AGENDA

STANDING COMMITTEE ON THE
MODEL UTAH CRIMINAL JURY INSTRUCTIONS

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84111

Wednesday, February 1, 2017
12:00 p.m. to 1:30 p.m.
Judicial Council Room

12:00	**Welcome and Approval of Minutes** (Tab 1)	Judge James Blanch
12:05	**Justification Defense Instructions** (Tab 2) Utah Code 76-2-402 (Tab 3) Utah Code 76-2-405 (Tab 4) Utah Code 76-2-406 (Tab 5) *State v. Karr* (Tab 6) *State v. Berriel* (Tab 7)	Mark Field
1:30	**Adjourn**	

Upcoming Meetings (held on the 1st Wednesday of each month unless otherwise noted)
March 1, 2017
April 5, 2017
May 3, 2017
June 7, 2017
September 6, 2017

Tab 1

MINUTES

STANDING COMMITTEE ON
THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, January 4, 2017
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT	**EXCUSED**
Judge James Blanch, Chair	David Perry
Keisa Williams, Staff	Judge Michael Westfall
Mark Field	
Sandi Johnson	
Linda Jones	
Karen Klucznik	
Judge Brendon McCullagh	
Steve Nelson	
Jesse Nix	
Nathan Phelps	
Scott Young	

1. Welcome **Judge Blanch**

Judge Blanch welcomed everyone to the meeting and each member introduced themselves.

Ms. Jones moved to approve the minutes from the November 2016 meeting. Mr. Phelps seconded the motion and it passed unanimously.

2. Proposed Amendments **Committee**

Ms. Jones stated that certain instructions needed to be updated. She offered additional language to ensure compliance with Rule 19(f) of the Rules of Criminal Procedure.

(a) CR105 Role of Judge, Jury, and Lawyers [Introduction]

CR105 Role of Judge, Jury and Lawyers [Introduction].

All of us, judge, jury and lawyers, are officers of the court and have different roles during the trial:

- As the judge, I will supervise the trial, decide legal issues, and instruct you on the law.
- As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.
- The lawyers will present evidence and try to persuade you to decide the case in one way or the other.

Neither the lawyers nor I decide the case. That is your role. You are the exclusive judges of all questions of fact. Do not be influenced by what you think our opinions might be. Make your decision based on the law given in my instructions and on the evidence presented in court.

Ms. Klucznik moved to approve the proposed modifications to the instruction. Mr. Young seconded the motion and it passed unanimously.

(b) CR202 Juror Duties [Closing]

CR202 Juror Duties [Closing].
You have two main duties as jurors.

The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine. You are the exclusive judges of all questions of fact.

The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction.

Perform your duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way. [You must also not let yourselves be influenced by public opinion.]

Ms. Klucznik moved to approve the proposed modifications to the instruction. Mr. Young seconded the motion and it passed unanimously.

(c) CR109B Further admonition about electronic devices

Ms. Jones stated that she spoke to judges who feel that the instruction is outdated. She presented changes to the committee.

Ms. Johnson suggested keeping the instruction general to ensure that the instruction remains relevant with changing technology. Judge Blanch suggested “electronic devices such as

phones, tablets, or computers." Judge McCullagh stated that the instruction should be readable because the instructions are read aloud.

CR109B Further admonition about electronic devices [Introduction].
Jurors have caused serious problems during trials by using electronic devices – such as phones, tablets, or computers - to research issues or share information about a case. You may be tempted to use these devices to investigate the case or to share your thoughts about the trial with others. Don't. While you are serving as a juror, you must not use electronic devices for these purposes, just as you must not read or listen to any sources outside the courtroom about the case or talk to others about it.

You violate your oath as a juror if you conduct your own investigation or if you communicate about this trial with others, and you may face serious personal consequences if you do. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "Tweet" or text about the trial; do not use electronic devices to gather or send information on the case; do not post updates about the trial on Facebook pages; do not use Wikipedia or other internet information sources, etc. Even using something as seemingly innocent as "Google Maps" or a dictionary to look up terms can result in a mistrial.

Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court and not on other sources of information.

Post-trial investigations are common. If improper activities are discovered, they will be brought to my attention, and the entire case might have to be retried at substantial cost.

Ms. Jones moved to approve the proposed modifications to the instruction. Ms. Klucznik seconded the motion and it passed unanimously.

(d) Proposed Instruction: Items not admitted into evidence

Judge Blanch presented an instruction for non-admitted exhibits and asked for comment from the committee. He stated that when he provides these instructions to juries, the juries submit fewer questions.

Ms. Johnson stated that some exhibits are allowed in the jury deliberation room, but some exhibits are not allowed. Ms. Jones was concerned that the instruction could be confusing because juries do not understand the difference between evidence and exhibits.

Judge Blanch stated juries do not appreciate the difficulty in answering jury questions. He stated the purpose of the instruction was limiting jury requests for non-evidence, such as transcripts, police reports, and other written or visual materials.

Judge McCullagh stated that the proposed last sentence should not be included because it is the subject of another instruction. Ms. Johnson suggested adding "audio materials." Mr. Nelson suggested adding a committee note regarding what exhibits the jury may request. Ms. Johnson disagreed and stated that a committee note may be more confusing.

Judge Blanch suggested "Items not admitted into evidence" as a title of the instruction.

CR206A. Items Not Admitted into Evidence – Closing.
Transcripts, police reports, or other written, audio, or visual materials may have been referenced during the trial but not admitted as exhibits. It is common during deliberations for jurors to ask to review these materials or to have transcripts of what witnesses said during trial. These materials, other than what may have been admitted as exhibits, may not be requested as part of your deliberations.

Ms. Johnson moved to approve the proposed instruction. Judge McCullagh seconded the motion and it passed unanimously.

(e) Proposed Instruction: Jury Questions During Deliberations – Closing

Judge Blanch presented an instruction for jury questions and asked for comment from the committee. He stated that he has given the proposed instruction to juries without a problem. He stated that this instruction would help juries write notes in an organized way.

Ms. Jones suggested "Jury Questions During Deliberations – Closing" as a title of the instruction.

CR217A. Jury Questions During Deliberations – Closing.
These instructions should contain all the information you need to decide this case based upon the evidence. However, if you have a question or need clarification during deliberations, write a note and give it to the bailiff. I will review it with the lawyers. We will answer your question as appropriate.

Ms. Klucznik moved to approve the proposed modifications to the instruction. Ms. Jones seconded the motion and it passed unanimously.

3. Other Business

Judge Blanch noted that the committee has a backlog of proposed instructions completed by Judge Taylor's subcommittee and asked for comment from the committee on how to speed up the process. The committee determined that they should address a few shorter instructions first and have a committee member review each set of instructions before they are presented at a meeting. The proposed instructions were divided among the members for review as follows:

- Assault, Burglary and Robbery – Ms. Johnson
- DUI, Traffic Statutes – Judge McCullagh
- Use of Force, Prisoner Offenses – Mr. Nelson
- Wildlife Crimes – Ms. Jones
- Murder – Ms. Klucznik and Mr. Fields

4. Adjourn **Committee**

The meeting was adjourned at 1:25 p.m. The next meeting is Wednesday, February 1, 2017.

Tab 2

CR ____. Unjustified Use of Force.

