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, May 3, 2017
12:00 p.m. to 1:30 p.m.

Council Room, N31, 3rd Floor

12:00	**Welcome and Approval of Minutes** (Tab 1)	Judge James Blanch
12:05	***State v. Hummel*** (Tab 2) Relevant Instructions: (Tab 3) • CR 216 Jury Deliberations • CR 218 Deadlocked Juries • CR 301 Elements • CR 1617 Sexual Offense Prior Convictions	Judge James Blanch
12:30	**Justification Defense Instructions** (Tab 4) Utah Code 76-2-402 (Tab 5) Utah Code 76-2-405 (Tab 6) Utah Code 76-2-406 (Tab 7) *State v. Karr* (Tab 8) *State v. Berriel* (Tab 9) *State v. Walker* (Tab 10)	Mark Field
1:30	**Adjourn**	

Upcoming Meetings (held on the 1st Wednesday of each month unless otherwise noted)
June 7, 2017
September 6, 2017
October 4, 2017
November 1, 2017
December 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, April 5, 2017
12:00 p.m. to 1:30 p.m.
Judicial Council Room

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

1. Welcome **Judge Blanch**

Judge James Blanch welcomed everyone to the meeting. Judge Blanch noted there were enough members to meet the requirements of a quorum.

Nathan Phelps recommended one minor change to the minutes. Sandi Johnson moved to approve the minutes from the February 1, 2017 meeting with the change noted by Mr. Phelps. Nathan Phelps seconded the motion and it passed unanimously.

2. Public Comments on Drug Offense Instructions **Judge Blanch**

Judge Blanch discussed the public comments received on the Drug Offense Instructions. Ms. Johnson distributed a copy of Utah Code § 58-37-2. She discussed instruction 1202 and the comments she received from her colleagues. Ms. Johnson recommended a separate definition of Possession to mirror the statutory definition. Ms. Klucznik and Judge Blanch agreed that the statutory definition of Possession should be added. Ms. Johnson recommended two separate definitions – one for Possession and one for Constructive Possession. Judge Blanch suggested separating 1202 into two instructions, 1202(a) and 1202(a). The committee then worked on separating the current instruction. Ms. Jones questioned the difference between "use" and "possess" and suggested that "use" be deleted. Mr. Field said the statute seems to equate the

words “possession” and “use,” but he thinks it would be easier for prosecutors to use the word “use.” Judge Blanch said if the two words have the same definition, one should be deleted. Ms. Jones said she believes the words have the same definition. Ms. Johnson noted that according to *State v. Ireland*, if someone “uses” drugs in another state where drugs are legal and then tests positive in Utah they cannot be convicted. Ms. Johnson said in *Ireland*, a trucker drove in to Utah and after an accident, he tested positive for marijuana. Judge Blanch said he's never seen a case where someone was charged for testing positive with no other evidence against them. Ms. Johnson stated that in Salt Lake County they don't, but she is aware of other counties where they are charged. Ms. Jones asked if any of the instructions discuss metabolite. The committee members did not believe there were instructions directly relating to metabolite. Mr. Phelps said “consumption” means ingesting or having any measurable amount in a person's body, but does not include metabolite. Mr. Phelps was concerned that adding “metabolite” to the instruction would cause experts to start being brought into court to testify. Mr. Nelson said they have to look at what is factually available. Ms. Jones said the word “use” would apply under situations like "use of a firearm" and wondered if it would apply here in the same way.

Judge Blanch suggested simply taking out the words "use" or "user" and keeping “possess.” Judge Blanch suggested changing the elements instruction as well. Mr. Field wondered if there needed to be an instruction or committee note stating that “possession” and “use” are the same things. Ms. Johnson noted that defense attorneys might argue that without “use” in the instruction, their client can’t be convicted. Ms. Klucznik wondered if this instruction would apply to paraphernalia. Mr. Phelps stated this definition does not apply to drug paraphernalia. The committee made various changes to the instructions.

Ms. Johnson noted the word “occupancy” relates to the Constructive Possession instruction. The committee discussed the term “occupancy” and chose to delete it. The committee discussed whether to keep the word “belonging.” Judge Brendan McCullagh said he would like to see the word “possession” deleted because as the statute is currently written, a person doesn’t actually have to “possess” something to be guilty. The committee discussed the word "controlled." Ms. Jones recommended removing the word “controlled” from a portion of the instruction to simplify the phrase and because the word “controlled” may get confused with the phrase "controlled substance."

Judge Blanch recommended a committee note explaining the elimination of terms. The committee drafted a committee note. Mr. Nelson noted prosecutors are leery of instructions that don't follow the statute. Judge Blanch noted that before allows the use of an instruction, he makes sure it is amended to be case-specific and that attorneys on both sides typically like more detailed instructions. After further discussion, the committee finalized the revised instructions as follows:

CR 1202(a). General Definition of Possession of a Controlled Substance.

"Possession" of a controlled substance means:

- owning,
- controlling,
- holding,

- retaining,
- maintaining,
- applying,
- inhaling,
- swallowing,
- injecting, or
- consuming

a controlled substance.

[For a person to possess a controlled substance, it is not required that the person individually possess it. It is sufficient if the person participated with one or more persons in the possession of a controlled substance with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating constructive possession.]

References
Utah Code § 58-37-2
State v. Lucero, 350 P.3d 237 (2015)

Committee Notes
Separate reference to the statutory term "use" was omitted from this instruction and the corresponding elements instruction because "possession" and "use" are defined identically in Utah Code section 58-37-2(1)(ii).

In addition, "belonging" and "occupying" were omitted from this instruction because the concepts are covered under the definition of constructive possession in CR 1202(b).

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing this instruction.

CR 1202(b). Definition of Constructive Possession.

A person is in constructive possession [a controlled substance] [drug paraphernalia] when the person has the ability and the intent to exercise control over it. Factors relevant to deciding constructive possession may include the following:

- ownership and/or occupancy of the [residence] [vehicle] [property] [personal effects] where the [controlled substance] [drug paraphernalia] was found;
- whether that ownership or occupancy was exclusive;
- presence of the [controlled substance] [drug paraphernalia] in a location where (DEFENDANT'S NAME) had special control;
- whether other people also had access to the location of the drugs;
- presence of (DEFENDANT'S NAME) at the time the [controlled substance] [drug paraphernalia] was found;
- (DEFENDANT'S NAME) proximity to the [controlled substance] [drug paraphernalia];

- previous drug use;
- incriminating statements or behavior; or
- any other factor related to whether (DEFENDANT'S NAME) had the ability and intent to exercise control over the [controlled substance] [drug paraphernalia].

References
Utah Code § 58-37-2
State v. Lucero, 350 P.3d 237 (2015)

Committee Notes
This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing this instruction.

CR 1203. Possession of a Controlled Substance.

(DEFENDANT'S NAME) is charged [in Count ___] with committing Possession of a Controlled Substance [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally and knowingly;
3. Possessed (NAME OF CONTROLLED SUBSTANCE/COUNTERFEIT SUBSTANCE), a schedule [I] [II] [III] [IV] [V] [controlled substance] [counterfeit substance][; and]

[4. The defense of _____ does not apply].

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 58-37-4.2
Utah Code § 58-37-8(2)(a)(i) & (2)(d)
State v. Miller, 2008 UT 61, 193 P.3d 92
State v. Ireland, 2006 UT 17, 133 P.3d 396

Committee Notes
This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing this instruction.

The defenses referenced in paragraph 4 of the instruction are affirmative defenses as defined by Utah statute or case law.

Judge McCullagh moved to approve the proposed division of instruction 1202 to 1202(a) and 1202(b), revisions to instruction 1203 and the committee notes, then to re-publish them. Ms. Jones seconded the motion and it passed unanimously. Ms. Williams will publish these to the website.

3. Justification Defense Instructions **Mark Field**

The committee briefly discussed the instruction on Use of Force in Defense of Habitation and noted potential changes. Ms. Williams will amend those instructions as indicated for the next meeting.

4. Other Business **Committee**

Ms. Williams noted that HB 139 passed the legislature, eliminating the defense of involuntary intoxication in a prosecution for rape. The committee discussed the instructions relating to involuntary intoxication. Judge McCullagh said it's not a defense; it's something that mitigates defense. Ms. Jones doesn't believe any changes are required to relevant instructions. Ms. Williams reviewed several additional bills that the committee may need to address; including HB 379, HB 202, HB 99, HB 17 and HB 369. HB 369 enacts provisions to enhance the classification of a sexual offense if the actor was infected with HIV or other viruses. The committee briefly discussed HB 369 and determined that a Special Verdict Form may be necessary.

Ms. Jones stated she is ready to present her instruction related to fur-bearing animals.

5. Adjourn **Committee**

The meeting was adjourned at 1:25 p.m. The next meeting is Wednesday, May 3, 2017.

Tab 2

2017 WL 1245460

Supreme Court of Utah.

STATE of Utah, Appellee,
v.
John E. HUMMEL, Appellant.

No. 20130281
|
Filed April 4, 2017

Synopsis

Background: Defendant was convicted in the Sixth District Court Department, Panguitch, James R. Taylor, J., of four counts of theft and one count of attempted theft. Defendant appealed.

Holdings: The Supreme Court, Lee, Associate Chief Justice, held that:

[1] jury unanimity was not required with respect to alternative methods for committing theft offenses that were presented at trial;

[2] sufficient evidence was not required on every method or means of fulfilling each individual element of charges;

[3] evidence was sufficient to support convictions;

[4] unpreserved claims of prosecutorial misconduct were subject to review for plain error, abrogating *State v. Ross*, 174 P.3d 628; and

[5] prosecutor's elicitation of witness testimony that was otherwise contradicted by other evidence did not constitute prosecutorial misconduct.

Affirmed.

West Headnotes (28)

[1] Jury
Concurrence of less than whole number

On multiple charges for theft, jury unanimity was not required with respect to alternative methods for committing offense that were presented at trial, i.e., by deception or by extortion; rather, under the Unanimous Verdict Clause of the Utah Constitution, jury unanimity was required only on each element of offense on each charge, namely, that defendant had obtained or exercised unauthorized control over property of another with a purpose to deprive him thereof. Utah Const. art. 1, § 10; Utah Code Ann. § 76-6-403.

Cases that cite this headnote

[2] Jury
Concurrence of less than whole number

At its most basic level, the Unanimous Verdict Clause of the Utah Constitution requires the full concurrence of all empaneled jurors on their judgment as to the criminal charges submitted for their consideration. Utah Const. art. 1, § 10.

Cases that cite this headnote

[3] Criminal Law
Failure of jury to reach verdict

If there are juror holdouts on the appropriate verdict, the result is a mistrial.

Cases that cite this headnote

[4] Jury
Concurrence of less than whole number

The state constitutional requirement of jury unanimity is not met if a jury unanimously finds only that a defendant is guilty of a crime; rather, the Unanimous Verdict Clause requires unanimity as to each count of each distinct crime charged by the prosecution

and submitted to the jury for decision. Utah Const. art. 1, § 10.

Cases that cite this headnote

[5] **Jury**
Concurrence of less than whole number

A generic "guilty" verdict that does not differentiate among various charges would fall short of the requirement under the Unanimous Verdict Clause of a unanimous verdict on each charge presented to the jury. Utah Const. art. 1, § 10.

Cases that cite this headnote

[6] **Criminal Law**
Assent of required number of jurors
Jury
Concurrence of less than whole number

There is no such thing as an omnibus "crime" in Utah; rather, crimes are set out distinctly in the law, with different elements and distinct punishments for each offense, and therefore, a verdict of "guilty of some crime" would not tell the court whether the jury was unanimous in finding guilt on any individual crime, and the verdict would fall short of the requirements of the Unanimous Verdict Clause on that basis. Utah Const. art. 1, § 10.

Cases that cite this headnote

[7] **Criminal Law**
Verdict or findings
Jury
Concurrence of less than whole number

If there is a holdout on the jury on one of the essential elements of one of the crimes charged, there is necessarily a lack of unanimity on the question of the defendant's guilt; thus, if the verdict indicates a lack of unanimity on one of the essential elements of a charged crime, there will also be a basis for a reversal under the Unanimous Verdict Clause. Utah Const. art. 1, § 10.

Cases that cite this headnote

[8] **Criminal Law**
Sufficiency to support conviction in general

Sufficient evidence is not required on every method or means of fulfilling each individual element of each crime in question; rather, such requirement is imposed only for all elements of a criminal charge.

Cases that cite this headnote

[9] **Courts**
Previous Decisions as Controlling or as Precedents

Under the doctrine of stare decisis, precedent is entitled to a measure of respect; it is crucial to the predictability of the law and the fairness of adjudication.

Cases that cite this headnote

[10] **Courts**
Previous Decisions as Controlling or as Precedents

The presumption of preserving past holdings is a rebuttable one and the presumption against overruling precedent is not equally strong in all cases.

Cases that cite this headnote

[11] **Courts**
Dicta

In considering whether to overrule case precedent, the Supreme Court retains greater flexibility on points of law reflected only in the broad dicta of its prior decisions.

Cases that cite this headnote

[12] **Criminal Law**
General Verdict

The jury's verdict in a criminal case is simply its determination of guilt or innocence.

Cases that cite this headnote

[13] **Jury**
Concurrence of less than whole number

In the standard case submitted on a general verdict, the constitutional requirement of jury unanimity calls for a straightforward assessment: all jurors must agree on whether the defendant has been proven guilty beyond a reasonable doubt, and any holdouts will require a mistrial. Utah Const. art. 1, § 10.

Cases that cite this headnote

[14] **Jury**
Concurrence of less than whole number

The constitutional requirement of unanimity in the case of a special verdict is still directed to the question of guilt or innocence on the crimes charged and submitted for the jury's decision, and it may ask the jury to indicate its specific factual findings on certain issues, in addition to its conclusion as to the defendant's guilt; however, the constitutional requirement of unanimity extends only to the jury's determination that the prosecution proved each element of the crimes in question beyond a reasonable doubt. Utah Const. art. 1, § 10.

Cases that cite this headnote

[15] **Jury**
Concurrence of less than whole number

Where separate crimes are charged, a verdict may be insufficient to satisfy the requirements of the Unanimous Verdict Clause if it fails to disclose the jury's unanimity on all elements of each crime. Utah Const. art. 1, § 10.

Cases that cite this headnote

[16] **Jury**
Concurrence of less than whole number

The requirement of jury unanimity extends only to the jury's verdict, which is defined by the matters submitted to the jury for decision, and such matters, in turn, are dictated by the substantive criminal law. Utah Const. art. 1, § 10.

Cases that cite this headnote

[17] **Criminal Law**
Grounds of review in general

Criminal Law
Presumptions

Uncertainty in the record counts against the appellant, who bears the burden of proof on appeal, and must overcome a presumption of regularity as to the record and decision in the trial court; thus, a lack of certainty in the record does not lead to a reversal and new trial but leads to an affirmance on the ground that the appellant cannot carry his burden of proof.

Cases that cite this headnote

[18] **Criminal Law**
Conclusiveness of Verdict

A jury verdict is a product of a substantial investment of public resources and is entitled to ample deference on appeal; the appellate court cannot reverse it on the mere basis of uncertainty.

Cases that cite this headnote

[19] **Larceny**
Weight and Sufficiency

Evidence supported jury's finding that defendant obtained or exercised unauthorized control over property of another with purpose to deprive him thereof, as required to support convictions for theft; defendant, who was attorney contracted to provide services as public defender, removed four of his clients' applications for appointed counsel from clerk's desk before applications were ruled on by court in each client's case, after convincing clients to retain him privately, in exchange for promissory notes and firearms as collateral, and information provided by defendant to clients was likely to affect their judgments on

whether to retain defendant privately. Utah Code Ann. § 76-6-403.

Cases that cite this headnote

[20] **Criminal Law**
Sufficiency of Evidence
Criminal Law
Inferences or deductions from evidence

In reviewing the sufficiency of evidence to support a verdict, the appellate court assumes that the jury believed the evidence and drew reasonable inferences supporting the verdict.

