d 1393 (1972). The granting or denial of an application for compulsory process for out-of-state witnesses is within the sound discretion of the court. Utah Code Ann. § 77-21-3 (1982); People v. Rich, 313 N.W.2d 364 (Mich. App. 1981); State v. Ivory, 609 S.W.2d 217 (Mo. App. 1980). Discretion is abused only where no reasonable man would take the view adopted by the trial court, Jankelson v. Cisel, 3 Wash. App. 139, 473 P.2d 202 (1970), or where the trial court in view of all the circumstances acts arbitrarily and exceeds the bounds of reason, resulting in substantial injustice. Porter v. Porter, 473 P.2d 538 (Mont. 1970). Under the circumstances of the instant case, the trial court's refusal to order the attendance of appellant's out-of-state witnesses at State expense was not an abuse of discretion.

The trial court denied appellant's request because Billy and Gary Poteet had both agreed, as a condition of probation, to return voluntarily to testify at appellant's trial that appellant had been the instigator of the assault (Tl. 492; Rl. 114, 116). Thus, their testimony would hardly be characterized as "material" to the defense. The trial court also reasoned that since they were appellant's brothers, appellant should arrange for their attendance at trial if their testimony was indeed material to his defense

(Tl. 23-24). Implicit in the trial court's ruling is the assumption that a defendant's relatives have a vital interest in the defendant's case and thus are not unduly burdened by having to pay transportation and other expenses related to their attending trial to testify on the defendant's behalf. In the instant case appellant's brothers not only would not have been unduly burdened by having to attend trial at their own expense, but also had an affirmative duty to do so under the terms of their probation--albeit to testify in behalf of the state.

Utah Code Ann. § 21-5-14 (1953) provides that no witness for a defendant in a criminal case shall be subpoenaed at State expense except upon court order, and such court order shall be made _only_ upon affidavit of the defendant showing (1) that the defendant is impecunious, (2) that counsel has advised the defendant that the witnesses' testimony is material to his defense, and (3) that the defendant cannot safely proceed to trial without the witnesses. Appellant prepared such an affidavit dated "February, 1983" (the specific date was not listed) (Tl. 25; Rl. 192-193), but the affidavit was not subscribed by a notary public, and was not filed with the court until the day of trial after the trial court had already denied appellant's "Motion for Subpoenas" as to appellant's out-of-state witnesses (Tl. 25; Rl. 185-188).[8]

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[8] Again, this prior motion had not requested that the out-of-state witnesses be obtained at State expense, it merely requested that they be obtained by subpoena.

Appellant's filing of the affidavit was untimely. The Supreme Judicial Court of Massachusetts, in Commonwealth v. Dirring, 354 Mass. 523, 238 N.E. 2d 508 (1968), ruled that the trial court had not abused its discretion in denying the defendant's tardy motion for compulsory process of out-of-state witnesses, where the motion was made on the fifth day of trial after the defendant had had approximately ten months in which to prepare for trial. In State v. Peyton, supra, the court upheld the denial of the defendant's motion for compulsory process of an out-of-state witness on the grounds that his filing the motion at the beginning of trial was untimely. The Peyton court also found that the trial court did not abuse its discretion by denying the defendant's motion for continuance in connection with the request for compulsory process in light of the fact that the trial had already been continued on three occasions, all attributable to the defendant's acts.

In the instant case, appellant included the names of his brothers in his Motions for Subpoenas (Rl. 185-188), but he did not file the requisite affidavit in support of his request for compulsory process for the out-of-state witnesses at State expense until the beginning of trial (Tl. 25), and never filed a motion under the Uniform Act to Secure the attendance of out-of-state witnesses, (Section 77-21-1 et. seq., supra). The trial court was understandably unwilling to further postpone the trial until appellant's brothers could be brought to Utah to attend the trial in light of the brothers'

agreement to return voluntarily and the more than fifteen month delay from the time of the assault to the time of trial caused by appellant's jumping bail in December of 1981, and his escaping from jail in June of 1982 (T1. 25). Thus, under the circumstances, and in accordance with Dirring and Peyton, cited above, it was not an abuse of discretion for the trial court to refuse to grant appellant's untimely application for an order that appellant's brothers and wife be brought to trial at State expense.