(Approved by Subcommittee)

The defendant did not have a duty to retreat from the force or threatened force when [he/she] was in a place where [he/she] had lawfully entered or remained. However, the defendant was not justified in using force if [he/she] [*include those which apply*]:

1. initially provoked the use of force against [himself/herself] with the intent to use force as an excuse to inflict bodily harm upon another person;
2. was attempting to commit, was committing, or was fleeing after the commission or an attempt to commit [*name of a felony offense*] described as Count __ [*if the alleged felony is uncharged, the court may need to provide a description of the elements*]; or
3. was the aggressor or was engaged in a combat by agreement, unless:
   a. the defendant withdrew from the encounter,
   b. effectively communicated to the other person his intent to do so, and
   c. the other person still continued the use of unlawful force.]

[*Include the following if supported by the evidence:* "Combat by agreement" does not include:

1. voluntarily entering into a relationship,
2. remaining in an ongoing relationship, or
3. entering or remaining in a place where one has a legal right to be.]

References
Utah Code § 76-2-402(2) and (3)

CR ____. Reasonable Belief.

(Approved by Subcommittee)

To decide whether it was reasonable for the defendant to believe that force or a threat of force was necessary to defend [*himself/herself or a third person*] against another person's imminent use of unlawful force, you may consider, but are not limited to, the following factors:

1. the nature of the danger;
2. the immediacy of the danger;
3. the probability that the unlawful force would result in death or serious bodily injury;
4. prior violent acts or violent propensities of the other person; and
5. any pattern of abuse or violence in the relationship of the parties.

References
Utah Code § 76-2-402(1)
Utah Code § 76-2-402(5)

CR ____. Use of Force Not Intended or Likely to Cause Death or Serious Bodily Injury in Defense of Habitation.

(Approved by Subcommittee)

A person is justified in using force against another, not including force which is intended or likely to cause death or serious bodily injury, when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation.

References
Utah Code § 76-2-405(1)
State v. Karr, 2015 UT App 287, 364 P.3d 49

CR ____. Use of Force Intended or Likely to Cause Death or Serious Bodily Injury in Defense of Habitation.

(Approved by Subcommittee)

It is a defense in this case if the defendant's use of force was legally justified. If the defendant's conduct was legally justified, you must enter a verdict of not guilty.

The use of force intended or likely to cause death or serious bodily injury is justified when and to the extent the defendant reasonably believed force was necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation only if: [*include 1, 2, or both 1 and 2 as applicable:*]

1. the defendant believes that:
   a. the entry was made or attempted in a violent or stealthy manner, and
   b. the defendant reasonably believed that:
      1) the entry was attempted or made for a violent purpose, and
      2) force was necessary to prevent the entry or attempted entry;

or

2. the defendant reasonably believed that:
   a. the entry was made or attempted for the purpose of committing a felony in the habitation, and
   b. force was necessary to prevent the commission of the felony.

References

Utah Code § 76-2-405(1)(a-b)
State v. Karr, 2015 UT App 287, 364 P.3d 49

CR ____. Use of Force to Prevent or Terminate Another Person's criminal interference with real property or personal property.

(Approved by Subcommittee)

It is a defense in this case if the defendant's use of force was legally justified. If the defendant's conduct was legally justified, you must enter a verdict of not guilty.

The use of force, other than deadly force, is justified when and to the extent the defendant reasonably believed force was necessary to prevent or terminate another person's criminal interference with real property or personal property if the property:

1. was lawfully in the defendant's possession;
2. was lawfully in the possession of a member of the defendant's immediate family; or
3. belonged to a person whose property the defendant had a legal duty to protect.

In determining whether the defendant's use of force was reasonable, you must consider any relevant facts proven in this case. In addition, you must consider:

1. the apparent or perceived extent of the damage to the property;
2. property damage previously caused by the other person;
3. threats of personal injury or damage to property that have been made previously by the other person; and
4. any patterns of abuse or violence between the defendant and the other person.

References

Utah Code § 76-2-406

Tab 3

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 2. Principles of Criminal Responsibility (Refs & Annos)
Part 4. Justification Excluding Criminal Responsibility

U.C.A. 1953 § 76-2-402

§ 76-2-402. Force in defense of person--Forcible felony defined

Currentness

(1)(a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.

(b) A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2)(a) A person is not justified in using force under the circumstances specified in Subsection (1) if the person:

(i) initially provokes the use of force against the person with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(ii) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(iii) was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

(b) For purposes of Subsection (2)(a)(iii) the following do not, by themselves, constitute "combat by agreement":

(i) voluntarily entering into or remaining in an ongoing relationship; or

(ii) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(a)(iii).

(4)(a) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape

of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property.

(b) Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

(c) Burglary of a vehicle, defined in Section 76-6-204, does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

(a) the nature of the danger;

(b) the immediacy of the danger;

(c) the probability that the unlawful force would result in death or serious bodily injury;

(d) the other's prior violent acts or violent propensities; and

(e) any patterns of abuse or violence in the parties' relationship.

Credits

Laws 1973, c. 196, § 76-2-402; Laws 1974, c. 32, § 6; Laws 1991, c. 10, § 5; Laws 1994, c. 26, § 1; Laws 2010, c. 324, § 126, eff. May 11, 2010; Laws 2010, c. 361, § 1, eff. May 11, 2010.

U.C.A. 1953 § 76-2-402, UT ST § 76-2-402
Current through 2016 Third Special Session

End of Document

Tab 4

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 2. Principles of Criminal Responsibility (Refs & Annos)
Part 4. Justification Excluding Criminal Responsibility

U.C.A. 1953 § 76-2-405

§ 76-2-405. Force in defense of habitation

Currentness

(1) A person is justified in using force against another when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation; however, he is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:

(a) the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence; or

(b) he reasonably believes that the entry is made or attempted for the purpose of committing a felony in the habitation and that the force is necessary to prevent the commission of the felony.

(2) The person using force or deadly force in defense of habitation is presumed for the purpose of both civil and criminal cases to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry is unlawful and is made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony.

Credits
Laws 1973, c. 196, § 76-2-405; Laws 1985, c. 252, § 1.

U.C.A. 1953 § 76-2-405, UT ST § 76-2-405
Current through 2016 Third Special Session

End of Document

Tab 5

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 2. Principles of Criminal Responsibility (Refs & Annos)
Part 4. Justification Excluding Criminal Responsibility

U.C.A. 1953 § 76-2-406

§ 76-2-406. Force in defense of property--Affirmative defense

Currentness

(1) A person is justified in using force, other than deadly force, against another when and to the extent that the person reasonably believes that force is necessary to prevent or terminate another person's criminal interference with real property or personal property:

(a) lawfully in the person's possession;

(b) lawfully in the possession of a member of the person's immediate family; or

(c) belonging to a person whose property the person has a legal duty to protect.

(2) In determining reasonableness under Subsection (1), the trier of fact shall, in addition to any other factors, consider the following factors:

(a) the apparent or perceived extent of the damage to the property;

(b) property damage previously caused by the other person;

(c) threats of personal injury or damage to property that have been made previously by the other person; and

(d) any patterns of abuse or violence between the person and the other person.