Cases that cite this headnote

[21] **Larceny**
Weight and Sufficiency

Evidence supported jury's finding that defendant obtained or exercised unauthorized control over property of another with purpose to deprive him thereof, as required to support conviction for theft; defendant, who was attorney contracted to provide services as public defender, convinced one of his clients to file application for appointment of counsel that overstated his annual income, so that client would not qualify, after defendant told client that he would not qualify, which likely affected client's decision whether to retain defendant privately, and client signed over his guns to defendant and agreed to pay him $2,500. Utah Code Ann. § 76-6-403.

Cases that cite this headnote

[22] **Criminal Law**
Requisites and sufficiency of accusation

Defendant waived claim on direct appeal that prosecutor changed its theory of case on charges for theft and attempted theft, in alleged violation of defendant's state constitutional right to demand nature and cause of accusations against him, where he failed to raise objection or ask for continuance. Utah Const. art. 1, § 12.

Cases that cite this headnote

[23] **Criminal Law**
Arguments and conduct in general
Criminal Law
Conduct of counsel in general

Unpreserved claims of prosecutorial misconduct were subject to review for plain error, and prosecutorial error did not constitute stand-alone basis for direct review; abrogating *State v. Ross*, 174 P.3d 628.

Cases that cite this headnote

[24] **Criminal Law**
Arguments and conduct in general

Plain error review of alleged prosecutorial misconduct considers the plainness or obviousness of the district court's error in failing to address the error, and not the prosecutor's.

Cases that cite this headnote

[25] **Criminal Law**
Necessity of specific objection
Criminal Law
Sufficiency and Scope of Motion

Defendant failed to preserve for review on direct appeal claim that district court admitted misleading hearsay evidence at preliminary hearing, specifically, out-of-court statements from defendant's clients that they believed defendant had been appointed as their public defender before they agreed to enter into private retention agreement with him, under exception to rule against hearsay for statements in criminal preliminary examination that were written, recorded, or transcribed verbatim, pursuant to notification to declarant that false statement made therein was punishable, in trial for theft and attempted theft, despite defendant's assertions that statements were false and that prosecutor could have determined their falsity by consulting court files, where he objected to only one part of one statement, which was

unconnected to question of whether he had been appointed as public defender for clients, and he did not assert that admission of false statements was basis for overturning bindover decision, in motion to quash same. Utah R. Evid. 1102(b)(8)(B).

Cases that cite this headnote

[26] Criminal Law
What constitutes perjured testimony

Prosecutor's elicitation of witness testimony indicating that defendant, who was contracted to perform services as public defender, had been appointed to represent one of his clients, did not constitute prosecutorial misconduct simply because other evidence had been admitted that contradicted testimony, in trial for theft and attempted theft.

Cases that cite this headnote

[27] Criminal Law
Effect of Failure to Object or Except

Criminal Law
Objections to evidence in general

It is not error—much less plain error—for the court to admit evidence without objection that is contradicted by other evidence in the record.

Cases that cite this headnote

[28] Criminal Law
Particular statements, arguments, and comments

Defendant failed to preserve for direct review claims of prosecutorial misconduct during closing argument, based on comments that were allegedly inaccurate or encouraged jury to engage in speculation, in trial for theft and attempted theft, where he failed to object to all but one of comments, with respect to one comment that he did object to, objection was sustained, and defendant failed to demonstrate that trial court's response to objection was inadequate.

Cases that cite this headnote

Sixth District, Panguitch, The Honorable James R. Taylor, No. 121600018

Attorneys and Law Firms

Sean D. Reyes, Att'y Gen., Kris C. Leonard, Asst. Att'y Gen., Salt Lake City for appellee.

Gary W. Pendleton, St. George, for appellant.

Associate Chief Justice Lee authored the opinion of the Court, in which Chief Justice Durrant, Justice Durham, and Justice Himonas joined.
Justice John A. Pearce became a member of the Court on December 17, 2015, after oral argument in this matter, and accordingly did not participate.

Opinion

Associate Chief Justice Lee, opinion of the Court:

¶1 John Hummel was charged and tried on four counts of theft and one count of attempted theft under Utah Code section 76-6-404. All eight jurors found him guilty on all five counts. There is no dispute in the record on this point. The jury was polled and all indicated that the verdict as announced was the one they voted for.

¶2 Yet Hummel challenges his conviction under the Unanimous Verdict Clause of the Utah Constitution. UTAH CONST. art. I, § 10.[1] He does so on the basis of an alleged lack of unanimity as to *alternative factual theories* advanced by the prosecution in support of some of the theft counts against him. Because of an alleged lack of record evidence to support some of the prosecution's theories, Hummel contends that we cannot be certain it was unanimous in its verdict. And he urges reversal on that basis. Alternatively, Hummel alleges two other sets of trial errors as grounds for reversal—in the prosecution purportedly changing theories partway through trial and in alleged "prosecutorial misconduct."

¶3 We affirm. First, we hold that unanimity is not required as to theories (or methods or modes) of a crime. Under the text and original meaning of the Unanimous Verdict Clause, unanimity is required only as to the jury's verdict—its determination of guilt, or in other words its determination that the prosecution has proven each

element of each crime beyond a reasonable doubt. There is no doubt that the jury was unanimous at that level in this case. And we affirm on that basis. We also reject Hummel's other arguments, concluding that his objection to the purported change in theories mid-trial was not preserved and that his charges of "prosecutorial misconduct" fail either on their merits or under plain error review.

I. BACKGROUND

¶4 Garfield County does not have a full-time public defender. Instead it retains a private attorney to handle all public defense cases for a flat annual fee. In 2008 and 2009 the county retained John Hummel to do its public defense work.

***2** ¶5 Hummel apparently concluded that he could make more money if he could convince his would-be public defense clients to retain him privately. So he met with a number of these clients before his formal appointment as public defender. In those meetings Hummel tried to persuade these clients to retain him privately.

¶6 Jerry Callies was one of the defendants who met with Hummel under these circumstances. Callies met with Hummel after Callies had applied for court-appointed counsel. A bailiff directed Callies to meet with Hummel to discuss Callies' application. During the meeting Hummel told Callies that he did not qualify for appointed counsel. Hummel then suggested that Callies retain him and pay him as his private lawyer.

¶7 Hummel told the imprisoned Callies that if Callies would sign over his guns and pay $ 2,500, Hummel would get him out of prison that day. He also warned that if Callies did not hire Hummel, Callies would spend thirty more days in prison and might even face additional charges. Callies relented. He gave Hummel his firearms and signed a promissory note for $ 2,500 in exchange for representation.

¶8 Callies also alleges that Hummel asked him to fill out a new application for appointment of counsel and to list an inflated income amount in order to guarantee that Hummel would not be appointed as counsel. At trial, there was conflicting evidence as to whether Hummel was in fact appointed as Callies' counsel (a minute entry suggested that Hummel was appointed, while a recommendation by the county attorney that Callies be denied counsel cuts the other way).

¶9 John Burke was a second would-be public defense client who met with Hummel. Hummel met with Burke after Burke had been charged with various drug and weapons charges. After filling out an application for court-appointed counsel, Burke gave the application to Hummel, believing that Hummel was in charge of the paperwork. During the meeting, Hummel mentioned that Burke, who had been in court before, must "know how courts are about public defenders." Hummel also indicated that he would be able to "better represent [Burke]" if Burke paid Hummel $ 5,000. After this conversation, Burke's father agreed to a $ 2,500 charge to his credit card. Hummel suggested he would work out a plan for payment of the remaining $ 2,500.

¶10 Scotty Harville and Joe Sandberg also met with Hummel. A judge had told them both that they qualified for counsel. Yet Hummel told them that "it would look better" in court if they hired private counsel rather than rely on the work of a public defender. He also said they had a "better chance" of getting out of jail and avoiding further jail time if they retained him privately. Hummel convinced both Harville and Sandberg to sign promissory notes, which, Hummel claimed, would "make it seem as though" they "had retained him as private counsel." Hummel indicated that he would never try to collect on the promissory notes. He also suggested that Harville sign over to Hummel the weapons seized upon Harville's arrest to avoid facing further charges related to the weapons.

¶11 John Spencer was the last of the would-be public defense clients at issue in this case. Spencer met with Hummel after completing his application for court-appointed counsel. Hummel asked Spencer for collateral in return for Hummel's services. And Spencer agreed—at Hummel's urging—to sign over multiple firearms to Hummel as collateral. As with Callies, a minute entry suggested that Hummel had in fact been appointed to represent Spencer.

***3** ¶12 Hummel admitted that he removed the applications for court-appointed counsel prepared by four of these clients—Burke, Harville, Sandberg, and Spencer—from the desk of the court clerk. When questioned by the clerk about his actions, Hummel stated that he had

destroyed the applications "because the men would not qualify for the public defender."

¶13 Hummel acquired the following property as a result of this scheme: at least $ 2,500 cash, $ 15,000 worth of written or oral promises, and eight firearms.

¶14 One of Hummel's clients eventually filed a complaint with the County Attorney's Office. An investigation ensued. Hummel was subsequently charged with theft under Utah Code section 76-6-404.

¶15 The case eventually proceeded to trial. At trial the prosecution advanced distinct theories of Hummel's theft under the various counts against him—different ways in which Hummel was alleged to have "obtain[ed] or exercise[d] unauthorized control over the property of another with a purpose to deprive him thereof" under Utah Code section 76-6-404. The prosecution's distinct theories were reflected in the jury instructions. On four of the counts the prosecution asserted that Hummel had committed theft (or attempted theft) by "engaging in a deception, *or* by engaging in an extortion."[2] On the fifth count, the one involving Spencer, the prosecution claimed only that Hummel had obtained the property "by deception."

¶16 The jury instructions further described ways that the jury could find that Hummel had committed theft by "deception" or "extortion"—they listed means by which the elements of the crime of theft could be satisfied. In the instructions the jury was presented with four ways that Hummel could have extorted his victims[3] and three ways that he could have deceived them.[4]

¶17 The jurors were not required to reach unanimity on any particular theory. But they were instructed that unanimity was required as to the determination that a theft had occurred. The relevant jury instruction on unanimity read as follows: "It is not necessary that all of you agree upon a particular alternative, only that all of you do agree that a theft under one of the alternatives did occur." *Jury Instruction No. 13*.

***4** ¶18 The jury convicted Hummel on all five counts, and he now appeals. He raises four arguments. First, Hummel contends that the jury should have been required to unanimously agree on theft by deception *or* extortion for the counts where both theories were presented. Second, he asserts that the evidence was insufficient to support a guilty verdict on all counts. Third, Hummel claims that the prosecution ran afoul of article 1, section 12 of the Utah Constitution by changing the theories of theft presented to the jury, in a manner preventing Hummel from knowing what crimes he was accused of and from mounting an appropriate defense. Fourth, he claims that prosecutorial misconduct tainted the verdict and violated his right to due process. We reject each of these arguments and affirm.

II. UNANIMOUS VERDICT CLAUSE

[1] ¶19 In Utah there is a single crime of "theft." UTAH CODE § 76-6-403. In enacting this theft provision the legislature combined a variety of "separate offenses," such as embezzlement, false pretense, extortion, and blackmail, into what now constitutes "a single offense." *Id.*[5] The elements of that crime are simple and straightforward. A person commits theft if he "obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." *Id.* § 76-4-404 (stating these elements in a section titled "Theft-Elements"). Our law lists common *means* by which those elements may be fulfilled.[6] It does so by setting forth ways that one may exercise unauthorized control over the property of another, as in different means by which one may engage in extortion or deception. *See id.* §§ 76-6-405 to -406. But these provisions set forth only non-exhaustive examples. They describe illustrative ways that the single crime of theft may be committed.[7] So the once separate offenses of theft by extortion and theft by deception are now just manners by which one commits the single offense of theft.

***5** ¶20 Sections 405 and 406 hammer this point home. In section 405 we learn that "a person commits theft" (another indication this is the single crime) "*if* the person obtains or exercises control over property of another person: (i) by deception; and (ii) with a purpose to deprive the other person of property." *Id.* § 76-6-405 (emphasis added). And this section then goes on to identify what does and doesn't count as deception. Section 406 is similar. It says that "[a] person is guilty *of theft* if he obtains or exercises control over the property of another *by extortion* and with a purpose to deprive him thereof," and also proceeds to identify prohibited means of extortion. *Id.* § 76-6-406 (emphasis added).

¶21 Theft by deception and theft by extortion are not and cannot logically be separate offenses. If they were, Hummel could be charged in separate counts and be convicted on both. That cannot be. When Hummel took money or property from a client, he may have both deceived and extorted the client. But he only committed one act of theft (just like the murderer who both poisons and suffocates the same victim has committed only one murder). This is why Hummel's counts are defined by victim, and not theory or manner of committing theft.

¶22 Nothing in the record on appeal suggests that the jury was less than unanimous in its decision to convict Hummel of theft. Nor is there any basis for finding a lack of unanimity as to the elements of theft in section 76-6-403.

¶23 Yet the jury was not given a special verdict form. It was asked to return only a general verdict. So we cannot tell from the record which of the prosecution's various theories the jury may have relied on, or whether it was unanimous as to which theory it accepted. And this uncertainty is the focus of Hummel's unanimity argument on appeal. He asserts that unanimity was required as to which of the prosecution's various theories of theft was accepted by the jury. And he also claims that evidence of at least some of those theories was lacking—a point he advances as a distinct (if related) basis for reversal.

¶24 We affirm. First, we conclude that our precedent does not support the requirement of unanimity or sufficiency of the evidence for alternative, exemplary means of committing a crime. With that conclusion in mind, we take a fresh look at our law of unanimity in light of the text and historical understanding of the Unanimous Verdict Clause. Because there is no textual, historical, or logical basis for a requirement of unanimity or sufficiency of the evidence as to alternative means of committing a crime, we conclude that the Utah Constitution imposes no such requirement. And we accordingly hold that there is no basis for reversal on the record before us on this appeal.

A. Utah Supreme Court Precedent on Unanimity

[2] **[3]** ¶25 The Unanimous Verdict Clause requires that "[i]n criminal cases the verdict shall be unanimous." UTAH CONST. art. I, § 10. At its most basic level, this provision requires the full concurrence of all empaneled jurors on their judgment as to the criminal charges submitted for their consideration. That is the jury's function—to render a verdict on the defendant's guilt on the charges presented for their deliberation. And a non-unanimous verdict has long been viewed as an invalid one. If there are holdouts on the appropriate verdict, the result is a mistrial. *See, e.g.*, *State v. Moore*, 41 Utah 247, 126 P. 322, 323 (1912) (noting that a trial "resulted in a mistrial for the reason that the jury was unable to agree upon a verdict").

[4] **[5]** ¶26 The implications of this constitutional requirement do not stop there. The article I, section 10 requirement of unanimity " 'is not met if a jury unanimously finds only that a defendant is guilty *of a crime*.' " *State v. Saunders*, 1999 UT 59, ¶ 60, 992 P.2d 951 (plurality opinion) (emphasis added). The Unanimous Verdict Clause requires unanimity as to each count of *each distinct crime charged* by the prosecution and submitted to the jury for decision. So a generic "guilty" verdict that does not differentiate among various charges would fall short. *See also infra* ¶ 54 (citing an 1859 Maryland case in which the court refused to accept a verdict of "guilty" of murder in a circumstance in which the jury was required to also determine the precise degree of murder involved).

***6** **[6]** ¶27 For similar reasons, a verdict would not be "valid if some jurors found a defendant guilty of robbery while others found him guilty of theft, even though all jurors agree that he was guilty of some crime." *Saunders*, 1999 UT 59, ¶ 60, 992 P.2d 951. There is no such thing as an omnibus "crime" in Utah. Our crimes are set out distinctly in our law, with different elements and distinct punishments for each offense. So a verdict of "guilty of some crime" would not tell us whether the jury was unanimous in finding guilt on any individual crime. And the verdict would fall short on that basis.