Furthermore, Utah Code Ann. § 78-26-5 (1953) provides that "an affidavit to be used before any court, judge or officer of this state may be taken before any judge or clerk of any court of any justice of the peace or any notary public in this state." Although the statute's language is permissive, it is well settled that an affidavit is a written statement, under oath, sworn to or affirmed by the person making it before some person who has authority to administer an oath or affirmation. 2A C.J.S. Affidavits § 2, pp. 435-436; Halsy v. Pat Reichenberger Lumber, Inc., 5 Kan. App. 2d 622, 621 P.2d 1021 (1981). Furthermore, "[I]n order to make an affidavit, there must be present at the same time the officer, the affiant, and the paper, and there must be something done which amounts to the administration of an oath." In re Education Association of Passaic, Inc., 117 N.J. Super. 255, 267, 284 A.2d 374 (1971). See also 2A C.J.S. Affidavits § 30, p.465; Thompson v. Self, 197 Ark. 70, 122 S.W.2d 182 (1938).

Thus, since appellant's affidavit was not made under oath before a person authorized to take such an affidavit, the affidavit is invalid, and the trial court properly refused to order that appellant's out-of-state witnesses be subpoenaed at State expense.

This Court dealt with a related situation in State v. Cox, 74 Utah 149, 277 P. 972 (1929). The defendant in Cox presented an affidavit at trial supporting his request for an order that certain witnesses be subpoenaed at State expense. This Court affirmed the trial court's denial of the demand on the grounds that cross-examination of the defendant revealed that he was in fact not unable to bear the expense of bringing the witnesses to the trial and that the affidavit failed to make the requiste showing of materiality of the witnesses' testimony.

In the instant case, although the trial court ruled that appellant was impecunious (Tl. 24), the court properly denied appellant's request on the grounds that his brothers had an affirmative duty to attend appellant's trial under the terms of their probation (Tl. 492; Rl. 114, 116). Furthermore, appellant's affidavit suffered not merely from an insufficient showing of materiality but from complete invalidity since it was not made under oath before a person authorized to take such an affidavit.

Therefore, the trial court properly denied appellant's demand.

POINT II

APPELLANT'S MOTION FOR DISQUALIFICATION OF THE HONORABLE DON V. TIBBS WAS PROPERLY DENIED.

Before trial, appellant filed an Affidavit of Bias and Prejudice against the Honorable Don V. Tibbs on the grounds that Judge Tibbs had previously denied appellant's petition for a writ of habeas corpus (Rl. 194-199). In accordance with Rule 63(b), Utah Rules of Civil Procedure, Judge Tibbs referred the matter to the Honorable Allen B. Sorenson, who found the affidavit insufficient and denied appellant's motion to disqualify Judge Tibbs (Tl. 10; Rl. 200). Appellant now objects for the first time that Judge Sorenson did not detail the reasons underlying this conclusion. Apparently, no attempt was made by the defense to ask Judge Sorenson for a clarification of the basis for his order.

Appellant relies on Rule 52(a), Utah Rules of Civil Procedure, which requires that a court find the facts cpecifically and state separately its conclusions of law thereon in all actions tried upon the facts without a jury or with an advisory jury. But Rule 52(a) also provides that "findings of fact and conclusions of law are unnecessary on decisions of motion under Rule 12 or 56 or any other motion except as provided in Rule 41(b)."