Credits
Laws 1973, c. 196, § 76-2-406; Laws 2010, c. 377, § 1, eff. May 11, 2010.

U.C.A. 1953 § 76-2-406, UT ST § 76-2-406
Current through 2016 Third Special Session

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Tab 6

364 P.3d 49
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Adam **KARR**, Appellant.

No. 20130878–CA.
|
Nov. 27, 2015.

Synopsis

Background: Defendant was convicted in the Third District Court, Salt Lake Department, James T. Blanch, J., of murder and obstruction of justice. Defendant appealed.

Holdings: The Court of Appeals, Davis, J., held that:

[1] **State** could defeat presumption that defendant was justified in using deadly force in defense of his habitation by showing that entry was lawful or not made with force, violence, stealth, or felonious purpose, and

[2] error in jury instructions explaining how **State** could rebut presumption was harmless.

Affirmed.

J. Frederic Voros, J., concurred in result and filed opinion in which Stephen L. Roth, J., concurred in part.

Stephen L. Roth, J., concurred and filed opinion.

West Headnotes (6)

[1] Criminal Law
Instructions

Claims of erroneous jury instructions present questions of law that are reviewed for correctness.

Cases that cite this headnote

[2] Criminal Law
Errors favorable to defendant

Any error in instructing jury that the presumption of reasonableness applied in murder trial in which defendant asserted that he was justified in using force in defense of his habitation was harmless, where error benefitted defendant. West's U.C.A. § 76–2–405.

Cases that cite this headnote

[3] Criminal Law
Compulsion or necessity;justification in general

The statute providing that a person is justified in using force in defense of habitation is an affirmative defense. West's U.C.A. § 76–2–405.

Cases that cite this headnote

[4] Criminal Law
Compulsion or necessity;justification in general

Criminal Law
Particular facts

Once the presumption that a defendant was justified in using deadly force in defense of habitation applies, the **State** may defeat it by showing that the entry was lawful or not made with force, violence, stealth, or felonious purpose. West's U.C.A. § 76–2–405.

Cases that cite this headnote

[5] Criminal Law
Instruction as to evidence

Error in jury instruction explaining that the **State** can rebut the presumption that defendant was justified in using deadly force in defense of his habitation by showing either that the victim's entry or attempted entry was not made for purposes of assaulting or committing a felony or that defendant's actions were unreasonable or unnecessary was harmless in murder trial; **State** did not

rely on "committing a felony language," and State sought to rebut presumption by showing that defendant's beliefs and actions were not reasonable. West's U.C.A. § 76–2–405(1)(a, b).

Cases that cite this headnote

[6] Criminal Law

Prejudice to rights of party as ground of review

Only harmful and prejudicial errors constitute grounds for granting a new trial.

1 Cases that cite this headnote

Attorneys and Law Firms

***49** Teresa L. Welch, Salt Lake City, and John B. Plimpton, for Appellant.

Sean D. Reyes and Jeanne B. Inouye, Salt Lake City, for Appellee.

Judge JAMES Z. DAVIS authored this Opinion, in which Judge STEPHEN L. ROTH concurred. [1] Judge J. FREDERIC VOROS JR. concurred in the result, with opinion, in which Judge STEPHEN L. ROTH concurred in part, with opinion.

Opinion

DAVIS, Judge:

¶ 1 Adam Karr appeals from his convictions of murder and obstruction of justice. We affirm.

***50** BACKGROUND

¶ 2 Karr's convictions stem from a fight that occurred during a party at the home Karr shared with his brother (Brother). [2] The victim (Victim) arrived at the party as a guest of Karr and Brother's mutual friend. Victim became increasingly "obnoxious" and "belligerent" as the night wore on. Karr and Brother eventually asked Victim to leave, but Victim resisted. When Victim did leave, he returned minutes later to retrieve the liquor he brought to the party. While Victim waited for someone to bring him his liquor, he began making threats against Brother that Karr overheard. After Victim got his alcohol back, a fight broke out among Victim, Karr, and Brother during which Brother restrained Victim while Karr stabbed Victim seven times. Victim ultimately died from his injuries. Karr was charged with one count of murder and one count of obstructing justice.

¶ 3 Karr's defense at trial centered around his right to use force to defend his home pursuant to Utah Code section 76–2–405. The jury received instructions on Karr's defense of habitation theory and returned with guilty verdicts. Karr appeals.

ISSUE AND STANDARD OF REVIEW

[1] ¶ 4 Karr raises several arguments on appeal focusing on the accuracy of the defense of habitation jury instruction. "Claims of erroneous jury instructions present questions of law that we review for correctness." *State v. Jeffs,* 2010 UT 49, ¶ 16, 243 P.3d 1250. [3]

ANALYSIS

[2] **[3]** ¶ 5 Karr argues that the jury instructions undermined the presumption of reasonableness he was entitled to under the defense of habitation statute. [4] We reject Karr's argument but recognize that the relevant jury instruction, Instruction 36, does contain errors. Those errors, however, are harmless. *See State v. Young,* 853 P.2d 327, 347 (Utah 1993) ("Even if [a] defendant can show that the instructions given by the trial court were in a technical sense incorrect, he has [to also] show[ ] that the instructions prejudiced him."). We address each issue in turn.

I. Karr's Claims of Error Are Without Merit.

¶ 6 The defense of habitation statute provides,

> (1) A person is justified in using force against another when and to the extent ***51** that he reasonably believes

> that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation; however, he is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:
>
> (a) the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence; or
>
> (b) he reasonably believes that the entry is made or attempted for the purpose of committing a felony in the habitation and that the force is necessary to prevent the commission of the felony.
>
> (2) The person using force or deadly force in defense of habitation is presumed for the purpose of both civil and criminal cases to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry is unlawful and is made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony.

Utah Code Ann. § 76–2–405 (LexisNexis 2012).

¶ 7 This court has explained that "[w]hile not a model of clarity"—subsection (1) of the statute "speaks of reasonable beliefs and subsection (2) of reasonable action and reasonable fear—the thrust of subsection (2) is to vest persons who defend their habitation under circumstances described in subsection (1) with the presumption that their beliefs and actions were reasonable." ***State*** *v. Moritzsky,* 771 P.2d 688, 691 (Utah Ct.App.1989).

¶ 8 Two of the jury instructions provided at **Karr's** trial mirror the statutory language; Instruction 34 recites subsection (1) of the statute, and Instruction 35 recites subsection (2). Following those two instructions is Instruction 36, which reads,

> However, even though the defendant is entitled to the presumption that his actions were reasonable,[5] the **state** may rebut that presumption by showing either that the entry was not made for the purposes of assaulting or offering personal violence to any person in the residence or for the purpose of committing a felony, or by showing that the defendant's actions were not reasonable or necessary....

¶ 9 **Karr** argues that Instruction 36 "significantly undermined the presumption of reasonableness [he] was entitled to under" subsection (2) of the statute. According to **Karr**,

> Instruction 36 told the jury to find [him] guilty if the prosecution proved any one of the following four facts: (1) [Victim's] entry was not made for the purpose of assaulting or offering personal violence to any person in the residence; or (2) [Victim's] entry was not made for the purpose of committing a felony; or (3) [**Karr's**] actions were not reasonable; or (4) [**Karr's**] actions were not necessary.