¶28 The same goes for the notion that a verdict would not "be valid if some jurors found a defendant guilty of robbery committed on December 25, 1990, in Salt Lake City, but other jurors found him guilty of a robbery committed January 15, 1991, in Denver, Colorado, even though all jurors found him guilty of the elements of the crime of robbery." *Id.* These are distinct counts or separate instances of the crime of robbery, which would have to be charged as such. [8] So we have also concluded that "[j]ury unanimity means unanimity as to a specific crime." *Id.*

[7] ¶29 We have also said that " 'a jury must be unanimous on all elements of a criminal charge for [a] conviction to stand.' " *State v. Johnson*, 821 P.2d 1150, 1159 (Utah 1991). If there is a holdout on the jury on one of the essential elements of one of the crimes charged, there is necessarily a lack of unanimity on the question of the defendant's guilt. So if the verdict indicates a lack of unanimity on one of the essential elements of a charged crime, there will also be a basis for a reversal under the Unanimous Verdict Clause.

¶30 All of the above is well-established in our law. But Hummel asks us to take our statements in *Saunders* and *Johnson* a substantial step further. He asks us to view our cases as establishing a requirement that each "theory" presented to the jury be supported by sufficient evidence. The scope of the term *theory* is not entirely clear from the briefing. But it appears to encompass all methods, modes, or manners by which a defendant is accused of committing a crime.[9] We find no basis for this requirement in our precedent. We have never required unanimity—or sufficient evidence—on alternate manners or means of fulfilling an element of a crime. Instead, *Johnson* and the cases it relied on required sufficient evidence on *alternate elements* of a crime as defined in our law. Our cases have used loose, broad language —referring to unanimity as to "theories" or "methods, modes, or manners" of committing a crime.[10] But we have never required unanimity or sufficient evidence on anything other than an *element*—or alternative element—of a crime.

***7** ¶31 *Johnson* involved alternate elements of the crime of attempted aggravated murder. By statute, attempted aggravated murder requires proof that the defendant attempted to cause the death of another intentionally or knowingly *and* that one of several aggravating circumstances was established. UTAH CODE § 76-5-202. In *Johnson* the prosecution alleged two aggravating circumstances—"(i) attempting to kill by administration of oxalic acid, which was either (a) a 'poison' or 'a lethal substance' or (b) 'a substance administered in lethal amount, dosage or quantity'; or (ii) attempting to kill 'for the purpose of pecuniary or other personal gain.' " *Johnson*, 821 P.2d at 1158 (quoting UTAH CODE § 76-5-202(1)(n) & (f) (1990)). Because "the State failed to prove either that oxalic acid is a poison or a lethal substance or that Johnson administered or attempted to administer a quantity of the acid that would have been lethal," the *Johnson* court found a unanimity problem with the verdict. *Id.* It reversed the aggravated attempted murder conviction without considering the sufficiency of the evidence on the other statutory aggravator—attempting to kill for pecuniary or other personal gain. And it based that decision on the Unanimous Verdict Clause.

¶32 The problem in *Johnson* was rooted in the jury's entry of only a general verdict. "No special verdicts were given that would indicate upon which aggravating circumstance the jury based the conviction." *Id.* at 1159. And because the court "has stated that a jury must be unanimous *on all elements of a criminal charge* for the conviction to stand," the *Johnson* court held that reversal was required "if the State's case was premised on more than one factual or legal theory *of the elements of the crime* and any one of those theories is flawed or lacks the requisite evidentiary foundation." *Id.* (emphasis added). But the *Johnson* court's subsequent analysis of sufficient evidence was only on the alternative elements of the crime, not anything below that level, such as theories or modes. So its broader language must be read in light of what it said elsewhere, and what it actually did—merely require sufficient evidence on both alternative elements, nothing more.

[8] ¶33 The *Johnson* opinion cannot sustain the broad reading Hummel gives it. *Johnson* in no way requires sufficient evidence on every *method or means* of fulfilling each individual element of each crime in question. It imposes that requirement only for "all elements of a criminal charge." *Id.*

¶34 *Johnson* 's predecessors are along the same lines. The plurality in *State v. Tillman* required unanimity on—and sufficient evidence to support a verdict on —the alternative elements of the crime of first-degree murder. 750 P.2d 546, 562–68 (Utah 1987) (plurality of the court requiring unanimity as to which of two aggravating circumstances was established—specifically, whether defendant intentionally caused the victim's death while engaged in the commission of (a) burglary or attempted burglary, or (b) arson or attempted arson). Our other cases are similar.[11]

***8** ¶35 Thus, the sufficiency of evidence requirement pushed by Hummel is by no means clearly established. Our past cases have invoked this principle only in the context

of *alternative elements* of a crime. We have never extended this principle to proof of alternative means of fulfilling an element of a crime.

B. The Unanimous Verdict Clause

[9] ¶36 Our precedents in this field are entitled to a measure of respect. "*Stare decisis* 'is a cornerstone of Anglo-American jurisprudence.' " *Eldridge v. Johndrow*, 2015 UT 21, ¶ 21, 345 P.3d 553 (citation omitted). It "is crucial to the predictability of the law and the fairness of adjudication." *Id.* (citation omitted).

[10] ¶37 Yet the presumption of preserving our past holdings is a rebuttable one. The "presumption against overruling precedent is not equally strong in all cases." *Id.* at ¶ 22. We have identified circumstances in which we may properly repudiate the standards in our prior decisions, as where the standard we have adopted has become unworkable over time, in a manner that sustains no significant interest of reliance on our decisions. *See id.* (observing that "how firmly precedent has become established ... encompasses a variety of considerations, including ... how well it has worked in practice, ... and the extent to which people's reliance on the precedent would create injustice or hardship if it were overturned").

[11] ¶38 In all events, the principle of *stare decisis* is focused on *holdings* of our prior decisions. Our law has long recognized a significant distinction between holding and dicta. *See Spring Canyon Coal Co. v. Indus. Comm'n of Utah*, 74 Utah 103, 277 P. 206, 210 (1929) ("Dictum is not embraced within the rule of stare decisis."). Thus, we retain even greater flexibility on points of law reflected only in the broad dicta of our prior decisions. *See Eldridge*, 2015 UT 21, ¶ 32, 345 P.3d 553 (suggesting a relaxed standard for repudiation of dicta, noting that "we would follow even ... dicta if we had no good reason to do otherwise").

¶39 That is where we stand on the question in this case. We have never squarely decided whether the Unanimous Verdict Clause requires unanimity on different means of fulfilling the elements of a crime, much less whether any such requirement should also sustain a requirement of sufficient evidence on each such means presented to the jury. This is an important issue. Absent a square holding resolving it, we return to first principles—to the text and original meaning of the constitution. And we affirm.

¶40 First, there is nothing in the language or history of the Unanimous Verdict Clause to support the requirement of unanimity on, or sufficient evidence of, alternative means of fulfilling the elements of a crime. The constitution requires unanimity only as to the "verdict," and that guarantee has long been understood to be limited to the matters submitted to the jury for decision (as to the defendant's guilt). So we interpret the Utah Constitution in line with this understanding, and affirm on the ground that there is no relevant unanimity problem on the record before us on this appeal.

¶41 Second, there is no logical connection between the constitutional guarantee of a unanimous verdict and the judicially imposed requirement of sufficient evidence to support alternative theories advanced by the prosecution. If anything the existence of sufficient evidence to sustain alternative theories would *heighten* the risk of a lack of unanimity. *See infra* ¶¶77–79. And if we were serious about requiring unanimity as to alternative means of fulfilling an element of a crime, we would not examine the sufficiency of the evidence; we would require a special verdict form. Our longstanding refusal to do so underscores the fact that the sufficiency of the evidence requirement is not a component of the constitutional guarantee of unanimity. This suggests that it would be improper to extend *Johnson* for this reason as well. We may have reason to respect the *Johnson* decision as a matter of *stare decisis*; but there is no basis for extending it further.

***9** ¶42 Finally, there is tension between the principle advanced by Hummel and longstanding caselaw on harmless error. The operative principle in these parallel cases goes to the appellant's burden of persuasion on appeal. That burden has long been understood to encompass an obligation to prove not only *error* but *prejudice*. The converse principle is known as the doctrine of harmless error. It holds that we reverse a judgment on appeal only if an error is shown to have likely made a difference in the lower court. And it yields the benefit of the doubt on that question to the appellee—or in other words to the outcome in the lower court. Hummel's reading of the Unanimous Verdict Clause is in substantial tension with this doctrine. Allowing an appellant to overturn a verdict based only on a showing

of insufficient evidence to support an alternative means of establishing an element of a crime is problematic. It effectively suspends the requirement that an appellant establish not just error, but *prejudicial* error. And it does so by yielding the benefit of the doubt to the appellant—by holding that because we can't be sure there was unanimity where there is a lack of evidence on alternative means of proving an element of a crime, we should reverse and remand for a new trial.

1. Text and Original Meaning

¶43 In adopting the Unanimous Verdict Clause, the framers of our Utah Constitution indicated their intent to memorialize a "well[-]understood, definite, common-law" principle. 1 UTAH CONVENTION DEBATES 494 (1895). We therefore interpret this provision in a matter in line with this historical understanding. And we reject the requirement of unanimity as to alternative means of fulfilling an element of a crime. We affirm here because the jury was unanimous on its *verdict*—on all matters submitted to it for decision.

a. Historical principles of unanimity

¶44 The requirement of a unanimous jury has common law origins. At common law, "the truth of every accusation"—of any criminal charge in an "indictment" or "information"—had to "be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769). This was an essential feature of the common law right to a jury trial at the time of the founding of our state Constitution. "A trial by jury [wa]s generally understood to mean ... a trial by a jury of twelve men, impartially selected, who must unanimously concur *in the guilt of the accused* before a legal conviction c[ould] be had." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 n.2 (5th ed. 1891) (emphasis added).

¶45 Yet the requirement of unanimity went no further than that. Unanimity was required "on the point or issue submitted to the[ ] jury." ARCHIBALD BROWN, A NEW LAW DICTIONARY AND INSTITUTE OF THE WHOLE LAW 377 (1874). And the point or issue submitted to the jury was purely a matter of guilt. Jurors were asked only to render a decision on the criminal charges presented—to enter a verdict of "guilty" or "not guilty" on each charge submitted for their deliberation. So "jurors [we]re not obliged to agree in the reason for finding a verdict as it is found; and if a reason be given by one or more of them, upon a question being asked by the judge, for finding it as it is found, this [wa]s not to be considered or recorded as part of the verdict." 7 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 8 (5th ed. 1798).

[12] ¶46 The Unanimous Verdict Clause articulates this same principle. It does so by requiring that "*the verdict* shall be unanimous" in criminal cases. UTAH CONST. art. I, § 10 (emphasis added). By law and longstanding practice, the jury's *verdict* is simply its determination of guilt or innocence. *See, e.g.*, *State v. Creechley*, 27 Utah 142, 75 P. 384, 384 (1904) ("A verdict upon a plea of not guilty shall be either 'Guilty' or 'Not guilty.' " (citation omitted)).

¶47 A *verdict* consists of the jury's decision on the matters submitted to it for decision. [12] In criminal cases the jury generally is charged only with determining the defendant's guilt on the counts presented at trial. [13] Other matters, such as sentencing, generally are submitted to the trial judge for decision.

***10** ¶48 As a general rule, juries are asked to drill no deeper than a judgment of conviction or acquittal. This is the essence of a general verdict. Such a verdict involves only a "find[ing] for the plaintiff or defendant" in a civil case, or "a verdict of guilty or not guilty" in a criminal case. 2 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 1326 (1888). [14]

[13] ¶49 In the standard case submitted on a general verdict, the constitutional requirement of unanimity calls for a straightforward assessment. All jurors must agree on whether the defendant has been proven guilty beyond a reasonable doubt. Any holdouts will require a mistrial.

[14] ¶50 Special verdicts, of course, have long been permitted. [15] But they are not required. [16] And the constitutional requirement of unanimity in the case of a special verdict is still directed to the question of guilt or

innocence on the crimes charged and submitted for the jury's decision. A special verdict form may ask the jury to indicate its specific factual findings on certain issues, in addition to its conclusion as to the defendant's guilt. [17] But the constitutional requirement of unanimity extends only to the jury's determination that the prosecution proved each element of the crimes in question beyond a reasonable doubt.

¶51 On either a general or special verdict the scope of the protections afforded by the Unanimous Verdict Clause is defined by the *elements of the substantive criminal law*. If a defendant is charged with first-degree murder, for example, the prosecution must prove beyond a reasonable doubt that the defendant "cause[d] the death of another" either "intentionally or knowingly." UTAH CODE § 76-5-203(2)(a). On a general verdict the jury is charged only with deciding the defendant's guilt—a determination that then forms the basis for a judgment of conviction or acquittal entered by the court. [18] On a special verdict, the jury must be unanimous in its findings on these elements. In neither case, however, would the Unanimous Verdict Clause require unanimity on the manner, mode, or factual or legal theory on which its verdict is based.

***11** ¶52 In a case in which the prosecution presented alternative evidence of the mechanism of the cause of death, for example, the jury would not be required to achieve unanimity as to which mechanism it agreed upon beyond a reasonable doubt. [19] So if the jury heard evidence that the defendant both poisoned the victim and tried to suffocate him with a pillow, there would be no requirement for the jury to agree on which mechanism was the ultimate cause of death. That is because *the precise mechanism* of the cause of death is not an element of the crime of murder. All that matters under our substantive law is that the defendant caused death knowingly or intentionally.

¶53 This is not to say that a mere verdict of *guilty* or *not guilty* will always suffice. That depends on the elements of the charged crimes as defined by the lawmaker, and on whether the verdict is clear on its face in establishing that all jurors agreed on each element of each crime.

***12** **[15]** ¶54 Where separate crimes are charged, for example, a verdict may be insufficient if it fails to disclose the jury's unanimity on all elements of each crime. In a case involving charges of both first-degree murder and manslaughter, for example, it would not be enough for the jury to unanimously indicate its support for a judgment of guilt. The classic case is *Ford v. State*, 12 Md. 514, 548 (Md. 1859). *Ford* involved a jury verdict in a case involving both manslaughter and first-degree murder charges. The jury foreman in *Ford* merely announced a verdict of "guilty," and eleven of twelve jurors stated only that they found the defendant "guilty" rather than "guilty of murder in the first degree." *Id.* And the Maryland Supreme Court held that the verdict fell short on unanimity grounds, explaining that "[t]he law says, that when a person shall be found guilty of the crime of murder, by a jury, the jury *shall, in their verdict*, find the degree." *Id.* at 549. Because "this had not been done" in *Ford*, the court reversed. *Id.*

b. The unanimous verdict in this case

[16] ¶55 This is the plain meaning of the Unanimous Verdict Clause of the Utah Constitution. The requirement of unanimity extends only to the jury's *verdict*. And a verdict—both historically and today—is defined by the matters submitted to the jury for decision. Such matters, in turn, are dictated by the substantive criminal law.

¶56 As noted above, the substantive criminal law of *theft* in Utah sets forth a single crime with a discrete set of elements. Our legislature has expressly consolidated the common-law offenses "heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, extortion, blackmail, [and] receiving stolen property" into a "single offense" denominated as "theft." UTAH CODE § 76-6-403. Under Utah Code section 76-6-404, "[a] person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Those are the elements of the crime of theft. And these are accordingly the matters committed to the jury in entering its verdict.

¶57 No other matters—whether denominated "theories" or "methods, modes, or manners" of committing a crime, *supra* ¶ 16 n.6—must be found by the jury to sustain a verdict on a count charging theft. And accordingly no unanimity is required under the Utah Constitution on anything except the prosecution's charge that Hummel exercised unauthorized control over his various clients'

property (on the dates in the five counts against him) with the purpose to deprive them of such control.

¶58 Hummel identifies multiple "theories" behind the charges of theft against him—extortion by threatening to subject someone to criminal confinement, extortion by threatening to take or withhold official action, extortion by threatening to cause a public official to take or withhold official action, deception by a false impression of law or fact, and deception by preventing another from acquiring information likely to affect his judgment. But those "theories" do not represent distinct criminal offenses with different elements in our substantive criminal law. Instead they are definitional *examples*—and non-exhaustive ones—of the various means by which someone may commit the single offense of theft.

¶59 The operative statutory provisions bear this out. Utah Code section 76-6-405 spells out how someone may commit theft through deception. But it does not establish a separate crime of theft by deception. It says only that "[a] person commits *theft* if the person obtains or exercises control over property of another person (i) by deception; and (ii) with a purpose to deprive the other person of property." UTAH CODE § 76-6-405(2)(a) (emphasis added). Section 76-6-406 is along the same lines. It says that "[a] person is guilty *of theft* if he obtains or exercises control over the property of another by extortion and with a purpose to deprive him thereof," and then proceeds to define "extortion" for purposes of the crime of theft. UTAH CODE § 76-6-406(1) (emphasis added).