An action is commenced by the filing of a complaint or the service of summons (Rule 3), while a motion is an application for an order (Rule 7(b)(1)). The filing of an

Affidavit of Bias and Prejudice is essentially an application for an order of disqualification. Thus, the filing of an Affidavit of Bias and Prejudice is a motion rather than an action, and Judge Sorenson's decision need not be accompanied by findings of fact and conclusions of law.

Appellant cites not law to the contrary. Therefore, it was not error for Judge Sorenson to summarily deny appellant's motion.

POINT III

THE EMERGENCY FIELD IDENTIFICATION WAS PROPER.

Appellant claims that he was denied due process of law by being subjected to an illegal line-up on November 1, 1981 when Office Mosier took him, his brothers, and his uncle to the Circle "D" Motel to be identified by the victim. Appellant asserted an identical claim in a petition for habeas corpus relief, which was denied by the Sixth District Court in a hearing held June 10, 1982 (R1. 195-196). This Court later upheld that denial. Poteet v. Garfield County Attorney, Utah (Case No. 18883, field December 17, 1982) (Minute Entry).

Applant was not subjected to a line-up at the Circle "D" Motel. Rather, it was an emergency field identification. Consequently, the statutes governing line-ups, cited by appellant in his brief, are inapposite to the circumstances of the instant case. State v. Allen, 29 Utah 2d 442, 511 P.2d 159 (1973).

In Stovall v. Denno, 388 U.S. 293 (1967), the United States Supreme Court ruled that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . . ." Id. at 302. Because in Stovall one of the assailant's victims was dead and the other critically injured, and feared to be close to death, the Court held that the confrontation was reasonable under the circumstances.

The circumstances of the instant case are remarkable similar. The victim, Rodney Jones, when discovered, had a weak pulse from the loss of so much blood; his breathing was shallow; and he faded in and out of consciousness (Tl. 330, 343-345, 386, 406). Officer Mosier feared that Jones might not live (Tl. 343-345). Thus, under the circumstances, it was imperative that Officer Mosier allow Jones an immediate opportunity to confront and identify the suspects Jones had named.

Appellant argues that the eighteen hour delay from the time of the assault to the time of the confrontation mitigates against characterizing the confrontation as an emergency field identification. Appellant cites no authority for his proposition. Furthermore, he and the other three suspects were brought to the Circle "D" Motel within an hour or two of the time that Jones was discovered in his room (Tl. 144, 159, 171, 333). Thus, the confrontation was conducted as soon as reasonably possible under the circumstances, and appellant's rights were not infringed.

POINT IV

THE TIME FOR PRELIMINARY HEARING ON THE CHARGE OF BAIL JUMPING WAS EXTENDED FOR GOOD CAUSE.

Appellant claims that he was denied due process of law because he was not afforded a preliminary hearing on the charge of Bail Jumping until December 9, 1982.

In December of 1982, after his preliminary hearing on the charges of Aggravated Assault, Aggravated Robbery, and Attempted Criminal Homicide, appellant moved his family from Escalante, Utah to California (T2. 75-77, 87, 92-93; T3. 15-19, 23; R1. 45). Consequently, appellant failed to appear as ordered at his January 7, 1982, arraignment hearing (T2. 92-93, 98-99; T3. 10, 16). On January appellant was arrested in San Luis Obisbo, California (T2. 88, 94; T3. 10). Appellant fought extradition and was not returned to Utah until April 27, 1982 (T2, 78, 88, 95; T3. 12).

On May 8, 1982, appellant was arraigned on the original three charges and a new charge of Bail Jumping (R1. 34-35). Appellant pled "Not Guilty" to all four charges (R1. 34).

On June 13, 1982, only three days after his petition for a writ of habeas corpus had been denied (R1. 190, 195), appellant escaped from jail (T4. 6-7, 10-12). Appellant was later discovered in Montana and after again fighting extradition, was finally returned to Utah on October 20, 1982 (T4. 10, 23).