¶ 10 **Karr** acknowledges that the **State** is entitled to rebut the presumption of reasonableness contained in the statute but argues that the **State** must do so exclusively by showing that **Karr's** belief that he needed to use deadly force to prevent the entry was unreasonable. According to **Karr**, a showing that Victim's entry was lawful rebuts the availability of the defense as a whole, not the presumption of reasonableness a defendant is entitled to once the unlawfulness of the entry is supported by the evidence. **Karr's** argument implies that once a fact like the unlawfulness of the entry is supported by the evidence, thereby "triggering" the availability of the defense and the presumption of reasonableness contained therein, that fact cannot be rebutted.

[4] ¶ 11 We disagree with **Karr's** interpretation of the defense of habitation statute. "When we interpret statutes, unless a statute is ambiguous, we look exclusively to a statute's ***52** plain language to ascertain the statute's meaning." *Prince v. Bear River Mut. Ins. Co.,* 2002 UT 68, ¶ 21, 56 P.3d 524. The defense of habitation statute indicates that the presumption is available if two

conditions are met: (1) the victim's entry was unlawful and (2) the victim's entry was "made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony." *See* Utah Code Ann. § 76–2–405(2) (LexisNexis 2012); *Moritzsky,* 771 P.2d at 692. Thus, once the presumption applies, the **State** may defeat it by refuting the defendant's evidence that either of the two presumption-creating elements exist, i.e., by showing that the entry was (1) lawful or (2) not made with force, violence, stealth, or felonious purpose. *See* Utah Code Ann. § 76–2–405(2). Our case law also provides that once the presumption is triggered, the **State** may rebut it by proving "that in fact defendant's beliefs and actions under subsection (1) were not reasonable." [6] *Moritzsky,* 771 P.2d at 691; *see also* Utah Code Ann. § 76–2–405(1)(a)–(b) (describing the defendant's beliefs and actions under subsection (1) as pertaining to whether "the entry [was] attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation"; whether "the entry [was] made or attempted for the purpose of committing a felony in the habitation"; and whether force was necessary to prevent the unlawful entry, assault, offer of violence, or commission of a felony). Thus, we reject **Karr's** argument that the only means by which the **State** could rebut the presumption was by showing that **Karr's** beliefs were not reasonable.

¶ 12 Moreover, the method the **State** used to rebut the presumption was to show that **Karr's** beliefs and actions were unreasonable—precisely the method **Karr** argues the **State** was required to use. The **State** focused on evidence indicating that Victim was neither inside the house nor attempting to reenter at the time of the stabbing and that Victim's intent in remaining by the entryway was to get his alcohol back. Indeed, **Karr** recognized in his opening brief that evidence showing that Victim's entry was, in fact, not "attempted or made for the purpose of assaulting" anyone in the home, *see* Utah Code Ann. § 76–2–405(1)(a), "might be relevant to deciding whether [his] belief was reasonable." (Emphasis omitted.) As the **State** asserted in closing argument, **Karr's** use of deadly defensive force "has to be only to the extent that is necessary to stop [Victim] from coming back in the house, ... not just to get his alcohol, but from coming back in the house to fight, beat up, cause a felony, to do something." The **State** acknowledged that Victim may have acted inappropriately during the party but argued that Victim's "actions are not on trial" and that Victim's alleged threats of future harm do not provide a reasonable basis to use deadly force. The prosecutor **stated**, "You can't kill people because you think they're going to do something in the future. You can't kill people because of what they did [earlier], no matter how bad it was."

¶ 13 In closing argument, the prosecutor also pointed out that several eyewitnesses testified that the fight occurred outside the house and that any blood found inside the house could have been tracked inside from other partygoers' feet; that various eyewitnesses testified about Victim's desire to get his alcohol before leaving; that Victim was unarmed; and that Victim did not throw the proverbial "first punch" or even try to fight back. Additionally, although it is undisputed that Victim was behaving "obnoxiously" and "belligerently," the record contained evidence that Brother had Victim restrained in a headlock on the front porch before and while **Karr** stabbed him repeatedly. In other words, because the evidence indicated that Victim was already outside the home and restrained prior to **Karr's** use of deadly force, it follows that Victim was neither attempting to reenter the home nor attempting to commit an assault in the home prior to **Karr's** use of deadly force, rendering unreasonable **Karr's** fear of imminent peril and his belief that deadly force was necessary.

***53** II. Instruction 36 Contains Harmless Errors.

[5] ¶ 14 Instruction 36 explains that the **State** can rebut the presumption by showing either (1) that Victim's entry or attempted entry was not made for purposes of assaulting or committing a felony or (2) that **Karr's** actions were unreasonable or unnecessary. Instruction 36's focus on the purpose of Victim's entry does not track the statute or case law applying it. But whether the victim entered the home for the purpose of assaulting someone or committing a felony *is* relevant to the reasonableness of the defendant's fears and beliefs at the time of the victim's entry. *See* Utah Code Ann. § 76–2–405(1)(a)–(b). Nonetheless, whether **Karr** believed that Victim entered or attempted to enter his home for the purpose of committing a felony, rather than an assault, was not at issue in this case. *See Green v. Louder,* 2001 UT 62, ¶ 17, 29 P.3d 638 (ruling that a trial court errs when giving a jury instruction that is "inconsistent with the evidence presented at trial"). Additionally, Instruction 36 focused

only on the reasonableness of Karr's action, when it should have directed the jury to consider Karr's "beliefs *and* actions." *See State v. Moritzsky,* 771 P.2d 688, 691 (Utah Ct.App.1989) (emphasis added). For these reasons, we consider Instruction 36 to be technically incorrect.

[6] ¶ 15 Nonetheless, "[o]nly harmful and prejudicial errors constitute grounds for granting a new trial." *See State v. Young,* 853 P.2d 327, 347 (Utah 1993). The errors here are harmless. The State did not rely on the "committing a felony" language, *see State v. DeAlo,* 748 P.2d 194, 198 (Utah Ct.App.1987) (ruling that the erroneous inclusion of a "superfluous" jury instruction was "harmless"), and we are not convinced that the omission of the words "and beliefs" in Instruction 36 had an effect on the outcome of the trial where the State sought to rebut the presumption by showing that both Karr's beliefs and actions were not reasonable. *See supra* ¶¶ 12–13; *see also Green,* 2001 UT 62, ¶ 17, 29 P.3d 638 (explaining that an error in a jury instruction is harmless if "we are not convinced that without this instruction the jury would have reached a different result").

¶ 16 In sum, although Instruction 36 could have been clearer, we reject Karr's claims of error in the instruction and are not convinced that any errors in the instruction were prejudicial. *See State v. Campos,* 2013 UT App 213, ¶ 64, 309 P.3d 1160 ("[I]f taken as a whole they fairly instruct the jury on the law applicable to the case, the fact that one of the instructions, standing alone, is not as accurate as it might have been is not reversible error." (alteration in original) (citation and internal quotation marks omitted)). Accordingly, the trial court did not err when it gave the jury Instruction 36. [7]

CONCLUSION

¶ 17 Instruction 36 did not undermine Karr's entitlement to the presumption of reasonableness provided by subsection (2) of the defense of habitation statute. Accordingly, the instruction did not prejudice Karr. We affirm Karr's convictions.