***13** ¶60 Importantly, neither of these provisions purports to define a separate crime. Both define the crime of *theft*.[20] For that reason they do not alter the *elements of theft*, or add in any way to what the jury must find to enter a verdict on a charge of theft.

¶61 We see no basis for this court to second-guess the legislature's determination of the requisite elements of the crime of theft. Hummel appears to argue that the different "theories" on which the jury might find guilt are legally distinct because each contains alternative *actus reus* elements by which a person could be found to have committed theft. But our substantive criminal law does not bear that out. The statutory examples of means by which a person can meet the elements of the single crime of theft are not "alternative actus reus elements" of theft. They are simply *exemplary means* of satisfying the criminal elements defined by the legislature—that the defendant "obtain[ed] or exercise[d] unauthorized control over the property of another with a purpose to deprive him thereof." UTAH CODE § 76-6-404.

¶62 The relevant parallel here would be to the above-noted example of a murder case with evidence of two alternative means by which it was committed—by poison and by suffocation. There is no distinct crime of murder by poison or murder by suffocation. And for that reason it cannot be said that these distinct theories or means of committing the murder are legally distinct, or more importantly, that they are legal *elements* that must be found unanimously by the jury to have a valid conviction under the Unanimous Verdict Clause.

¶63 The only defensible way to distinguish what is legally distinct from what is not is to defer to the substantive criminal law. Doing so here would require unanimity only as to the elements of the charge of theft on each of the counts against Mr. Hummel. Nothing in the record suggests that there were any holdouts among the jurors at that level. And that leads to an affirmance under the plain meaning of the Unanimous Verdict Clause set forth herein.[21]

***14** ¶64 Hummel's construction of the Unanimous Verdict Clause would set us on a slippery slope without a logical endpoint. If unanimity is required as to anything we could call a distinct "theory" of a crime, our juries would be required to agree on every minute detail presented by the evidence—on whether a murder was caused by suffocation or poisoning, or whether a shoplifter placed a stolen item in his pocket or backpack. If we divorced the requirement of unanimity from the elements set forth in the substantive criminal law, we would open the door to the argument that any and every detail presented by the evidence implicates a distinct "theory" of the crime charged.[22]

¶65 We avoid these line-drawing problems by leaving the requirement of unanimity where it stands under the plain text of the Unanimous Verdict Clause. We therefore hold that the constitutional requirement of unanimity is limited to those matters identified as *elements* of a crime in the substantive criminal law. Mere examples of ways of fulfilling such elements, on the other hand, are not

a necessary part of a verdict, and thus fall beyond the requirement of unanimity. [23]

2. The Requirement of Sufficient Evidence of Alternative Theories

¶66 The sufficiency of the evidence requirement is generally traced back to the influential decision in *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989, 989 (1903). Courts in Utah and elsewhere have cited *Sullivan* as support for a requirement of "substantial evidence to support each of" two alternative theories of a crime. [24] But this conclusion is rooted in a misunderstanding of *Sullivan*. And it bears no logical connection to the constitutional requirement of unanimity, and in fact undermines it. We reject it, at least as extended to alternative means of fulfilling an element of a crime.

a. *Sullivan*

***15** ¶67 *People v. Sullivan* involved two alternative grounds to support a charge of first-degree murder: (1) that the victim was killed with a "deliberate and premeditated design to effect his death"; and (2) "that he was killed by the defendant while the latter was engaged in the perpetration of a felony, or an attempt to commit one." 65 N.E. at 989. The jury returned a verdict of "guilty." Sullivan challenged the verdict on appeal, asserting that the jury had failed to identify the specific ground on which they had found guilt. The New York Court of Appeals affirmed.

¶68 In so doing it emphasized that "[t]here was but a single crime charged in the indictment against the defendant[ ]—that of murder in the first degree." *Id.* And it noted that "the only issue to be determined by the jury was whether the defendant had been guilty of that crime." *Id.* Because guilt of that crime could be established upon "proof *either* that the defendant killed the deceased with a deliberate and premeditated design to effect his death, *or* while the defendant was engaged in the commission of a felony, or an attempt to commit a felony," the *Sullivan* court concluded that it was not "necessary that a jury ... should concur in a single view of the transaction disclosed by the evidence." *Id.*

¶69 In other words, *Sullivan* said "it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one." *Id.* at 989–90. "It was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute." *Id.* at 990.

¶70 This account of *Sullivan* is entirely consistent with the plain text of the Utah Unanimous Verdict Clause, as set forth above. Yet, as noted, *Sullivan* is frequently cited as the root of the requirement of sufficient evidence to support both of two alternative theories of a crime. One basis for this view of *Sullivan* is the following statement in the *Sullivan* majority: " 'If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other.' " *Id.* (quoting *Murray v. N. Y. Life Ins. Co.*, 96 N.Y. 614, 615 (N.Y. 1884)).

¶71 That statement is not a basis for a requirement that *each theory* presented to the jury be supported by sufficient evidence. *See Johnson*, 821 P.2d at 1159 (speaking of a rule of reversal where "any one" of the prosecution's theories "lacks the requisite evidentiary foundation"). Instead, the *Sullivan* majority—and the *Murray* opinion on which it relies—articulates a much more lenient standard. The operative requirement of *Sullivan* is simply that "*the conclusion* may be justified *upon either of two interpretations of the evidence*." *Sullivan*, 65 N.E. at 989 (emphasis added). In context, the relevant "conclusion" is the determination of guilt on the "single crime charged in the indictment"—and on "the only issue to be determined by the jury," which was "whether the defendant had been guilty of that crime." *Id.* With this in mind, the requirement that the verdict be justifiable "upon either of two interpretations of the evidence" is just a classic statement of the general requirement of sufficient evidence to sustain a jury verdict.

¶72 *Sullivan* required sufficient evidence to support "*either of two* " theories of the crime presented to the jury. Naturally. If the record is lacking in evidence of *both* a premeditated killing *and* a killing in the course of a felony, there can be no evidentiary basis for a jury to find the

defendant guilty of the single crime of first-degree murder. This version of the *Sullivan* rule is unimpeachable. It is also the view that prevailed when *Sullivan* was handed down—and around the time of the framing of the Utah Constitution. [25]

***16** ¶73 Yet *Sullivan* was misconstrued over time to require sufficient evidence upon *both of two* theories of a crime. That conclusion is traceable to a separate sentence in the *Sullivan* opinion—a stray statement that "[i]f as to either claim the evidence was insufficient to justify the submission of the question to the jury, the conviction must be reversed, since it cannot be known on which ground the jury based its verdict." 65 N.E. at 989. Yet this statement seems to turn the more detailed analysis in the opinion on its head. It seems to require sufficient evidence on *both* theories of a crime, or in other words *reversal* (not affirmance) if the evidence is insufficient "as to either claim."

¶74 The purported rule of reversal if evidence is lacking on "either" theory of the crime is inconsistent with the thrust of the majority's analysis in *Sullivan*. And this point is a rank dictum: It was completely unnecessary to the court's holding (given that the majority found evidence supporting both theories of the crime [26]), and it appears to represent only an *arguendo* response to the dissent.

¶75 In any event, over time this stray sentence has become the tail that has wagged the *Sullivan* dog. The opinion generally—and quite clearly—declined to require unanimity on which of two theories of the crime was accepted by the jury. And it unequivocally held that evidence of "either" variant was sufficient to sustain the verdict. Yet in this court and others, *Sullivan* eventually became known for a supposed rule of *reversal* if evidence was lacking on either theory of a crime, or in other words a requirement of sufficient evidence as to *both* theories of the crime.

b. The (il)logic of the requirement of sufficient evidence on alternative theories

¶76 For these reasons the notion of a requirement of sufficient evidence to sustain both of two theories of a crime is a product of a mistaken reading of precedent. [27] And that begs a reconsideration of this principle. Not only is this principle indefensible as a matter of the plain language and original meaning of the constitution, but it also fails as a matter of basic logic.

¶77 The sufficiency of the evidence on alternative means of committing a crime tells us nothing about the jury's unanimity on such means. If anything, the existence of evidence of both of two alternatives heightens the risk of a lack of unanimity.

¶78 Consider again the hypothetical murder case involving evidence of both poisoning and suffocation. Compare two alternative cases, one in which we have evidence of only one theory or means of committing the murder and one in which we have evidence of both. The jury returns a guilty verdict in both cases. In which case would we have a greater cause for doubting the jury's unanimity on the means by which the crime was committed? Surely the latter, in which there is sufficient evidence of both alternative means. In that case the likelihood of a split verdict—with some jurors finding murder by suffocation and others finding murder by poisoning—is obvious.

***17** ¶79 Such a split is also possible in a case in which the record evidence supports only one theory (but the prosecution argues both, and/or the jury instructions identify both). Members of the jury, after all, could become confused. Or they could vote for a verdict on a theory unsustained by any evidence at all. But the lack of evidence on an alternative theory makes the possibility of a lack of unanimity *less likely*. And this tells us that the requirement of sufficient evidence on two alternative theories has little or nothing to do with the requirement of unanimity.

¶80 If we were to seriously require unanimity as to distinct theories or means of committing a crime, it would not be enough to require sufficient evidence of both alternatives. We would require a special verdict form requiring the jury to make express findings on which of two theories or means it found sustained by the evidence. Our law has never done that, however. And our refusal to do so further supports the conclusion that our law does not require unanimity at the level of *theory* of a crime or means of fulfilling an element. [28]

3. The Burden of Establishing Prejudicial Error

¶81 It is true, of course, that "it is impossible to determine whether the jury agreed unanimously" on which of two alternative theories of a crime was accepted by a jury who issues a general verdict. *State v. Johnson,* 821 P.2d 1150, 1159 (Utah 1991). But that will hold regardless of whether there is sufficient evidence to support both theories, and perhaps more so when that is the case.

[17] ¶82 Uncertainty, moreover, is not a basis for reversal. Uncertainty counts against the appellant, who bears the burden of proof on appeal, and must overcome a presumption of regularity as to the record and decision in the trial court.[29] Thus, a lack of certainty in the record does not lead to a reversal and new trial; it leads to an affirmance on the ground that the appellant cannot carry his burden of proof.

¶83 Our cases identify a settled means of assessing the effect of a superfluous jury instruction. Such an instruction does not lead to automatic reversal. It simply opens the door for the appellant to carry the burden of showing that the unnecessary instruction affected the judgment below—that it was not *harmless*.[30]

***18** ¶84 Hummel's theory would have us turn this law on its head—by concluding that an unnecessary jury instruction leads to automatic reversal in a case in which there is no evidence to support it. That is not the law.

[18] ¶85 A jury verdict is a product of a substantial investment of public resources. It is entitled to ample deference on appeal. We cannot reverse it on the mere basis of uncertainty. Under our established case law, we may reverse on the basis of an unnecessary jury instruction only if the instruction is shown to be prejudicial (or in other words not harmless). And that forecloses Hummel's invitation for reversal whenever a *theory* is presented to the jury without any supporting evidence.

III. SUFFICIENCY OF THE EVIDENCE

[19] ¶86 Hummel also challenges the sufficiency of the evidence to support the jury's verdict in this case. We assess this challenge in light of the above understanding of the Unanimous Verdict Clause.

[20] ¶87 Thus, we consider only whether there is credible evidence to sustain the *verdict*—the determination of guilt on each of the elements of the crime charged in each count against Hummel. We do not require sufficient evidence on alternative theories or means of committing each count of theft. It is enough that there is sufficient evidence on even one theory or means of proving theft on each count in question. In reviewing the sufficiency of evidence, moreover, "we 'assume that the jury believed the evidence' " and drew reasonable inferences supporting the verdict. *State v. Boyd*, 2001 UT 30, ¶ 16, 25 P.3d 985 (citation omitted).

¶88 We affirm under these standards. We hold that the State presented believable evidence to support a determination of guilt—of proof beyond a reasonable doubt on each of the elements of theft—on each of the counts against Hummel.

¶89 Hummel challenges the strength of the prosecution's evidence on the theory of theft by extortion. And he may be right to question the strength of the prosecution's case on this theory. But in Utah there is no separate crime called theft by extortion, and Hummel was not charged with such a crime. He was charged with *theft*. And the jury verdict on the counts of theft may be sustained with evidence of alternative theories of this crime—such as theft by deception—even if there is insufficient evidence of theft by extortion. *See supra* ¶87.

¶90 We affirm on that basis. We conclude that there was ample evidence that Hummel engaged in theft—that he "obtain[ed] or exercise[d] unauthorized control over the property of another with a purpose to deprive him thereof." *Id.* § 76-4-404. Specifically, we hold that there was sufficient evidence to sustain a determination by the jury that Hummel obtained or exercised unauthorized control over the property of each of his clients by acts of deception.

¶91 For four of the five counts against Mr. Hummel, there was evidence that he committed theft by deception by preventing his clients "from acquiring information likely to affect [their] judgment[s] in the transaction." UTAH CODE § 76-6-401(5) (setting forth means of engaging in "deception"). The evidence indicated that Hummel removed four of his clients' applications for appointed counsel from the clerk's desk before the court could rule on them. And the jury could reasonably have concluded that the court's disposition of these applications was "information likely to affect [their] judgment[s]" on the

question whether to retain him privately. It was a fair inference, in fact, that that was Hummel's purpose in removing the applications. Alternative inferences could also be drawn from the evidence. But this was a fair one, and that is all that is necessary to sustain the jury verdict.

***19** **[21]** ¶92 There was one other count on which there was no indication that Hummel had removed his client's application from the clerk's desk. But on this count there was evidence that Hummel encouraged his client to file an application overstating his annual income in order to ensure that he was denied counsel (after telling him that he did not qualify). As with the removal of applications, a jury could find that this prevented the client from discovering "information likely to affect [his] judgment." UTAH CODE § 76-6-401(5). And with this client there was also evidence that Hummel had in fact been formally appointed as a public defender, so the jury could have concluded that Hummel's assertion that the client did not qualify for a public defender was false and deceptive.

¶93 We accordingly find sufficient evidence to sustain guilty verdict on all of the counts against Hummel. And we affirm on that basis.

IV. CONSTITUTIONAL RIGHT TO DEMAND THE NATURE AND CAUSE OF ACCUSATIONS

[22] ¶94 Hummel also challenges his convictions under article I, section 12 of the Utah Constitution. He says the prosecution initially alleged that Hummel talked his clients out of the public defender arrangement after it had been finalized, but shifted gears when it learned that no formal appointment had been made (as to most of the clients at issue in this case). And he says that this deprived him of his right to "demand the nature and cause of the accusations against him" under the Utah Constitution. UTAH CONST. art. 1, § 12.

¶95 We reject this argument on preservation grounds. If Hummel had a gripe with the prosecution's change in the theory of its case he had an obligation to object and ask for a continuance. *See State v. Fulton*, 742 P.2d 1208, 1215 (Utah 1987). Yet he failed to raise any objection or ask for a continuance. And that failure is fatal. *Id.* at 1215–16 (explaining that "the failure of a defendant to seek a continuance negates any claim of surprise and amounts to a waiver of any claim of variance").

V. "PROSECUTORIAL MISCONDUCT" IN INTRODUCING FALSE OR MISLEADING EVIDENCE AT THE PRELIMINARY HEARING AND TRIAL

[23] ¶96 Lastly, Hummel alleges "misconduct" on the part of the prosecution, asserting that his right to due process was infringed thereby. The alleged "misconduct" falls into three categories: (a) presentation of allegedly false hearsay statements at the preliminary hearing; (b) presentation of misleading or false testimony at trial; and (c) statements made in closing argument, which in Hummel's view were inaccurate and aimed at encouraging the jury to engage in speculation.

¶97 Hummel lumps these items together and labels them all "prosecutorial misconduct." In so doing, he glosses over his lack of preservation—his failure (on most of these points) to raise an objection at trial. And he seeks to sidestep the requirement of proof of obvious, prejudicial error—traditional "plain error"—on the arguments he failed to preserve.