At a November 4, 1982 hearing, new counsel for appellant was appointed (Rl. 125-127). At that hearing the court also directed that any request for preliminary hearing on the three new charges of Bail Jumping, Escape, and Injuring a Jail should be referred to the Circuit Court (Rl. 125). On December 1, 1982 appellant moved to dismiss the Bail Jumping charge on the grounds that he had not been afforded a preliminary hearing on that charge (Rl. 158-159). The preliminary hearing on the Bail Jumping charge was held on December 9, 1982 (T3. 1-26; T4. 1-28). Consequently, at the January 6, 1983 hearing on the motion to dismiss and other motions, the trial court ruled that the matter was moot (Rl. 163-164). Appellant's subsequent motions to the same effect were denied on the same grounds (Tl. 17; T2. 4-6).

Under the circumstances, appellant was not denied due process of law. By pleading to the Bail Jumping charge at the May 8, 1982 arraignment hearing, appellant implicitly waived a preliminary hearing on that charge. State v. Gustaldi, 41 Utah 63, 123 P. 897 (1912); Pope v. Turner, 30 Utah 2d 286, 517 P.2d 536 (1973).[8]

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[8] Although, in contrast to the circumstances in Gustaldi and Pope, appellant moved before trial to dismiss the Bail Jumping charge for failure to hold a preliminary hearing on that charge, the trial court in all likelihood considered the motion to be a request for such a hearing in accordance with the court's discretion at the November 4, 1982 hearing. Significantly, appellant did not object to the failure to hold a preliminary hearing until nearly eight months after pleading to the Bail Jumping charge, and once he raised the objection he was afforded a hearing within ten days.

Even assuming that appellant did not waive the preliminary hearing, the preliminary hearing was continued for good cause as provided for in Utah Code Ann. § 77-37-7(4)(c). The delay from the May 8, 1982 hearing at which appellant was first charged with Bail Jumping to the December 9, 1982 preliminary hearing on that charge was due primarily to appellant's escape from jail on June 13, 1982.

This Court in State v. Bradshaw, Utah (Case Nos. 18255 and 18430, filed February 9, 1984), ruled that a 170-day delay in the holding of a preliminary hearing was not an abuse of the "good cause" extension since the delay was the result of the defendant's own actions and concerns. In the case at bar, the delay was likewise a result of appellant's actions and conduct.

Thus, there was good cause to extend the time for the preliminary hearing, and the resulting delay did not deny appellant's right to due process of law.

POINT V

THE WARRANTLESS ARREST OF APPELLANT AT HIS RESIDENCE WAS PROPER.

Appellant contends that under Payton v. New York, 445 U.S. 573 (1980), Officer Mosier's arrest of appellant without a warrant at his place of residence was improper, and thus all evidence of the line-up identification and following processes should have been suppressed by the trial court.

Appellant moved to suppress this evidence on the same grounds before trial (R1. 179-180). The trial court denied the motion on the grounds that exigent circumstances existed, justifying the warrantless arrest (T1. 18, 346-349).

Appellant's reliance on Payton is misplaced. When, as in the instant case, the persons to be arrested answer the door or come outside the residence, no warant is required because there has been no entry of private premises. United States v. Mason, 661 F.2d 45 (5th Cir. 1981); Waldrop v. State, 424 So.2d 1345 (Ala. Cr. app. 1982); People v. Morgan. 113 Ill.App. 3d 543, 447 N.E.2d 1025 (1983); LaFave, SEARCH AND SEIZURE § 6.1 (Supp. 1984).

Therefore, since appellant and his co-suspects all voluntarily came outside their residence, the later warrantless arrest was proper, and appellant's motion to suppress was properly denied.

Even assuming that a warrant was required to arrest appellant and the others outside their home absent exigent circumstances in accordance with the Supreme Court's ruling in Payton, such exigent cirucmstances existed in the case at bar. The victim had been seriously injured and was feared to be close to death or losing consciousness (T1. 343-345). Officer Mosier had probable cause to believe that appellant, his brothers, and his uncle had committed the assault since the victim named them as his assailants (T1. 329, 349, 360). Finally, Officer Mosier believed that appellant and the other

Poteets were transients living in Escalante only temporarily (Tl. 343-345; T5. 11).