VOROS, Judge (concurring):

¶ 18 I concur in the result. I agree with the majority that, on the facts before the jury, the instructional errors were harmless. I write to urge the legislature to consider clarifying the defense-of-habitation statute and in particular its presumption of reasonableness. *See* Utah Code Ann. § 76–2–405 (LexisNexis 2012).

¶ 19 Subsection (1) of section 405 defines the defense of habitation. It consists of a single sentence of 157 words. The subsection's proviso specifies when deadly force may be used in defense of one's habitation. Such force may be used in either of two circumstances. *See id.* § 76–2–405(1)(a) and (b).

¶ 20 The first circumstance occurs when three elements are all present. *See* ***54** *id.* § 76–2–405(1)(a). The first element includes three alternative sub-elements ("the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth"). *Id.* The second element contains two alternative sub-elements, each of which includes two alternative sub-sub-elements (the defendant reasonably believes that the entry is either "attempted or made" for either "assaulting or offering personal violence to any person ... dwelling ... or being in the habitation"). *Id.* The third element requires only a single showing ("the force is necessary to prevent the assault or offer of personal violence"). *Id.*

¶ 21 The second circumstance occurs when two elements are both present. *See id.* § 76–2–405(1)(b). The first element includes two alternative sub-elements ("the entry is made or attempted for the purpose of committing a felony in the habitation"). *Id.* The second element requires a single showing (the defendant reasonably believes "that the force is necessary to prevent the commission of the felony").

¶ 22 The complexity of subsection 405(1) renders the defense of habitation difficult to apply in practice. By my calculation, subsection 405(1)'s one sentence creates 24 possible permutations for establishing the defense of habitation.

¶ 23 Subsection 405(2)'s presumption of reasonableness further complicates the analysis. *See* Utah Code Ann. § 76–5–405(2) (LexisNexis 2012). That subsection lists five facts that, if established, trigger the rebuttable presumption of two facts: (1) that the actor "acted reasonably" and (2) that the actor "had a reasonable fear of imminent peril of death or serious bodily injury" (the presumed facts). *Id.* The first presumed fact roughly

correlates to the elements of the defense of habitation in subsection (1), which requires that the defendant acted while "reasonably believing" certain things. But it does not track the text of the defense of habitation as defined in subsection (1).

¶ 24 Similarly, the second presumed fact loosely correlates to certain elements of the defense of habitation, such as whether the defendant "reasonably believes" the victim entered for the purpose of "offering personal violence to any person" (whatever that means). But again, it does not track the text of any element of the defense of habitation and in fact seems aimed at establishing an element of the related—but nevertheless distinct—defense-of-person statute. *See id.* § 76–2–402(1)(b) ("A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force, or to prevent the commission of a forcible felony.").

¶ 25 In short, subsection 405(1) creates a complex matrix of elements necessary to establish the defense of habitation, and subsection 405(2) creates a presumption that permits certain facts to be presumed. But the presumed facts only approximate, not duplicate, elements of the defense of habitation. For these reasons, I urge the legislature to consider amending this section to the extent it deems appropriate.

¶ 26 Of course, while legislatures enact statutes, courts apply them in live cases, and we have one before us. Like the majority, I believe the appeal turns on prejudice. **Karr** explicates well the flaws in Instruction 36—flaws that (I believe) derive from the defense-of-habitation statute's complexity as catalogued above. That said, Instruction 36 instructed the jury that "defendant is entitled to the presumption that his actions were reasonable." It then described how the prosecution could rebut that presumption. That description was, as **Karr** contends, wrong. I agree with **Karr's** contention that "to rebut the presumption of reasonableness under § 76–2–405(2), the prosecution must show that it was unreasonable for the defendant to believe that deadly force was necessary."

¶ 27 For reasons explained in the majority opinion, demonstrated in the **State's** brief, and apparent on the record, I conclude that the prosecution did show, beyond a reasonable doubt, that **Karr** could not have reasonably believed that deadly force was necessary here. Uncontroverted trial testimony established ***55** that Victim, after partying for some time, stepped out momentarily then stepped back inside to retrieve some liquor; that **Karr** quarreled with Victim, who was drunk; that **Karr** stabbed Victim outside on the porch; that **Karr** stabbed Victim, who was unarmed, seven times; that Brother restrained Victim during the stabbing; and that Victim did not resist. In contrast, **Karr's** own version of events, as reported to police, evolved over time. First he said he was not present at the house where the stabbing occurred; then that he acted in defense of Brother; then that Victim attacked him with a knife; and finally that when he saw Victim go for Brother, he "snapped."

¶ 28 On this record, the instructional errors do not undermine my confidence in the jury's verdict. I accordingly concur in the result.

ROTH, Judge (concurring):

¶ 29 I concur in the lead opinion. In addition, I join Judge Voros in "urg [ing] the legislature to consider clarifying the defense-of-habitation statute and in particular the presumption of reasonableness." *See supra* ¶ 18. I do so for the reasons he has cogently **stated** in his concurrence.

All Citations

364 P.3d 49, 801 Utah Adv. Rep. 25, 2015 UT App 287

Footnotes

1 Judge James Z. Davis participated in this case as a member of the Utah Court of Appeals. He retired from the court on November 16, 2015, before this decision issued.

2 "In reviewing a jury verdict, we view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." ***State*** *v. Dunn,* 850 P.2d 1201, 1205 (Utah 1993).

3 We reject the **State's** claims that **Karr** has not adequately preserved his arguments for our review.

4 **Karr** also contends that the trial court erroneously "instructed the jury to determine whether the evidence triggered the presumption of reasonableness because the court was obligated to determine that issue itself." This is not what occurred;

Instruction 36 affirmatively instructed the jury that the presumption applied. **Karr** alternatively argues that the trial court "erred when it failed to instruct the jury on the evidentiary threshold sufficient to trigger the presumption." However, because the court instructed the jury that the presumption applied, there was no need for the court to also instruct the jury on the evidentiary threshold necessary to trigger the presumption. Although we believe the trial court may have erred by instructing the jury that the presumption applied, *see* ***State*** *v. Patrick,* 2009 UT App 226, ¶ 19, 217 P.3d 1150 (explaining that "the statutory presumption of reasonableness" is "preclude [d]" by a finding that the victim's entry was lawful), the error benefited **Karr** and accordingly is not a prejudicial error warranting reversal, *see* ***State*** *v. Lafferty,* 749 P.2d 1239, 1255 (Utah 1988) ("An error is prejudicial only if we conclude that absent the error, there is a reasonable likelihood of a more favorable outcome for the defendant."). **Karr** also discusses at length the characterization of the defense of habitation as an evidentiary presumption versus an affirmative defense. Our case law settles any dispute as to the nature of the rights provided by the defense of habitation statute; it is an affirmative defense. *See, e.g., Patrick,* 2009 UT App 226, ¶ 18, 217 P.3d 1150 (referring to a defense of habitation argument as a "justification defense"); *Salt Lake City v. Hendricks,* 2002 UT App 47U, para. 2, 2002 WL 257553 (referring to the language in the defense of habitation statute as "appropriate for an affirmative defense"); ***State*** *v. Moritzsky,* 771 P.2d 688, 691 n. 2 (Utah Ct.App.1989) (identifying what a defendant relying on the defense of habitation statute must do "[t]o mount a successful affirmative defense of this sort").