¶98 Citing *State v. Emmett*, 839 P.2d 781 (Utah 1992), and *State v. Ross*, 2007 UT 89, 174 P.3d 628, Hummel says that acts of "prosecutorial misconduct" are reversible error so long as "they are harmful" (or in other words prejudicial). *Appellant's Brief* at 53. He identifies two broad categories of prosecutorial misconduct: (a) introducing evidence a prosecutor "knows or has reason to know is false," a category he traces to *State v. Doyle*, 2010 UT App 351, 245 P.3d 206; and (b) making statements in closing that "call to the jurors' attention matters that they would not be justified in considering in reaching a verdict," a category he ties to *State v. Emmett*, 839 P.2d 781 (Utah 1992). *Id.*

¶99 The State responds by asserting that Hummel failed to preserve an objection to most of these acts of "misconduct." It asks us to affirm on the basis of "inadequate briefing" on Hummel's part—his failure to present a more extensive argument under the law of plain error.

***20** ¶100 The State acknowledges Hummel's reliance on *Ross* in support of his preferred "plain error standard for a misconduct claim." But it chides him for "presum[ing] the State maintains the burden of proof on appeal in that

context without recognizing the unsettle[d] state of the law on the issue." To illustrate the unsettled state of the law, the State cites *State v. Clark*, 2014 UT App 56, 322 P.3d 761, and *State v. Cox*, 2012 UT App 234, ¶ 15 n.2, 286 P.3d 15 (Voros, J., concurring), which highlight the lack of clarity in our law as to "the harmlessness standard and who bears the burden of proof for unpreserved claims of prosecutorial misconduct in the plain error context." *Clark*, 2014 UT App 56, ¶ 31 n.7, 322 P.3d 761. And the State urges us to reject Hummel's position on appeal "as inadequately briefed" given his failure to address these nuances. *Appellee's Brief* at 63.

¶101 We recently noted the "tension in our previous cases" on the standard that applies in a case involving an unpreserved challenge to a prosecutor's questions eliciting material that should have been withheld from the jury. *See State v. Bond*, 2015 UT 88, ¶ 38 n.10, 361 P.3d 104. In the *Bond* case we considered a challenge to a prosecutor's "leading questions of a witness who claims a privilege against self-incrimination"—questions that had a tendency to inculpate the defendant while depriving him of his Confrontation Clause right of cross-examination. *Id.* ¶ 33. Yet we noted that the defense had failed to object to these questions. *Id.* ¶ 30. "Therefore," we held that "our disposition turn[ed] on whether the trial court plainly erred in allowing the prosecution to question [the witness] in this manner or whether [the defendant's] lawyers rendered ineffective assistance in failing to move for a mistrial based on the Confrontation Clause." *Id.*

¶102 Our *Bond* opinion acknowledged the above-noted line of cases suggesting a basis for direct review of alleged prosecutorial misconduct. *See id.* ¶ 38 (citing *Ross*, 2007 UT 89, 174 P.3d 628). But we also reiterated our commitment to the law of preservation—and to the set of well-established exceptions to the general rule requiring an objection at trial to preserve an argument for appeal (plain error, exceptional circumstances, and ineffective assistance of counsel). *See id.* ¶ 41 n.14 (establishing that "we have already announced that our 'preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that exceptional circumstances exist or plain error occurred' " (citation omitted)). And we "h [e]ld that unpreserved federal constitutional claims are not subject to a heightened review standard but are to be reviewed under our plain error doctrine." *Id.* ¶ 44.

¶103 In so holding, we emphasized that this rule "comports with the aims of preservation as expressed by the United States Supreme Court and this court." *Id.* ¶ 45. We noted, for example, "that under plain error review, the 'burden should not be too easy for defendants' and the standard of review should 'encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error.' " *Id.* (quoting *United States v. Dominguez*, 542 U.S. 74, 82, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004)). "And because in our adversarial system the responsibility to detect errors lies with the parties and not the court," we explained that "preservation rules encourage litigants to grant the district court the first opportunity to rule on an issue." *Id.*

¶104 With this in mind, we proceeded in *Bond* to consider whether the *trial court committed plain error* "in permitting the prosecutor to ask [the witness] leading questions." *Id.* ¶ 48. We asked, in other words, not whether the prosecutor's questions were improper, but whether the impropriety "should have been obvious to the trial court." *Id.*

***21** ¶105 This same approach is appropriate here. On points on which Hummel raised no objection at trial, our review is for plain error.[31] And our plain error analysis asks not whether *the prosecutor* made a misstep that could be characterized as *misconduct*, but whether the *trial court* made an "obvious" error in its decision. *See State v. Thornton*, 2017 UT 9 ¶ 49, —— P.3d —— (noting that generally appellate courts "ask only whether the trial court committed a reversible error in resolving a question presented for its determination" rather than "review[ing] the trial record in a search for an idealized paradigm of justice").

¶106 Our *Ross* line of "prosecutorial misconduct" cases is in some "tension" with the above. *See Bond*, 2015 UT 88, ¶ 38 n.10, 361 P.3d 104. In *Ross* and elsewhere we have suggested that *a prosecutor's* error may constitute a " 'standalone basis for direct review of the actions of prosecutors.' " *Id.* ¶ 23 n.5 (quoting *State v. Larrabee*, 2013 UT 70, ¶ 65, 321 P.3d 1136 (Lee, J., dissenting)). Yet in *Bond* we declined to "endors[e]" that approach. *Id.* And we emphasized the need to focus our analysis on *district court decisions* in order to preserve the lines and policies protected by the law of preservation.

[24] ¶107 We extend *Bond* a step further here. We do so by concluding that plain error review considers the

plainness or obviousness of the district court's error (not the prosecutor's). That follows from the nature of our appellate jurisdiction: Appellate courts review the decisions of lower courts. We do not review the actions of counsel—at least not directly.

¶108 That is not to say that the extent of a prosecutor's "misconduct" is irrelevant to our analysis. The propriety of a lower court decision may turn, in part, on the egregiousness of an attorney's misstep. If a prosecutor asks a question aimed at eliciting material that is both highly prejudicial and clearly inadmissible, that may suggest that the trial judge was plainly wrong in not intervening to block its admission *sua sponte*. The more plain or obvious the prosecutor's misstep, the greater the likelihood (other things being equal) that an appellate court would find plain error in a judge's failure to step in to stop it. That kind of thinking may be behind our assertion that "prosecutorial misconduct" can constitute plain error. [32]

¶109 It goes too far, however, to suggest that every misstep of a prosecutor should be corrected by the trial judge —or in other words that it is always plain error by the judge not to step in when the prosecutor oversteps his bounds. At least occasionally, the defense may be aware of a prosecutor's misstep but choose not to highlight it through an objection. Our adversary system, moreover, relies generally on objections from parties to police the admissibility of evidence. We do not require or even expect our trial judges to exercise their own independent judgment on the question of admissibility. [33]

***22** ¶110 The same goes for statements in closing argument. In closing counsel have "considerable latitude" in the points they may raise. *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989). And the law recognizes the prerogative of opposing counsel to swallow their tongue instead of making an objection that might have the risk of highlighting problematic evidence or even just annoying the jury. [34] With this in mind, we cannot properly conclude that every misstep of counsel in closing amounts to plain error—subject only to proof of prejudice. We must ask first whether counsel's missteps were so egregious that it would be plain error *for the district court* to decline to intervene *sua sponte*.

¶111 For these reasons we repudiate the statements in *Ross* and related cases in which we have identified "prosecutorial misconduct" as a standalone basis for independent judicial review. We hold instead that the law of preservation controls here as in other circumstances. Thus, absent an objection at trial, we review the district court's actions under established exceptions to the law of preservation (here, plain error).

¶112 A contrary holding would open the door to the use of the "prosecutorial misconduct" label as an end-run around the law of preservation (and the doctrine of plain error review). Most every problematic turn in the proceedings in a criminal trial could be reframed as a result of a prosecutorial misstep. An erroneous jury instruction, for example, could be blamed on the prosecutor who was involved in drafting it. The same goes for presenting inadmissible evidence or asking leading questions to a witness who has invoked the Fifth Amendment (as in *Bond*). Appellate review of these and other proceedings at trial must be subject to the law of preservation. The call of "prosecutorial misconduct" cannot override our usual standards of review in this area.

¶113 In this case, we therefore ask not whether the prosecutor made missteps but whether the trial judge committed reversible error. And we distinguish the grounds raised on appeal that were preserved from those that were not, assessing the latter under plain error review.

A. Misleading Hearsay Evidence at the Preliminary Hearing

[25] ¶114 Hummel complains that the district court admitted misleading hearsay evidence at the preliminary hearing. The out-of-court statements in question were from Hummel's clients, who stated they believed Hummel had been appointed as a public defender before they agreed to enter into a private retention agreement with him. These statements came in under Utah Rule of Evidence 1102(b)(8)(B). That rule allows hearsay in "criminal preliminary examinations" if it is "a statement of a declarant that is written, recorded, or transcribed verbatim which is: ... (B) pursuant to a notification to the declarant that a false statement made therein is punishable." *Id.* On appeal, Hummel argues that these statements were "false," and that "[t]he prosecutor could have determined" their falsity "by simply consulting the district court's files." *Appellant's Brief* at 50. And

he challenges the admission of this evidence in the preliminary hearing on that basis.

***23** ¶115 We affirm. Hummel failed to preserve an objection to the admission of these statements at the preliminary hearing. He objected only to the admission of a part of one of the statement—a part that was unconnected to the question of whether he had been appointed as counsel. And in his motion to quash the bindover decision he did not assert that the admission of false statements was a basis for overturning the bindover decision. So his argument fails for lack of preservation—and for lack of any argument for reversal on grounds of plain error.

B. Misleading Testimony at Trial

[26] ¶116 Hummel next complains of the admission at trial of testimony that Hummel had been appointed to represent one of his clients (Callies). He asserts that this testimony was misleading—and contradicted by other evidence. And he asks for reversal on the basis of "prosecutorial misconduct" in presenting this testimony.

¶117 The question for our review is not whether to question the prosecutor's actions. It is whether the district court erred in admitting this evidence. And here we begin by noting a lack of preservation. Hummel never objected to the admission of the testimony in question. That is fatal to his argument on appeal. Hummel cannot establish plain error. His position, as above, is to question the evidence that was admitted by countering it with other evidence in the record. That is insufficient.

[27] ¶118 It is not error—much less plain error—for the court to admit evidence (without objection) that is contradicted by other evidence in the record. Such contradictions are commonplace. And they are a significant reason why cases go to trial. We affirm because we cannot fault the district court for admitting evidence that was not objected to just because other evidence in the record seems to cut the other way.

C. Statements in Closing Argument

[28] ¶119 That leaves the question of the prosecution's allegedly misleading statements in closing argument. Hummel points to several statements the prosecutor made in closing that were allegedly inaccurate and encouraged the jury to engage in speculation. Again, however, there is a preservation problem. For all but one of the statements in question, Hummel raised no objection at trial. And none of those statements was so egregiously false or misleading that the judge had an obligation to intervene by raising an objection *sua sponte*. [35]

¶120 Hummel points to one statement in closing that he objected to at trial. But the trial judge sustained the objection. And Hummel makes no attempt to argue that the judge's response to the objection was inadequate—that a curative instruction was required, or a mistrial. That is also fatal under the law of preservation. [36] If Hummel believed that the sustaining of his objection was insufficient, he had a duty to ask the judge to do more. Where the judge gave him everything he asked for (sustaining his objection), he is in no position to ask for more on appeal.

V. CONCLUSION

***24** ¶121 Mr. Hummel raises important, unresolved questions of state constitutional law in this appeal. But he has failed to identify a basis for reversal of his convictions. We affirm.

All Citations

--- P.3d ----, 2017 WL 1245460, 2017 UT 19

Footnotes

1 On October 25, 2016, this court requested supplemental briefing on the question whether "the Utah Constitution require[s] sufficient evidence on both of two alternative theories (or methods or modes) of a crime that are submitted to a jury." Suppl. Briefing Order 1, Oct. 25, 2016. In response the State asserted that the Due Process Clause of the Utah Constitution does not require unanimity as to alternative factual theories supporting conviction. State's Suppl. Br. *passim*, Nov. 9, 2016. In his reply to the State's supplemental brief, Hummel clarified that his appeal on this issue rests exclusively on the Unanimous Verdict Clause of the Utah Constitution, not the Due Process Clause. Reply to State's Suppl. Br. at 2–3,

Nov. 18, 2016. Our analysis is accordingly focused on the Unanimous Verdict Clause; we do not reach the due process issues alluded to by the State because Hummel has not advanced a due process claim.

2 The count involving Sandberg was for attempted theft, given that Hummel did not actually acquire Sandberg's property. On the attempted theft charge the jury instruction spoke of "attempt[ing] to obtain or exercise" rather than "obtain[ing] or exercis[ing]."

3 The listed means of extortion were as follows: (1) "threaten [ing] to subject the alleged victim to physical confinement or restraint," (2) "threaten[ing] to ... take action as an official against the alleged victim," (3) "threaten[ing] to ... withhold official action related to the victim," or (4) "threaten[ing] to ... cause such action or withholding of action."

4 The listed means of deception were as follows: (1) "creat[ing] or confirm[ing] by words or conduct an impression of law or fact that [was] false," which Hummel did not believe to be true, and that was likely to affect the judgment of another in the transaction, (2) "fail[ing] to correct a false impression of law or fact that [Hummel] previously created or confirmed by words or conduct that [was] likely to affect the judgment of another and that [Hummel] does not now believe to be true," or (3) "prevent[ing] another from acquiring information likely to affect his judgment in the transaction." For the count that offered only a theory of theft by deception, only the latter two sub-theories were presented to the jury.

5 *See also State v. Taylor,* 570 P.2d 697, 698 (Utah 1977) ("The Utah theft statute consolidates the offenses known under prior law as larceny, embezzlement, extortion, false pretenses, and receiving stolen property into a single offense entitled theft, and clearly evidences the legislative intent to eliminate the previously existing necessity of pleading and proving those separate and distinct offenses. All that is now required is to simply plead the general offense of theft and the accusation may be supported by evidence that it was committed in any manner specified in sections 404 through 410 of the Code...." (footnotes omitted)); Paul N. Cox, Note, *Utah's New Penal Code: Theft,* 1973 UTAH L. REV. 718, 733 (1973) (observing that the Utah legislature consolidated extortion, larceny, false pretenses, and several other property offenses into one single crime of theft; and noting that "[t]he complex technical distinctions among offenses against property and resulting procedural reversals of criminal convictions gave rise to a ... movement to eliminate these distinctions through substantive consolidation").

6 "An accusation of theft may be supported by evidence that it was committed in any *manner* specified in Sections 76-6-404 through 76-6-410." UTAH CODE § 76-6-403 (emphasis added).

7 A defendant could hardly escape a theft charge by admitting he "obtain[ed] or exercise[d] unauthorized control over the property of another with a purpose to deprive him thereof" but insisting that he didn't do so in any of the specific manners set forth in sections 405 through 410. (A pickpocket, for example, is still guilty of theft even if pickpocketing is not expressly set forth as a manner of committing theft.) Thus, section 404 sets the general elements of the crime of theft and sections 405 through 410. identify exemplary (non-exclusive) ways of fulfilling those elements.

8 *See, e.g.*, *State v. Thompson*, 31 Utah 228, 87 P. 709, 710 (1906) ("Every information or indictment, to be adequate, must allege a day and year on which the offense was committed. It is inadequate to charge an offense committed at some indefinite time between two specified days."); *State v. Hoben*, 36 Utah 186, 102 P. 1000, 1006 (1909) ("The record here shows two separate and distinct offenses, and two separate and distinct transactions. Two separate and distinct offenses were testified to by the prosecutrix and proven by the state. One was committed on the 1st day of April, 1906, when the prosecutrix became pregnant, and the other along about the 1st of November, 1905. It was with respect to the offense of April, 1906, and to the transactions out of which it arose, that the defendant was given his constitutional privilege of a preliminary hearing.").