Thus, under the circumstances, it would have been unreasonable to require that Officer Mosier obtain a warrant in order to arrest appellant and the his relatives so that he could take them to the Cirle "D" Motel for the emergency field identification. Therefore, the trial court's denial of appellant's motion to suppress was also proper under this analysis.

POINT VI

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

Appellant contends that the evidence was insufficient to support his conviction of Aggravated Assault since the prosecution produced no evidence that appellant used a deadly weapon in the assault.

This Court has used the following standard of review in considering a challenge to the sufficiency of the evidence:

> This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonble doubt. We also view in a light most favorable to the jury's verdict those faults which can be reasonably inferred from the evidence presented to it.

State v. McCardell, Utah, 652 P.2d 942, 945 (1982) (citations ommitted).

Appellant was convicted of Aggravated Assault in a jury trial held February 28, 1983 and March 1, 1983 (Tl. 5-6). There are two elements to the offense: first, under Utah Code Ann. § 76-5-102 (1978), there must be either "(a) [a]n 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" (emphasis added); and second, under Utah Code Ann. § 76-5-103 (1978), the assailant must either "(a) . . . intentionally cause [ ] serious bodily injury to another; or (b) . . . use [ ] a deadly weapon or such means or force likely to produce death or serious bodily injury" (emphasis added). The information charged the offense under theory (a) of Section 76-5-103 (Rl. 154), a theory which appellant does not even challenge on appeal. Even so, under the disjunctive wording of the statute, lack of evidence as to use of a deadly weapon in the assault is not necessary to sustain a conviction of Aggravated Assault. Moreover, the evidence adduced at trial was more than sufficient to establish that appellant attempted, with unlawful force or violence, to do bodily injury to the victim, Rodney Jones, and that appellant either intended to cause Jones serious bodily injury or used such means or force likely to produce death or serious bodily injury.

Appellant and the other Poteets were seen entering Jone's motel room on the afternoon of the assault (Tl. 140, 218-219, 322-323, 367). They were later heard to say, " We God Damn sure tore that room up, TV and all" (Tl. 240-248). Jones was discovered the next morning in his motel room unconscious, battered, and covered with blood (Tl. 141, 159, 171-172). Jones named and identified appellant as one of his assailants (Tl. 289, 329, 339, 349, 358, 360).

Appellant finally claims, that the evidence did not establish that Jones sustained a serious bodily injury as defined in Utah Code Ann. § 76-1-601(9) (miscited by appellant), which states that "'Serious bodily injury' means bodily 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."

The evidence established that the assault rendered Jones unconscious for approximately eighteen hours (Tl. 282, 363, 422). His face, ears, and left eye were bruised, and he had a small skull fracture (Tl. 420-421, 428, 431-432). Dr. Henrie, Jones's attending physician, testified that Jones had suffered a concussion and a contusion of the brain, and that Jones was somnolent (Tl. 422-423, 439). Dr. Henrie further testified that Jones had been in danger of death by aspiration of his vomit while unconscious (Tl. 424). Finally, Jones's mentation and memory were seriously impaired by the assault (Tl. 287, 422, 426, 439).

The above evidence amply supports the conclusion that Jones's injury either caused a protracted impairment of his mentation and memory or created a substantial risk of death. Thus, the evidence was sufficient to support appellant's conviction of Aggravated Assault.

CONCLUSION

For the above stated reasons, appellant's convictions should be affirmed.

RESPECTFULLY submitted this 5th day of March, 1984.

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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 James L. Shumate, attorney for appellant, P.O. Box 623, Cedar City, Utah 84720-0623, this 7th day of March, 1984.

Kathleen D. Bellingham