5 Instruction 37 adds, "In the context of defense of habitation, the facts and circumstances constituting reasonableness must be judged not from the actor's subjective viewpoint, but rather from the viewpoint of a person of ordinary care and prudence in the same or similar circumstances."

6 This refutes **Karr's** argument that the "beliefs" at issue in subsection (2) of the statute are not the same as those referenced in subsection (1).

7 Because we have determined that only one error occurred below—that Instruction 36 erroneously, but harmlessly, contained the "committing a felony" language and omitted the words "and beliefs"—we necessarily reject **Karr's** cumulative error argument. *See generally* ***State*** *v. Dunn,* 850 P.2d 1201, 1229 (Utah 1993) (explaining the cumulative error doctrine). Likewise, we need not address **Karr's** argument that a reversal and new trial on his murder conviction requires a reversal and new trial on his obstruction of justice conviction.

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Tab 7

299 P.3d 1133
Supreme Court of Utah.

STATE of Utah, Plaintiff and Respondent,
v.
Darren BERRIEL, Defendant and Petitioner.

No. 20110926.
|
April 5, 2013.

Synopsis

Background: Defendant was convicted in the Fourth District Court, Provo Department, Gary D. Stott, J., of aggravated assault. Defendant appealed. The Court of Appeals, 262 P.3d 1212, affirmed. Defendant sought certiorari review. Writ was granted.

Holdings: The Supreme Court, Durham, J., held that:

[1] court of appeals' employment of incorrect standard of review was harmless error, and

[2] evidence was insufficient to warrant jury instruction on defense of another.

Affirmed.

West Headnotes (16)

[1] Criminal Law
Decisions of Intermediate Courts

On certiorari review, the supreme court reviews for correctness the decision of the court of appeals, not the decision of the district court.

Cases that cite this headnote

[2] Criminal Law
Decisions of Intermediate Courts

On certiorari review, the correctness of the court of appeals' decision turns on whether that court correctly reviewed the trial court's decision under the appropriate standard of review.

1 Cases that cite this headnote

[3] Criminal Law
Failure to instruct

Refusal to give a jury instruction is reviewed for abuse of discretion, with the precise amount of deference afforded on review depending on the type of issue presented; on issues that are primarily or entirely factual, the reviewing court affords significant deference, while on issues that are primarily or entirely legal in nature, it affords little or no deference.

2 Cases that cite this headnote

[4] Criminal Law
Instructions

A district court's refusal to instruct the jury on a defendant's theory of the case, the issue of whether the record evidence, viewed in its totality, supports the defendant's theory of the case is primarily a factual question, and thus reviewed deferentially.

3 Cases that cite this headnote

[5] Criminal Law
Questions of Fact and Findings

Factual determinations are entitled to more deference than any other kind of determination, largely for reasons of institutional competency; trial courts are better factfinders than appellate courts.

1 Cases that cite this headnote

[6] Criminal Law
Instructions

The issue of whether to instruct the jury on a theory that is supported by the evidence presents a legal question, that is reviewed for errors of law.

1 Cases that cite this headnote

[7] **Criminal Law**
Necessity of instructions

When the record evidence supports a defendant's theory of the case, the defendant is legally entitled to have an instruction on that theory given to the jury.

3 Cases that cite this headnote

[8] **Criminal Law**
Proceedings After Judgment

Court of appeals' employment of correctness standard of review in analyzing trial court's refusal to instruct on defendant's theory of the case in prosecution for aggravated assault was harmless error, where such standard was more favorable to defendant than correct standard, namely, abuse of discretion.

1 Cases that cite this headnote

[9] **Criminal Law**
Necessity of instructions

Defendant is entitled to have the jury instructed on the defense's theory of the case if there is any basis in the evidence to support that theory.

3 Cases that cite this headnote

[10] **Assault and Battery**
Defense of another

Imminence requirement, as applicable to the defense to a criminal charge of defense of another, distinguishes lawful defensive force from two forms of unlawful force, namely, that which comes too soon and that which comes too late; preemptive strike against a feared aggressor is illegal force used too soon, and retaliation against a successful aggressor is illegal force used too late. West's U.C.A. § 76–2–402(1)(a).

2 Cases that cite this headnote

[11] **Assault and Battery**
Defense of another

For purposes of the defense to a criminal charge of defense of another, defensive force is neither a punishment nor an act of law enforcement, but rather an act of emergency that is temporally and materially confined, with the narrow purpose of warding off the pending threat.

1 Cases that cite this headnote

[12] **Assault and Battery**
Defense of another

Necessity requirement, as applicable to the defense to a criminal charge of defense of another, distinguishes wanton violence from force that is crucial to averting an unlawful attack; force is justifiable in defense of another only if a reasonable belief in the imminence of unlawful harm and in the necessity of defensive force coincide with the defendant's use of force. West's U.C.A. § 76–2–402.

1 Cases that cite this headnote

[13] **Assault and Battery**
Provocation or justification

Evidence that defendant reasonably believed that third person was in imminent danger at time of assault and that assault was necessary to protect such third person was insufficient to warrant jury instruction on defense of another, in prosecution for aggravated assault; while third person had called defendant, claiming that victim was hurting her and asking for help, at time of incident victim and third person did not appear to be arguing, victim did not threaten, touch, harm, or approach third person and did not exhibit weapon, and victim's attention was directed entirely at defendant, who was coming at him with a knife, while third person was 15 feet away and out of path of confrontation. West's U.C.A. § 76–2–402.

Cases that cite this headnote

[14] **Assault and Battery**
Defense of another

For purposes of the defense to a criminal charge of defense of another, an aggressor's act of violence does not give a would-be rescuer a continuing license to attack the aggressor at any time until the would-be rescuer is assured of the victim's safety. West's U.C.A. § 76–2–402.

Cases that cite this headnote

[15] **Assault and Battery**
Defense of another

For purposes of the defense to a criminal charge of defense of another, an aggressor's prior violent acts or violent propensities and any patterns of abuse or violence in the parties' relationship are relevant to a jury's assessment of whether a defendant reasonably believed harm was imminent. West's U.C.A. § 76–2–402.

Cases that cite this headnote

[16] **Assault and Battery**
Defense of another

For purposes of the defense to a criminal charge of defense of another, a history of violence or threats of future violence, standing alone, are legally insufficient to create a situation of imminent danger. West's U.C.A. § 76–2–402.

1 Cases that cite this headnote

Attorneys and Law Firms

***1135** John E. Swallow, Att'y Gen., Ryan D. Tenney, Asst. Att'y Gen., for respondent.

Douglas J. Thompson, Provo, for petitioner.

On Certiorari to the Utah Court of Appeals

Justice DURHAM, opinion of the Court:

INTRODUCTION

¶ 1 On certiorari, we consider whether the court of appeals erred in affirming the district court's refusal to instruct the jury on defense of a third person. We consider whether the evidence supports defendant Darren Berriel's theory that he stabbed the victim in defense of a third person under Utah Code section 76–2–402. We agree with the court of appeals that there is no basis in the evidence to support this theory and accordingly affirm.