9 Hummel's arguments are not even limited to the distinct *theories* of theft set forth in the exemplary provisions of the Utah Code—to theft *by extortion* or theft *by deception*. In assessing the sufficiency of the evidence to support the prosecution's theory of theft, Hummel also analyzes *sub-theories*. He asks not whether there was sufficient evidence to support a theory of theft by extortion, but whether there was sufficient evidence to support the separate means by which the prosecution argued that theft by extortion was committed. That exacerbates the line-drawing problem introduced by Hummel's position.

10 *See Johnson*, 821 P.2d at 1159 *overruled in part on other grounds by State v. Crank*, 105 Utah 332, 142 P.2d 178 (1943); *State v. Tillman*, 750 P.2d 546, 563 (Utah 1987) (plurality opinion); *State v. Russell*, 733 P.2d 162, 165 (Utah 1987).

11 The other two cases on point are *State v. Russell*, 733 P.2d 162 (Utah 1987), and *State v. Johnson*, 76 Utah 84, 287 P. 909 (1930) *overruled in part on other grounds by State v. Crank*, 105 Utah 332, 142 P.2d 178 (1943). *Russell* raised the question whether unanimity was required as to which of three alternative mental states for second-degree murder was proven beyond a reasonable doubt—"intentionally or knowingly" causing death; intending to cause "serious bodily injury" and causing death by an act clearly "dangerous to human life"; and causing death in circumstances evidencing "depraved indifference to human life." *Russell*, 733 P.2d at 164. The court was splintered. The lead opinion (of Justice

Howe, joined by Justice Hall) concluded that unanimity was not required at this level, asserting that "[t]he decisions are virtually unanimous that a defendant is not entitled to a unanimous verdict on the precise manner in which the crime was committed." *Id.* at 165. Justice Stewart concurred in the result and wrote separately. He indicated his view "that it would have been preferable for the trial judge to give an instruction on unanimity as to the defendant's *mens rea*," but concluded that "the fundamental principle of jury unanimity was [not] violated in this case." *Id.* at 169. Justice Durham also concurred in the result and authored an opinion. She indicated that she would require unanimity except where "(1) a single crime has been charged, even though it may be committed in alternative ways or by alternative but related acts, (2) those acts are not substantially distinct from each other in terms of either their legal, factual, or conceptual content, and (3) the State has presented substantial evidence supporting each alternative mode of commission of the crime." *Id.* at 176. Yet she voted to affirm because she found these conditions to be met. *Id.* at 178 (concluding that the three alternative *mens rea* elements arise under "a single offense," that the three alternative elements were "significantly distinct from one another in terms of their legal or factual content," and there was sufficient "evidence on each of the three alternatives"). Justice Zimmerman concurred only in the result, without opinion. *Id.* at 178.

Thus, *Russell* also stopped short of resolving the question in this case. Like *Tillman*, *Russell* involved not distinct "theories" in the sense of merely different manners of fulfilling an element of a crime, but different alternative *elements* of a crime. And there was no majority view on the standard for assessing the constitutional requirement of unanimity as to such alternative elements.

Lastly, in the earlier *Johnson* case the court reversed an involuntary manslaughter conviction where there was insufficient evidence to support one of the alternative elements for satisfying the unlawful act requirement of the statute. 287 P. at 911–12; *see also* *State v. Rasmussen*, 92 Utah 357, 68 P.2d 176, 182 (1937) (plurality opinion) (identifying the unlawful acts requirement of the manslaughter statute as involving "several elements ... any one of which properly pleaded and proved would support a [guilty] verdict"); *State v. Roedl*, 107 Utah 538, 155 P.2d 741, 747 (1945) (discussing *Rasmussen* and reiterating that an "unlawful act [ ]" was one of the "necessary elements to be proved beyond a reasonable doubt in proving the crime of involuntary manslaughter and the finding of a verdict of guilty by the jury").

In 1928, our law defined involuntary manslaughter as "the unlawful killing of a human being without malice ... in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection." UTAH CODE § 103–28–5 (1928). Like the aggravating circumstance element of aggravated murder, the element requiring a killing "in the commission of an unlawful act" is subject to the requirement of unanimity, but that element may be proved by reference to any number of statutory violations. The information in *Johnson* asserted several alternative unlawful acts not amounting to a felony, including driving while intoxicated and a variety of traffic infractions. *Johnson*, 287 P. at 910. The defendant contended that there was insufficient evidence to support a finding that he was driving while intoxicated and the court agreed. *Id.* at 911–12. Because the jury had rendered only "a general verdict of guilty 'as charged in the information,' " the court could not determine whether there had been unanimity on the unlawful act element. *Id.* at 912. Accordingly, the court reversed the conviction. *Id.* Contrary to Hummel's assertion, the earlier *Johnson* case only strengthens our conclusion that unanimity is required only as to *elements* of an offense.

12 *See* WILLIAM C. COCHRAN, THE STUDENTS' LAW LEXICON: A DICTIONARY OF LEGAL WORDS AND PHRASES 266 (1888) (defining *verdict* as "the decision of a jury reported to the court, on the matters submitted to them on the trial of a cause"); HENRY CAMPBELL BLACK, DICTIONARY OF LAW 1216 (1891) (defining *verdict* as the "formal and unanimous decision or finding of a jury, impaneled and sworn for the trial of a cause, upon the matters or questions duly submitted to them upon the trial"); J. KENDRICK KINNEY, A LAW DICTIONARY AND GLOSSARY 683 (1893) (defining *verdict* as "the finding of a jury as to the truth of matters of fact submitted to them for trial").

13 *See, e.g.,* *State v. Creechley*, 27 Utah 142, 75 P. 384, 384 (1904) ("A verdict upon a plea of not guilty shall be either 'Guilty' or 'Not guilty,' which imports a conviction or acquittal of the offense charged in the information or indictment. Upon a plea of a former conviction or acquittal of the same offense, it shall be either 'For the state' or 'For the defendant.' " (quoting UTAH REV. ST. 1898, § 4891)).

14 *See also* *Callahan v. Simons*, 64 Utah 250, 228 P. 892, 894 (1924) (noting that in a general verdict, "as contradistinguished from a special verdict," "the jury merely ... found the issues in favor of the defendant and stated the amount that was allowed him on his counterclaim"); *State v. Tillman*, 750 P.2d 546, 563 (1987) (observing that "the jury was given a general verdict form which it subsequently returned unanimously finding defendant guilty of first degree murder").

15 *See, e.g.,* 1876 COMPILED UTAH LAWS 728, § 175 (declaring that a special verdict lays out the jury's findings of fact, not the evidence needed to prove those conclusions); UTAH REV. ST., § 3292(2) (1898) (providing means of proving

that a juror has "been induced to assent to any general or special verdict"); *Toltec Ranch Co. v. Cook*, 24 Utah 453, 67 P. 1123, 1123 (1902) (concluding that there was no "irregularity ... as to warrant a reversal" where jury found both general and special verdicts for each defendant, and the "court adopted the verdict and special findings of the jury").

16 "At early common law, the jury determined whether it would bring in a general or special verdict.... With few exceptions, it is discretionary with the court whether to require a general or special verdict." 6 AM. JUR. TRIALS 1043 (2016).

17 *Cf.* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 377 (1768) (noting that in a special verdict, the jury "state[s] the naked facts, as they find them to be proved, and pray the advice of the court thereon"); *Special verdict*, Black's Law Dictionary (10th ed. 2014) ("A verdict in which the jury makes findings only on factual issues submitted to them by the judge, who then decides the legal effect of the verdict.").

18 *See, e.g.*, *State v. Logan*, 712 P.2d 262, 264 (Utah 1985) (distinguishing the verdict handed down by the jury from the judgment entered by the trial judge).

19 *See United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 201, 5 L.Ed. 64 (1820) (unanimity not required on whether the crime of piracy was "committed ... in a haven ... or bay," on one hand, or "on the high seas," on the other; general verdict deemed sufficient); GEORGE BEMIS, REPORT OF THE CASE OF JOHN W. WEBSTER 471 (1850) (quoting Chief Justice Lemuel Shaw in the Webster case on whether unanimity was required as to "several modes of death": "The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may well be satisfied that the homicide was committed, and yet the evidence before them leave it somewhat doubtful as to the mode of death.... Take the instance of a murder at sea. The man is struck down, — lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow, or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts.... [I]t would certainly be unreasonable that the defendant should escape conviction because of difference of opinion among the jurors as to whether his victim was killed by the blow or by drowning, when all were convinced that the killed was effected by the felonious act of the defendant."); *People v. Sullivan,* 173 N.Y. 122, 65 N.E. 989, 989–90 (1903) ("[I]t was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one. It was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute."); *State v. Baker*, 63 N.C. 276, 281 (1869) (observing that "[t]he killing is the substance, the mode is the form: and while it is important, that the prisoner should be specifically informed of the charge against him, so that he may make his defence, yet he cannot complain that he is informed that, if he did not do it in one way, he did it in another—both ways being stated; and it is not to be tolerated, that the crime is to go unpunished, because the precise manner of committing it is in doubt.... [W]hen there are several counts, some [supported by the evidence] and some [not], and a general verdict, judgment may pass upon the good, rejecting the [unsupported] as surplusage. Where there are several counts, and evidence was offered with reference to one only, the verdict though general, will be presumed to have been given on that alone. Where there are several counts, charging the same crime to have been done in different ways, the jury are not bound to distinguish in which way it was done, but the verdict may be general." (citations omitted)).

20 "A person commits *theft* if the person obtains or exercises control over property of another person: (i) by deception." UTAH CODE § 76-6-405(1) (emphasis added). "A person is guilty of *theft* if he obtains or exercises control over the property of another by extortion...." *Id.* § 76-6-406(1) (emphasis added).

21 The district court in this case followed this line of reasoning precisely. In issuing the jury instructions for Hummel's trial, the trial court rejected defense counsel's proposal for an alternative instruction that would have required unanimity as to the means or manner in which the theft was committed. And it did so, correctly, on the basis of the determination that "the unanimity rule" turns on "whether [the charged crime] is a single crime that can be committed in different ways." *Transcript of Trial*, 132 (Feb. 1, 2013). Because the theft charges at issue here fit that mold, the district court properly held that there was no requirement of unanimity at the granular level of the "way[ ]" in which the crime was committed.

In explaining his conclusion, the trial judge raised a murder hypothetical, in which there is some question of how the murder was caused. And he rightly noted that under our cases "it doesn't really matter" whether they agreed on the means of causing death "if they think that he caused the death." *Id*. That conclusion is precisely in line with our decision today. We affirm on that basis, while noting that Hummel's contrary approach would open a hornet's nest of problems in future cases, as in the murder hypothetical raised above.

22 *See State v. Russell*, 733 P.2d 162, 167–68 (Utah 1987) (Howe, J., plurality) (expressing agreement with concerns raised in other courts about "the difficulty that would be encountered with juries if" unanimity were required on sub-elemental aspects of a crime); *State v. James*, 698 P.2d 1161, 1165 (Alaska 1985) ("There are differences in conduct, intent or

circumstances between the subsections of almost every criminal statute in our code. Rejection of the [limiting principles of the] *Sullivan* rule would therefore result in juror disagreement over semantics in many cases in which they unanimously agree that the defendant committed the wrongful deed. ... By requiring semantic uniformity we encourage overcomplicated instructions and hung juries in cases in which the jurors actually agree upon the defendant's guilt."); *Holland v. State*, 91 Wis.2d 134, 280 N.W.2d 288, 293 (1979) ("To require unanimity as to the manner of participation would be to frustrate the justice system, promote endless jury deliberations, encourage hung juries, and precipitate retrials in an effort to find agreement on a nonessential issue.").

23 In rejecting Hummel's approach we also avoid another line-drawing problem of constitutional magnitude—whether reversal on the basis of insufficient evidence of one of more theories of a crime bars retrial under the Double Jeopardy Clause. This is an important, complex question without a clear answer. Some courts have rejected double jeopardy arguments in analogous circumstances. *See United States v. Garcia*, 938 F.2d 12, 13 (2d Cir. 1991); *State v. Kalaola*, 124 Hawai'i 43, 237 P.3d 1109, 1112 (2010). But there is a contrary argument with some weight behind it: Hummel has once been subjected to the full range of jeopardy that attaches to a defendant at trial, and it is not at clear whether a retrial after reversal on the grounds proposed by Hummel would give the state "another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Our decision to affirm allows us to avoid this difficult question.

24 *See State v. Tillman*, 750 P.2d 546, 564 (Utah 1987) (plurality opinion of Hall, C.J.); *see also State v. Arndt*, 87 Wash.2d 374, 553 P.2d 1328, 1330 (1976) (citing *Sullivan* for the proposition that "it is unnecessary to a guilty verdict that there be more than unanimity concerning guilt as to the single crime charged, ... regardless of unanimity as to the means by which the crime is committed *provided there is substantial evidence to support each of the means charged*" (emphasis added)); *Bloomquist v. State*, 914 P.2d 812, 818–19 (Wyo. 1996) (holding that defendant was not denied the constitutional right to a unanimous verdict when he was charged with committing a crime in two different ways, the jury returned a general verdict, and there was "sufficient evidence support[ing] each alternative ground" for the conviction).

25 *See, e.g.*, *State v. Baker*, 63 N.C. 276, 280 (N.C. 1869) (citing WHARTON'S CRIM. LAW § 3047) (affirming conviction on homicide where the indictment contained four counts covering several distinct methods of commission, all of which were submitted to the jury, but only one of which was supported by the evidence); *Rhea v. State*, 63 Neb. 461, 88 N.W. 789, 799 (1902) (applying the *Murray* rule where the defendant was charged with first degree murder, either by a premeditated act or in the course of a felony; observing that "[t]he rule, as we understand the authorities," was that the jury could return a general verdict when either of the alternatives was supported by the evidence (emphasis added)).

26 *See People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989, 991–92 (1903) (finding sufficient evidence for the jury to find the defendant guilty of first degree murder via premeditation and deliberation); *id.* at 992 (concluding that "the evidence was also sufficient to justify the jury in finding that the defendant and his associates were engaged in an attempt to commit a felony ... when they took the life of the deceased").

27 Many courts in other jurisdictions agree with this conclusion. In the decisions cited below and others, the courts have declined to adopt the broad reading of the *Sullivan* dictum. *See, e.g., Rice v. State*, 311 Md. 116, 532 A.2d 1357, 1364 (1987) (citation omitted) (arguing that the *Sullivan* logic "requires unanimity only in the verdict, not in the rationale upon which the verdict is based," without including an additional requirement of sufficient evidence on all alternatives); *see also People v. Smith*, 233 Ill.2d 1, 329 Ill.Dec. 331, 906 N.E.2d 529, 537–38 (2009); *State v. Elliott*, 987 A.2d 513, 520–21 (Me. 2010); *Davis v. State*, 313 S.W.3d 317, 342 (Tex. Crim. App. 2010); *State v. Johnson*, 243 Wis.2d 365, 627 N.W.2d 455, 459 (2001).

28 We need not and do not overrule the *Johnson* line of cases. We simply adopt a limited reading of these cases and decline to extend them to a case involving alternative theories that are not alternative elements of a crime.

29 *See State v. Triptow,* 770 P.2d 146, 149 (Utah 1989) ("A previous judgment of conviction ... is entitled to a presumption of regularity...."); *Broderick v. Apartment Mgmt. Consultants, L.L.C.,* 2012 UT 17, ¶ 19, 279 P.3d 391 ("We recognize that appellants bear the burden of persuasion on appeal."). That presumption is further reinforced by the presumption of constitutionality. *See State v. Robison,* 2006 UT 65, ¶ 21, 147 P.3d 448 ("Under the presumption of regularity, 'Utah courts place the initial burden on the appellant, not on the state, to produce some evidence that the prior conviction was improper, attaching a presumption of regularity, including a presumption of constitutionality, to the prior conviction.' " (citation omitted)).

30 *See State v. Fisher*, 680 P.2d 35, 37 (Utah 1984) (finding only harmless error, and thus no need to "reverse a conviction even if there were erroneous instructions on [one] variation" of a "crime submitted to the jury" where "the evidence overwhelmingly supports a conviction under one variation"). *See also State v. Young*, 853 P.2d 327, 347 (Utah 1993) ("Even if defendant can show that the instructions given by the trial court were in a technical sense incorrect, he has

not shown that the instructions prejudiced him. Only harmful and prejudicial errors constitute grounds for granting a new trial."); *State v. Johnson*, 774 P.2d 1141, 1146 (Utah 1989) ("[D]efendant does not contend that had his proposed instruction been given, the outcome of the trial would have been different, and indeed, nothing appears to indicate that the result would have been otherwise had the instruction been given.").