BACKGROUND

¶ 2 Darren Berriel was convicted of aggravated assault for stabbing the victim, Luis. On the evening of the stabbing, Mr. Berriel received a phone call from Rachel, Luis's girlfriend. Rachel told Mr. Berriel that Luis "had been hurting [her]" and asked him "to come over and help." According to Mr. Berriel's friends who were with him when he received the call, Rachel was screaming and crying over the phone. After the phone call, Mr. Berriel told his friends that Rachel "was getting beat up" by Luis and that he needed to go to her house to help her.

¶ 3 Mr. Berriel and at least three friends immediately drove to the house where Rachel and Luis lived with Rachel's family. On the way, Mr. Berriel called Krissy, Rachel's friend, and asked her to "get Rachel away from the house." In the meantime, Luis and Rachel had left the house and driven to pick up Rachel's thirteen-year-old brother.

¶ 4 Luis and Rachel returned to the house with Rachel's brother shortly after Mr. Berriel and his friends arrived. After parking on the street in front of the house, Rachel and her brother exited from the passenger's side of the car onto the sidewalk, and Luis exited from the driver's side onto the street. ***1136** Mr. Berriel and his friends were waiting on the opposite side of the street. Mr. Berriel and Luis approached one another, meeting in the middle of the road. According to Luis's testimony, he told Mr. Berriel, "[Y]ou don't need that knife to fight with me, if you want to fight with me." According to another observer, Luis told Mr. Berriel, "You don't know what's going on, stay out of it."

¶ 5 Mr. Berriel then thrust a knife toward Luis's torso. Luis moved his arms to protect his abdomen, and the knife slashed his left forearm, causing a laceration that required stitches. Luis then ran toward the house to get his dog, and Mr. Berriel and his friends drove away. Meanwhile, Rachel stood at least fifteen feet away from where the stabbing occurred and was not involved in the altercation.

¶ 6 Mr. Berriel later turned himself in to law enforcement and was prosecuted for the stabbing. At trial, the district court instructed the jury on self-defense. However, the court refused to instruct the jury on defense of a third person because it determined that Mr. Berriel's theory that he stabbed Luis in defense of Rachel was "not supported by the evidence." Following his conviction for aggravated assault, Mr. Berriel appealed the district court's refusal to instruct the jury on defense of a third person. [1] A divided panel of the court of appeals affirmed, explaining that "a jury could not reasonably have concluded" that Rachel was in imminent danger at the time of the assault. *State v. Berriel,* 2011 UT App 317, ¶ 6, 262 P.3d 1212. Mr. Berriel petitioned this court for certiorari, and we agreed to consider whether the court of appeals erred in affirming the district court's refusal to give a jury instruction on defense of a third person.

STANDARD OF REVIEW

[1] **[2]** ¶ 7 "On certiorari, we review for correctness the decision of the court of appeals, not the decision of the district court. The correctness of the court of appeals' decision turns on whether that court correctly reviewed the trial court's decision under the appropriate standard of review." *Utah Cnty. v. Butler,* 2008 UT 12, ¶ 9, 179 P.3d 775 (internal quotation marks omitted).

ANALYSIS

I. THE DISTRICT COURT'S REFUSAL TO ISSUE A JURY INSTRUCTION IS REVIEWABLE FOR ABUSE OF DISCRETION

[3] ¶ 8 "[T]he refusal to give a jury instruction is reviewed for abuse of discretion...." *Miller v. Utah Dep't of Transp.,* 2012 UT 54, ¶ 13, 285 P.3d 1208. The precise amount of deference we afford on review depends on the type of issue presented. On issues that are primarily or entirely factual, we afford significant deference; on issues that are primarily or entirely legal in nature, we afford little or no deference.

[4] **[5]** ¶ 9 A district court's refusal to instruct the jury on a defendant's theory of the case presents questions on both sides of the spectrum. The issue of whether the record evidence, viewed in its totality, supports the defendant's theory of the case is primarily a factual question. Factual determinations are entitled to more deference than any other kind of determination, largely for reasons of institutional competency. *Manzanares v. Byington (In re Adoption of Baby B.),* 2012 UT 35, ¶ 40, 308 P.3d 382, 2012 WL 4486225. Trial courts are better factfinders than appellate courts. *See id.* For example, here, the district court's first-hand familiarity with the testimony and other evidence puts it in a better position than an appellate court to determine whether the evidence supports the defendant's theory.

[6] **[7]** ¶ 10 In contrast, the issue of whether to instruct the jury on a theory that *is* supported by the evidence presents a legal question. When the record evidence supports a defendant's theory, the defendant "is legally entitled to have [an] instruction [on ***1137** that theory] given to the jury. In those circumstances, refusal constitutes an error of law, and an error of law always constitutes an abuse of discretion." *Miller,* 2012 UT 54, ¶ 13 n. 1, 285 P.3d 1208.

[8] ¶ 11 The court of appeals employed a correctness standard of review, in accordance with our precedent at the time it issued its opinion. *State v. Berriel,* 2011 UT App 317, ¶ 4, 262 P.3d 1212 (citing *State v. Gallegos,* 2009 UT 42, ¶ 10, 220 P.3d 136). This error was harmless to Mr. Berriel. In fact, the correctness standard was more favorable to him than the abuse-of-discretion standard we set forth in this opinion. As explained below, we hold that under either standard of review, the district court did not err in refusing to instruct the jury on defense of a third person.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID

NOT ERR BECAUSE MR. BERRIEL'S THEORY IS NOT SUPPORTED BY THE EVIDENCE

[9] ¶ 12 A "[d]efendant is entitled to have the jury instructed on [the defense's] theory of the [case] if there is any basis in the evidence to support that theory." *State v. Brown,* 607 P.2d 261, 265 (Utah 1980). Mr. Berriel contends that the record in this case supports his theory that he stabbed Luis in defense of Rachel.

¶ 13 Under Utah Code section 76–2–402(1)(a), "[a] person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force." [2] "When interpreting a statute, we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning." *Marion Energy, Inc. v. KFJ Ranch P'ship,* 2011 UT 50, ¶ 14, 267 P.3d 863 (internal quotation marks omitted). The key terms in section 76–2–402 for purposes of this case are "imminent" and "necessary."

[10] **[11]** **[12]** ¶ 14 Black's Law Dictionary defines "imminent danger" as "[a]n immediate, real threat to one's safety" and as "[t]he danger resulting from an immediate threatened injury." 450 (9th ed. 2009). Webster's Dictionary defines "imminent" as "[a]bout to occur at any moment" and as "impending." WEBSTER'S II NEW COLLEGE DICTIONARY 553 (1995). The imminence requirement distinguishes lawful defensive force from two forms of unlawful force: that which comes too soon and that which comes too late. "A preemptive strike against a feared aggressor is illegal force used too soon; and retaliation against a successful aggressor is illegal force used too late." George P. Fletcher, BASIC CONCEPTS OF CRIMINAL LAW 133–34 (1998). Defensive force "is neither a punishment nor an act of law enforcement" but rather "an act of emergency that is temporally and materially confined[,] with the narrow purpose of warding off the pending threat." Onder Bakircioglu, *The Right to Self–Defence in National and International Law: The Role of the Imminence Requirement,* 19 IND. INT'L & COMP. L. REV. 1, 21 (2009). Webster's Dictionary defines "necessary" as "[a]bsolutely required," "indispensable," and "[u]navoidably determined by prior conditions or circumstances." WEBSTER'S II NEW COLLEGE DICTIONARY 731 (1995). The necessary requirement distinguishes wanton violence from force that is crucial to averting an unlawful attack. Force is justifiable under section 76–2–402 only if a reasonable belief in the imminence of unlawful harm and in the necessity of defensive force coincide with the defendant's use of force.

¶ 15 In this case, Mr. Berriel argues that three pieces of evidence support his theory that he reasonably believed Rachel was in imminent danger at the time of the stabbing: (1) Rachel's phone call for help; (2) the fact that at the time of the stabbing, Rachel was still in Luis's presence and that Luis instructed Mr. Berriel to "stay out of it"; and ***1138** (3) Luis's "violent character and his history of violence toward" Rachel.

[13] ¶ 16 We agree that Rachel's phone call for help suggested that she was in imminent danger *at the time of the call.* However, intervention by Mr. Berriel at that time was impossible because he was in a different location than Rachel. When Mr. Berriel encountered Rachel and Luis some time after the phone call, he had no basis for reasonably believing that Rachel continued to be in "imminent" danger or that it was "necessary" for him to stab Luis. As the court of appeals summarized,

> when Rachel and Luis arrived at their residence ... they did not appear even to be arguing. There was no evidence that Luis, during the time he could have been observed by Berriel, had threatened, touched, harmed, or even approached Rachel in any way, nor had he exhibited any weapons. In fact, from the point at which he emerged from the car, Luis's attention was directed entirely at Berriel, who was coming at him with a knife .... Rachel was at least fifteen feet away and out of the path of the confrontation.

Berriel, 2011 UT App 317, ¶ 5, 262 P.3d 1212. We agree with the court of appeals that, on these facts, Mr. Berriel could not have reasonably believed that Rachel was in imminent danger at that time or that his stabbing of Luis was necessary to defend her. [3]

[14] ¶ 17 In dissent, Judge Thorne reasoned that "once Berriel had a reasonable basis to believe that Rachel was

in imminent danger due to her phone call, his actions in her defense were potentially justifiable under Utah Code section 76–2–402 *until* such time as Berriel had reason to believe that the danger to Rachel had passed." *Id.* ¶ 23 (Thorne, J., concurring and dissenting). We disagree. An aggressor's act of violence does not give a would-be rescuer a continuing license to attack the aggressor at any time until the would-be rescuer is assured of the victim's safety. As the majority of the court of appeals explained, "it is the imminence of harm to another that is central to the legal justification of violence to prevent it; otherwise, this humane law of justification could be extended to countenance retribution or vigilantism." *Id.* ¶ 6 (majority opinion). Given the abusive relationship between Luis and Rachel, there might never have come a time when Mr. Berriel "had reason to believe that the danger to Rachel had passed." Thus, while Mr. Berriel's ongoing concern for Rachel's safety was appropriate, his assault on Luis at a time when Luis was not harming or threatening Rachel was not justifiable.

¶ 18 This case is analogous to *State v. Hernandez,* 253 Kan. 705, 861 P.2d 814 (1993), in which the Kansas Supreme Court ruled that a defendant who killed his sister's abusive husband was not entitled to a jury instruction on defense of a third person. The husband had abused the sister throughout their relationship and had even threatened to take her life. *Id.* at 816–17. The killing of the husband occurred at the industrial plant where the defendant, the sister, and the husband were all employed. *Id.* at 816–18. On the morning of the killing, the husband "told [the sister] that she had until 11 o'clock that morning to make up her mind." *Id.* at 817. Upon learning of this confrontation, the defendant feared the husband would harm or kill the sister at eleven o'clock. *Id.* Sometime after nine o'clock, the defendant retrieved a gun from his car and invited the husband outside to talk. *Id.* When the defendant thought he saw the husband reaching for a knife, the defendant shot the husband. *Id.* Having survived the initial attack, the husband said, "Now, I'm gonna kill you too" and began running toward the plant. *Id.* at 818. Thinking that the word "too" indicated that the husband intended to kill the defendant's sister, the defendant continued to shoot at the husband as he ran toward and into the plant. *Id.* The husband died from the gunshot wounds. *Id.*

¶ 19 The Kansas Supreme Court concluded that "a rational factfinder could not find that ***1139** [the defendant] acted in defense of his sister ... at the time he shot [the husband]" because the defendant, "who was armed, approached [the husband], asked him to come outside, and then provoked the conflict." *Id.* at 820. "[T]he only imminent danger was that created by [the defendant] himself." *Id.* The court held that "[t]he history of violence" and the threat of future harm, "could not turn the killing into a situation of imminent danger." *Id.*

[15] **[16]** ¶ 20 Similarly, we conclude that Luis's past abuse of Rachel and the likelihood of future abuse cannot justify Mr. Berriel's assault on Luis. Like the defendant in *Hernandez,* Mr. Berriel armed himself, approached the abusive partner, and provoked a violent conflict. *See id.* at 820. Mr. Berriel is correct that under section 76–2–402(5), the aggressor's "prior violent acts or violent propensities" and "any patterns of abuse or violence in the parties' relationship" are relevant to a jury's assessment of whether a defendant reasonably believed harm was imminent. However, relevancy and sufficiency are distinct concepts. We agree with the Kansas Supreme Court that, standing alone, a history of violence or threats of future violence are legally insufficient to create "a situation of imminent danger." *Id.* at 820. And we see no other facts in the record which, taken together with Luis's history of violence, render erroneous the district court's refusal to instruct the jury on defense of a third person.

CONCLUSION

¶ 21 We agree with the court of appeals that there is no basis in the evidence to support Mr. Berriel's theory that he acted in defense of Rachel when he stabbed Luis. Thus, we affirm the court of appeals' holding that the district court did not err in refusing to instruct the jury on defense of a third person.

Justice DURHAM authored the opinion of the Court in which Chief Justice DURRANT, Associate Chief Justice NEHRING, Justice PARRISH and Justice LEE joined.

All Citations

299 P.3d 1133, 731 Utah Adv. Rep. 6, 2013 UT 19

Footnotes

1 The jury also convicted Mr. Berriel of possession of a dangerous weapon with intent to assault. However, the court of appeals vacated this conviction because the jury was not informed "that it had to find a separate factual basis for the possession ... conviction beyond the possession necessary to commit the aggravated assault." *State v. Berriel,* 2011 UT App 317, ¶ 16, 262 P.3d 1212. We have not been asked to review the vacatur.

2 At the time of Mr. Berriel's offense, current Utah Code section 76–2–402 was located at 76–1–601 of the Code. We cite to the current version because it is substantively identical to the provision in force at the time of the offense.

3 Although our analysis focuses on whether the evidence supports a conclusion that Mr. Berriel *reasonably* believed his use of force was necessary to defend Rachel from imminent harm, Mr. Berriel appears to admit that he may not have even *subjectively* held this belief. In his opening brief, Mr. Berriel states that en route to Rachel's house, he called her friend Krissy and told her "to get Rachel away from the house." Thus, he seems to concede that he drove to the house to confront Luis, not to rescue Rachel from any immediate harm.