31 Hummel makes no exceptional circumstances argument and does not allege ineffective assistance of counsel.

32 *See State v. Ross*, 2007 UT 89, ¶ 53, 174 P.3d 628 (asking "whether the *State's* remarks during closing arguments constitute prosecutorial misconduct" and "[a]pplying our plain error standard of review" (emphasis added)); *id.* (concluding that "it was not plain error for the *trial court* not to have intervened when the State stretched evidence" (emphasis added)).

33 *See State v. King*, 2006 UT 3, ¶ 14, 131 P.3d 202; *Polster v. Griff's of Am., Inc.*, 184 Colo. 418, 520 P.2d 745, 747 (1974) (citing the general rule that "the trial court has no duty to question each piece of evidence offered.... It should not assume the role of advocate and on its own motion, without request therefor, limit, comment upon, qualify, or strike evidence offered by the parties. These are the basic functions of trial counsel in our adversary system of justice and underlie the rationale of the contemporaneous objection rule").

34 *State v. Houston*, 2015 UT 40, ¶ 76, 353 P.3d 55, *as amended* (Mar. 13, 2015) (emphasizing that defense retains the discretion not to object to arguments made at closing unless a prosecutor's argument is "so inflammatory that 'counsel's only defensible choice was to interrupt those comments with an objection' " (citation omitted)); *State v. Bedell*, 2014 UT 1, ¶ 25, 322 P.3d 697 (refusing to find that counsel was ineffective for failing to object to a prosecutor's closing argument when not doing so was "a legitimate strategic decision").

35 Such a course is often a perilous one for a trial judge. A judge who interrupts a closing argument to question the basis for a lawyer's statement risks treading on the toes of opposing counsel—of highlighting a point that counsel may prefer to ignore, in the hopes that it may go unnoticed or at least minimized by the jury. So a judge who does so must be certain that the attorney's statement is both highly prejudicial and obviously beyond the bounds of the "considerable latitude" of counsel at closing to "discuss fully from their viewpoints the evidence and the inferences and deductions arising therefrom." *State v. Tillman*, 750 P.2d 546, 560 (Utah 1987). We are in no position to question the trial judge's decision here to sit silent in the absence of an objection.

36 *See State v. Low*, 2008 UT 58, ¶ 17, 192 P.3d 867 ("Utah courts require specific objections in order to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate." (citation omitted)); *State v. Briggs*, 2006 UT App 448, ¶ 4, 147 P.3d 969 (concluding that a defendant failed to preserve an objection because he did not "request any specific relief" (citation omitted)).

Tab 3

CR216 Jury Deliberations.
In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty." In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.

References
Utah Const. Art. I, § 10.
Utah R. Crim. P. 21(b).
Utah R. Civ. P. 59(a)(2).
Burroughs v. United States, 365 F.2d 431, 434 (10th Cir. 1966).
State v. Lactod, 761 P.2d 23, 30-31 (Utah Ct. App. 1988).
75 Am. Jur.2d Trial §§ 1647, 1753, 1781.

CR218 Deadlocked Juries.
The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty to consult with one another and to deliberate. Your goal should be to reach an agreement if you can do so without surrendering your individual judgment. Each of you must decide the case for yourself, but do so only after impartially considering the evidence with your fellow jurors. Do not hesitate to reexamine your own views and change your position if you are convinced it is mistaken. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or just to return a verdict. You are judges -- judges of the facts. Your sole interest is to determine the truth from the evidence in the case.

CR301 Elements.
(DEFENDANT'S NAME) is charged [in Count ____] with committing (CRIME) [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. ELEMENT ONE...;
3. ELEMENT TWO...;
4. [That the defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

Comment [a1]: This statement is found in several instructions.

Committee Notes
This is a pattern elements instruction that can apply in most cases. If the date or the location of a crime could be considered an element of the offense, it should be included within the list of elements. In some circumstances, identifying the specific counts might help the jury sort through offenses with similar elements. In those circumstances, the specific counts should be identified in the first paragraph.

With respect to the bracketed defense element, unless the statute directs otherwise, the trial court should instruct the jury that the State has the burden to disprove an affirmative, partial, or justification defense beyond a reasonable doubt.

CR1617 Sexual Offense Prior Conviction.
Having found (DEFENDANT'S NAME) guilty of [Rape][Rape of a Child][Object Rape][Object Rape of a Child][Forcible Sodomy][Sodomy on a Child][Aggravated Sexual Abuse of a Child][Aggravated Sexual Assault] [as charged in Count ____], you must now determine whether at the time (DEFENDANT'S NAME) committed this offense, [he][she] had been previously convicted of a grievous sexual offense.

"Grievous sexual offense" means [rape][rape of a child][object rape][object rape of a child][forcible sodomy][sodomy on a child][aggravated sexual abuse of a child][aggravated sexual assault], or any attempt to commit the offense.

The State must prove beyond a reasonable doubt that the defendant was previously convicted of a grievous sexual offense. Your decision must be unanimous and should be reflected on the special verdict form.

References
Utah Code § 76-1-601
Utah Code § 76-5-402
Utah Code § 76-5-402.1
Utah Code § 76-5-402.2
Utah Code § 76-5-402.3
Utah Code § 76-5-403
Utah Code § 76-5-403.1
Utah Code § 76-5-404.1
Utah Code § 76-5-405

Committee Notes
Utah law does not state whether a determination that a prior conviction for an out-of-state offense is sufficiently similar to a Utah offense to prove a prior conviction is a question of law or fact. In either case, further jury instructions will be required.

However, at least one other jurisdiction has held that the determination is a legal one, and one that should be made by the trial court, not the jury. *State v. Henderson*, 689 S.E.2nd 462, 465 (N.C.App. 2009).

Tab 4

NOTE: At its 2/1/17 meeting, the committee felt that the 2 subcommittee drafts for Force in Defense of Habitation didn't track the statutory definition closely enough. The committee started over with the statutory definition and created the following drafts (Draft 2), renaming them: "Use of Force in Defense of Habitation" and "Deadly Force in Defense of Habitation." I've included the subcommittee's original draft (Draft 1) and basically cut and paste the statutory definition into Draft 3, so the committee can see where it started.

DEFENSE OF HABITATION

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

DRAFT 1 - Subcommittee Original

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 in Defense of Habitation.

DRAFT 2 – MUJI Committee Edits on 2/1/17

The defendant is justified in using force against another person to defend [his][her] habitation when and to the extent [he][she] reasonably believes the force is necessary to:

- prevent the other person's unlawful entry into the habitation; or
- terminate the other person's unlawful entry into the habitation; or
- prevent the other person's attack upon the habitation; or
- terminate the other person's attack upon the habitation.

The defendant is presumed 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,
- in a violent and tumultuous manner,
- surreptitiously,
- by stealth, or
- for the purpose of committing a felony.

The defendant is not required to prove [he][she] was justified in using force. Rather, the prosecution must prove beyond a reasonable doubt that the defendant was not justified in using force. The prosecution carries the burden of proof. If the prosecution has not carried this burden, then you must find the defendant not guilty.

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

CR____. Force in Defense of Habitation.
DRAFT 3 – Statutory definition

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.

A person is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:

1. the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and
2. 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
3. he reasonably believes that the force is necessary to prevent the assault or offer of personal violence; or
4. 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.

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.

References
Utah Code § 76-2-405

CR ____. Use of Force Intended or Likely to Cause Death or Serious Bodily Injury in Defense of Habitation.
DRAFT 1 - 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____. Deadly Force in Defense of Habitation

DRAFT 2 – MUJI Committee on 2/1/17

The defendant is justified in using force which is intended or likely to cause death or serious bodily injury against another person to defend [his][her] habitation only if the other person's entry or attempted entry is:

- made or attempted in a violent and tumultuous manner,
- surreptitiously, or
- by stealth

AND

The defendant reasonably believed:

- the force was necessary to prevent the assault or offer of personal violence, or
- the entry was made or attempted for the purpose of committing a felony in the habitation and the force was necessary to prevent the commission of the felony.

The defendant is presumed 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,
- in a violent and tumultuous manner,
- surreptitiously,
- by stealth, or
- for the purpose of committing a felony.

The defendant is not required to prove [he][she] was justified in using force. Rather, the prosecution must prove beyond a reasonable doubt that the defendant was not justified in using force. The prosecution carries the burden of proof. If the prosecution has not carried this burden, then you must find the defendant not guilty.

References

Utah Code § 76-2-405
State v. Karr, 2015 UT App 287, 364 P.3d 49
State v. Walker, 2017 UT App 2

DEFENSE OF PROPERTY

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

DRAFT 1 - 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

CR____. Use of Force in Defense of Property.

DRAFT 2 – Keisa Williams

The defendant is justified in using force, other than deadly force, against another person to defend [his][her] real or personal property when and to the extent [he][she] reasonably believes the force is necessary to:

- Prevent the other person's criminal interference with real or personal property; or
- Terminate the other person's criminal interference with real or personal property.

The property must have been:

- lawfully in the defendant's possession; or
- lawfully in the possession of a member of the defendant's immediate family; or
- belonging to a person whose property the defendant has a legal duty to protect.

In determining reasonableness, the trier of fact shall consider:

- the apparent or perceived extent of the damage to the property;
- property damage previously caused by the other person;
- threats of personal injury or damage to property that have been made previously by the other person;
- any patterns of abuse or violence between the person and the other person; and
- any other relevant factor.

References

Utah Code § 76-2-406

DEFENSE OF PERSON(S)

CR ____. Use of Force in Defense of Person(s).

DRAFT – Keisa Williams

The defendant is justified in threatening or using force against another person when and to the extent that the defendant reasonably believes the force or threat of force is necessary to:

- defend [himself][herself] against another person's imminent use of unlawful force; or
- defend a third person against another person's imminent use of unlawful force.

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.

In determining "imminence" or "reasonableness," the trier of fact may consider any of the following factors:

- the nature of the danger;
- the immediacy of the danger;
- the probability that the unlawful force would result in death or serious bodily injury;
- the other person's prior violent acts or violent propensities;
- any patterns of abuse or violence in the parties' relationship; and
- any other relevant factor.

References

Utah Code § 76-2-402(1), and (5)
State v. Walker, 2017 UT App 2

CR ____. Deadly Force in Defense of Person(s).

DRAFT – Keisa Williams

The defendant is justified in using force intended or likely to cause death or serious bodily injury against another person only if:

1. [he][she] reasonably believes the force is necessary to:
    - prevent death or serious bodily injury to [himself][herself]; or
    - prevent death or serious bodily injury to a third person; or
    - prevent the commission of a forcible felony;

and

2. defendant's use of the force was in response to the other person's imminent use of unlawful force.

In determining "imminence" or "reasonableness," the trier of fact may consider any of the following factors:

- the nature of the danger;
- the immediacy of the danger;
- the probability that the unlawful force would result in death or serious bodily injury;
- the other person's prior violent acts or violent propensities;
- any patterns of abuse or violence in the parties' relationship; and
- any other relevant factor.

References
Utah Code § 76-2-402(1), and (5)
State v. Walker, 2017 UT App 2

CR ____. Unjustified Use of Force.
DRAFT 1 - 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 ____. Unjustified Use of Force in Defense of Person(s).
DRAFT 2 - Keisa Williams

The defendant is not justified in using force against another person if the defendant:

1. initially provokes the use of force against another person with the intent to use force as an excuse to inflict bodily harm; or

2. is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or
3. was the aggressor or was engaged in a combat by agreement, unless:
    - the defendant withdraws from the encounter; and
    - effectively communicates to the other person [his][her] intent to do so; and
    - regardless of the effective communication, the other person continues or threatens to continue the use of unlawful force.

The following do not, on their own, constitute "combat by agreement":

- voluntarily entering into or remaining in an ongoing relationship; or
- entering or remaining in a place where one has a legal right to be.

The defendant does not have a duty to retreat from the force or threatened force in a place where that person has lawfully entered or remained, except as provided in 3 above.

The prosecution must prove, beyond a reasonable doubt, all the elements above. If the prosecution has not carried this burden, then you must find the defendant not guilty.

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

CR ____. Reasonable Belief.

DRAFT 1 - 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), and (5)

CR ____. Reasonable Belief in Defense of Person(s).

DRAFT 2 – Keisa Williams

In determining "imminence" or "reasonableness" in CR____ and CR____, the trier of fact may consider any of the following factors:

- the nature of the danger;
- the immediacy of the danger;
- the probability that the unlawful force would result in death or serious bodily injury;

- the other person's prior violent acts or violent propensities;
- any patterns of abuse or violence in the parties' relationship; and
- any other relevant factor.

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

CR___. Definition of Forcible Felony in Defense of Person(s).
Draft – Keisa Williams

A forcible felony includes:

- aggravated assault,
- mayhem,
- aggravated murder,
- murder,
- manslaughter,
- kidnapping,
- 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,
- aggravated sexual assault,
- arson,
- robbery,
- burglary,
- burglary of a vehicle when the vehicle is occupied at the time unlawful entry is made or attempted, and
- 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.

References
Utah Code § 76-2-402(4)

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 § 76-2-402

§ 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

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Tab 6

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 7

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 8

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.

End of Document

Tab 9

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.

Tab 10

2017 WL 74867

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Utah.

State of Utah, Appellee,
v.
Timothy Noble Walker, Appellant.

No. 20150317-CA
|
Filed January 6, 2017

Synopsis

Background: Defendant was convicted in the Third District Court, Salt Lake Department, Mark S. Kouris, J., of aggravated assault and he appealed.

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

[1] jury instruction that "strangulation to the point of unconsciousness constitutes serious bodily injury" improperly relieved the State of its burden of proving every essential element of the crime beyond a reasonable doubt, and

[2] improper instruction was not harmless error.

Reversed and remanded.

West Headnotes (12)

[1] Criminal Law
Reasonable Doubt

Jury
Weight and sufficiency of evidence

Criminal convictions in state proceedings are required to rest upon a jury determination that the defendant is guilty of every element of the crime charged, beyond a reasonable doubt; a state must therefore persuade the jury of the facts necessary to establish each of those elements. U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[2] Criminal Law
Questions of Law or of Fact

Neither the legislature nor the judiciary may usurp the jury's role as fact-finder.

Cases that cite this headnote

[3] Constitutional Law
Fourteenth Amendment in general

While legislatures are largely free to choose the elements that define their crimes, statutory directives that foreclose independent jury consideration of whether the facts proved establish certain elements of the offense violate a defendant's Fourteenth Amendment rights. U.S. Const. Amend. 14.

Cases that cite this headnote

[4] Criminal Law
Functions as judges of law and facts in general

Criminal Law
Of conviction

While it is the role of the judge to instruct the jury on the law, it is the jury's constitutional prerogative to determine the facts and to apply the law to those facts and draw the ultimate conclusion of guilt or innocence; a judge, therefore, may not direct a verdict for the State, in whole or in part, no matter how damning the evidence. U.S. Const. Amend. 6.

Cases that cite this headnote

[5] Jury
Issues of law or fact in general

Pure questions of law, which are not within the province of the jury, cannot implicate the right to a jury trial; but a fact question, or a mixed question of law and fact, does not morph into a pure legal question for Sixth Amendment

purposes merely because the evidence is overwhelming and might be characterized as supporting only one reasonable conclusion as a matter of law. U.S. Const. Amend. 6.

Cases that cite this headnote

[6] **Assault and Battery**
Aggravated assault
Constitutional Law
Particular issues and applications
Jury
Weight and sufficiency of evidence

In aggravated assault prosecution, jury instruction that "strangulation to the point of unconsciousness constitutes serious bodily injury" improperly relieved the State of its burden of proving every essential element of the crime beyond a reasonable doubt, thus violating defendant's rights to due process and trial by jury. U.S. Const. Amends. 6, 14; Utah Code Ann. §§ 76-1-601(11), 76-5-103.

Cases that cite this headnote

[7] **Assault and Battery**
Questions for jury

Whether a defendant caused serious bodily injury or used means or force likely to produce such injury, for purposes of an aggravated assault offense, is a question for the jury to decide based on the facts presented in the case before it. Utah Code Ann. §§ 76-1-601(11), 76-5-103.

Cases that cite this headnote

[8] **Assault and Battery**
Questions for jury

When the State brings charges and prosecutes a defendant for aggravated assault, it is within the province of the jury to consider the means and manner by which the victim's injuries were inflicted along with the attendant circumstances in determining whether a defendant caused serious bodily injury. U.S. Const. Amend. 6; Utah Code Ann. §§ 76-1-601(11), 76-5-103.

Cases that cite this headnote

[9] **Criminal Law**
Elements of offenses
Criminal Law
Evidence Justifying or Requiring Instructions

While the strength of the State's evidence may be a crucial factor with regard to lesser offense instructions, it does not provide grounds for removing an element of an offense from the jury's consideration.

Cases that cite this headnote

[10] **Assault and Battery**
Questions for jury
Criminal Law
Evidence Justifying or Requiring Instructions

An appellate court may hold that a defendant is not entitled to a lesser included offense instruction because, under the circumstances of that case, there is no question of fact as to whether the injury is mere bodily harm or great bodily harm, it constitutes great bodily harm; but an appellate court's statement that an injury is great bodily harm as a matter of law is not precedent for the trial judge's instructing the jury that such an injury is great bodily harm.

Cases that cite this headnote

[11] **Criminal Law**
Presumption as to Effect of Error; Burden

If a defendant preserves a claim of federal constitutional error at trial and establishes a constitutional violation on appeal, the burden shifts to the State to demonstrate that the error was harmless beyond a reasonable doubt.

Cases that cite this headnote

[12] Criminal Law
Invasion of province of jury

Improper instruction, usurping role of the jury in violation of defendant's rights to due process and trial by jury by instructing that "strangulation to the point of unconsciousness constitutes serious bodily injury" was not harmless error in prosecution for aggravated assault; there was undisputed evidence that individuals may promptly recover from temporary unconsciousness induced by brief pressure on the carotid sinus, it was undisputed that victim was choked for approximately ten to fifteen seconds and regained consciousness fairly quickly, victim suffered no long-term complications, prosecutor emphasized improper instruction during closing argument, and jury's sole question sought guidance on the improper instruction. U.S. Const. Amends. 6, 14; Utah Code Ann. §§ 76-1-601(11), 76-5-103.

Cases that cite this headnote

Third District Court, Salt Lake Department, The Honorable Mark S. Kouris, No. 141904012

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Judge Jill M. Pohlman authored this Opinion, in which Judges J. Frederic Voros Jr. and Kate A. Toomey concurred.

Opinion

POHLMAN, Judge:

***1** ¶1 Timothy Noble Walker asserts that he was denied his federal constitutional right to a jury trial with respect to a key element of the State's case. We agree and therefore vacate his conviction and remand for a new trial.

BACKGROUND [1]

¶2 Walker and his wife (Wife) had been married less than a month when Wife's employer transferred her job from South Carolina to Utah. The couple then moved to Utah, bringing Wife's teenage son (Son) with them. They stayed in hotels for a few days while Wife began work at her new location.

¶3 One evening the three were together in their hotel room. Walker and Wife had been drinking and, sometime during the evening, Wife picked up Walker's glass and poured his drink down the sink. Upset, Walker struck Wife in the face. She fell against the refrigerator, then stood up and walked around the hotel room, searching for something. She found the keys to the couple's van in Walker's clothing, and she put them in her pocket.

¶4 Walker approached Wife from behind and put his right wrist against her neck. He lifted her up with his right hand while reaching into her pocket with his left hand, attempting to get the keys. During the struggle that followed, Wife kicked at Walker and pulled at his arm, trying to loosen his hold on her neck. But Walker used his left hand to reinforce his grip, and he lifted Wife completely off the floor. Wife was unable to wrench free.

¶5 Son was sitting on a bed a few feet away. He saw Wife struggling to free herself and heard her making "choking sounds." He told Walker to stop, but Walker persisted. Walker kept his wrist pressed against Wife's neck until she suddenly exhaled. Her eyes rolled back in her head, her arms fell to her sides, and her body went limp. She had been subject to Walker's grip for approximately ten to fifteen seconds.

¶6 Walker abruptly let go and pushed Wife away. She fell face-first against the wall and did not move. Walker began gathering his things. When Son asked him what he had done, Walker replied that he "didn't do anything" and that Wife was "faking it" because she was a "drama queen." Walker then walked out of the room. He drove away, ultimately returning to South Carolina.

¶7 Son attempted to waken Wife and shift her into a sitting position. He also called the police. After about a minute, Wife began to regain her faculties. She heard Son crying

and calling her name. Not long afterward, she heard a knock on the door when a police officer arrived.

¶8 The officer found Son and Wife in the hotel room. Wife was conscious but "didn't appear *to be+ in the right state of mind," and the officer "couldn't understand what she was saying at first." After listening to Son's description of the evening's events, the officer called for medical assistance to evaluate Wife. He also photographed Wife's injuries, which consisted of "visible injury" to her right eye and "red marks around her neck," which "appeared to be swollen." The officer also called Walker. After the officer identified himself, Walker said, "I'm driving out of the state, don't worry about me," and hung up.

***2** ¶9 A paramedic evaluated Wife and asked if she wanted to go to the hospital, but Wife declined. However, Wife saw a doctor several days later and told him that she felt soreness and tenderness about her head, face, and neck. She underwent testing and was told to "take it easy" and allow her body time to heal, but she was not prescribed any particular medical treatment.

¶10 Walker was charged with aggravated assault, a second degree felony. *See* Utah Code Ann. § 76–5–103(2)(b) (LexisNexis 2012). [2] He elected to have the charge tried by a jury. Wife, Son, and the officer each testified for the State regarding the evening's events. During cross-examination, Wife was asked about the medical documentation of her injuries. She testified that she had suffered a concussion and headaches, but she could not identify any reference to those injuries in the records from her doctor visit. Wife also testified that she was unaware of any long-term physical or medical complications resulting from the incident.

¶11 In defense, Walker elicited brief testimony from the paramedic, who stated that he had not characterized Wife's injuries as threatening life or limb. Walker also called Robert Rothfeder as an expert witness on the subject of strangulation injuries. Rothfeder's testimony distinguished structural injuries to the neck from suffocation injuries to the brain. According to Rothfeder, causing structural damage to a person's trachea requires "a significant amount of force" and would result in a "serious situation" from which the body would not "automatically rebound." Regarding suffocation, Rothfeder testified that lack of oxygen could cause brain injury or death after a "number of minutes. Most people would say two to three minutes in an otherwise reasonably healthy person.... [But] [t]he brain can survive those kinds of insults for a period, for that period of time."

¶12 Rothfeder also testified that putting pressure on a certain place on either side of the neck—on the carotid sinus—would lead to a drop in blood pressure that could result in a person fainting. Rothfeder explained that medical professionals may massage the carotid sinus for therapeutic purposes—for example, to treat a person experiencing a rapid heart rate. But a "complication of doing that" is a person may "faint or pass out ... if [his or her] blood pressure drops too quickly." According to Rothfeder, pressure on the carotid sinus for as little as ten to fifteen seconds could cause a person to lose consciousness. But if the pressure were removed, the person's pulse would increase and he or she would quickly regain consciousness.

¶13 Following Rothfeder's testimony, the court instructed the jury, giving it four options. The jury could find Walker not guilty or find him guilty of one of the following offenses: aggravated assault, a second degree felony; aggravated assault, a third degree felony; or assault, a class B misdemeanor. If Walker had committed more than one offense, the jury was instructed to find him guilty of the most serious crime.

¶14 The instructions for the offenses largely tracked the relevant statutory language. For the most serious charge—aggravated assault, a second degree felony—the jury was required to find that Walker had intentionally, knowingly, or recklessly committed assault; used means or force likely to produce death or serious bodily injury; and caused serious bodily injury. *See* Utah Code Ann. §§ 76–2–102, 76–5–103(1), (2)(b) (LexisNexis 2012). The instructions for aggravated assault, a third degree felony, imposed the same requirements except that Walker need not have caused serious bodily injury. *See id.* § 76–5–103(1), (2)(a). The requirements for the misdemeanor assault charge, per the applicable statutory language, dropped any reference to "serious bodily injury." *See id.* § 76-5-102. The jury was instructed that Walker was guilty of misdemeanor assault if he had intentionally, knowingly, or recklessly committed an act with unlawful force or violence and caused bodily injury or created a substantial risk of bodily injury. *See id.* §§ 76–2–102, 76–5–102.

***3** ¶15 "Serious bodily injury" was defined in accordance with its statutory meaning as "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." *See id.* § 76-1-601(11). "Bodily injury" was also defined according to the relevant statutory language as "physical pain, illness[,] or an impairment of physical condition." *See id.* § 76-1-601(3).

¶16 Over Walker's objection, the jury received an additional instruction (Instruction 18) that did not mirror any statutory language but was based on two Utah Supreme Court cases that addressed whether strangulation or attempted strangulation constituted serious bodily injury or force sufficient to cause such injury. *See State v. Speer*, 750 P.2d 186, 191 & n.4 (Utah 1988); *State v. Fisher*, 680 P.2d 35, 37 (Utah 1984). Instruction 18 stated, "You are instructed that strangulation to the point of unconsciousness constitutes serious bodily injury." Walker objected that this instruction violated his right to have the jury "make [a] determination of proof beyond a reasonable doubt on each and every element of the offense." His objection was overruled.

¶17 In closing argument, the prosecutor asserted that the "paramount issue" was whether Wife "suffer[ed] serious bodily injury." Commenting that "this is the part where I'm going to ask you to follow the law," the prosecutor walked the jury through the statutory definitions of bodily injury and serious bodily injury and then turned to Instruction 18, stating: "[T]he next instruction gives you a further definition of what the law recognizes as serious bodily injury. It says, you are instructed that strangulation to the point of unconsciousness constitutes serious bodily injury." The prosecutor then asked, "Do you see what I mean when I said this just comes down to your ability to follow the law?"

¶18 The case was submitted to the jury and, after deliberating for more than an hour, the jury sent the court a note asking, "What is the definition of 'constitutes'? As in [Instruction] 18." The court responded, "Use the common and ordinary meaning of the word. A dictionary definition is to 'amount to' or 'add up to.' " The jury continued deliberating for about another hour and a half before reaching its verdict. The jury acquitted Walker of the most serious offense but found him guilty of aggravated assault, a third degree felony. Walker appeals.

ISSUE AND STANDARD OF REVIEW

¶19 Walker asserts that his federal constitutional right to a jury trial, as secured by the Sixth and Fourteenth Amendments to the United States Constitution, was violated when the trial court instructed the jury that "strangulation to the point of unconsciousness constitutes serious bodily injury." According to Walker, a trial court "violates the Sixth and Fourteenth Amendments if it instructs a jury how to find on an element of the offense." Here, Walker claims that if the jury found that he choked Wife and she lost consciousness, even briefly, the jury was required to find that he used force likely to produce serious bodily injury. Walker's challenge to the jury instruction presents a question of law, which we review for correctness. *See State v. Jeffs*, 2010 UT 49, ¶ 16, 243 P.3d 1250.

ANALYSIS

[1] ¶20 The Sixth Amendment protects a defendant's right to trial by jury in federal criminal proceedings. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."). The Fourteenth Amendment guarantees that right to criminal defendants in state courts —i.e., those who, "were they to be tried in a federal court[,] would come within the Sixth Amendment's guarantee." *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Read together, these provisions require criminal convictions in state proceedings to rest upon a jury determination that the defendant is guilty of every element of the crime charged, beyond a reasonable doubt. *See id.*; *cf. United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) (discussing the Fifth and Sixth Amendments in the context of a federal criminal proceeding). A state must therefore persuade the jury "of the facts necessary to establish each of those elements." *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). [3]

***4** **[2]** **[3]** ¶21 Neither the legislature nor the judiciary may usurp the jury's role as fact-finder. While legislatures are largely "free to choose the elements that define their

crimes," *Jones v. United States*, 526 U.S. 227, 241, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), statutory directives that "foreclose[ ] independent jury consideration of whether the facts proved establish[ ] certain elements of the offense[ ]" violate a defendant's Fourteenth Amendment rights, *see, e.g.*, *Carella v. California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (per curiam).

¶22 For example, a jury instruction that "[t]he law presumes that possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property," although tracking statutory language, creates an impermissible mandatory presumption. *State v. Crowley*, 2014 UT App 33, ¶¶ 3, 8–13, 16, 320 P.3d 677 (internal quotation marks omitted) (holding the instruction unconstitutional because it lacked "language clarifying that the jury [was] allowed to make a permissive inference, and because the instruction contain[ed] the confusing words 'prima facie' with no supporting explanation"). "Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." *See Carella*, 491 U.S. at 265, 109 S.Ct. 2419 (concluding that jury instructions incorporating statutory presumptions violated the Fourteenth Amendment); *see also, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 518 & n.6, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (same).

[4] ¶23 The judiciary likewise must take care not to step into the jury's fact-finding shoes. While "it is the role of the judge to 'instruct the jury on the law,' " *State v. Palmer*, 2009 UT 55, ¶ 14, 220 P.3d 1198 (quoting *Gaudin*, 515 U.S. at 513, 115 S.Ct. 2310), it is the jury's constitutional prerogative to determine the facts and "to apply the law to those facts and draw the ultimate conclusion of guilt or innocence," *Gaudin*, 515 U.S. at 514, 115 S.Ct. 2310. A judge, therefore, may not direct a verdict for the State, in whole or in part, no matter how damning the evidence. *See Sullivan*, 508 U.S. at 277, 113 S.Ct. 2078.

[5] ¶24 There is an exception to these principles for "pure question[s] of law," which are not within the province of the jury and thus "cannot implicate the right to a jury trial." *Palmer*, 2009 UT 55, ¶¶ 14–18, 220 P.3d 1198 (concluding that the timing of a defendant's conviction —either at the time of sentencing or at the time he pleaded guilty—was a pure question of law for the judge to decide). But a fact question, or a mixed question of law and fact, does not morph into a pure legal question for Sixth Amendment purposes merely because the evidence is overwhelming and might be characterized as supporting only one reasonable conclusion as a matter of law. *Cf. Rose v. Clark*, 478 U.S. 570, 579–82 & n.10, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (suggesting that instructing a jury to presume malice or intent is error even if that "inference is overpowering" and it would "defy common sense" to conclude otherwise), *abrogated on other grounds by Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Thus, a court errs by instructing a jury that, as a matter of law, a bicycle path is a public park constituting a drug-free zone, *State v. Davis*, 2007 UT App 13, ¶ 12, 155 P.3d 909, or by determining that a defendant is a "Category I restricted person" barred from possessing a firearm, *State v. Liti*, 2015 UT App 186, ¶¶ 25–26, 355 P.3d 1078.

***5** **[6]** ¶25 In this case, the trial court instructed the jury that "strangulation to the point of unconsciousness constitutes serious bodily injury," relying on two Utah Supreme Court opinions that addressed whether strangulation or attempted strangulation constituted serious bodily injury or force sufficient to cause such injury. *See State v. Speer*, 750 P.2d 186, 191 & n.4 (Utah 1988); *State v. Fisher*, 680 P.2d 35, 37 (Utah 1984). But as set forth below, whether strangulation to unconsciousness constitutes serious bodily injury is not a pure legal question. The matter is within the province of the jury and, in urging us to conclude otherwise, the State fails to properly distinguish the Legislature's role in defining elements of criminal offenses, the appellate court's role in reviewing criminal proceedings, and the trial court's role in instructing the jury.

[7] **[8]** ¶26 Whether a defendant caused serious bodily injury or used means or force likely to produce such injury, for purposes of an aggravated assault offense, is a question for the jury to decide based on the facts presented in the case before it. The Utah Code sets forth the elements of aggravated assault and provides a legal definition of the term "serious bodily injury" to guide the fact-finder's inquiry. Utah Code Ann. §§ 76–5–103, 76–1–601(11) (LexisNexis 2012) (" '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."). When the State brings

charges and prosecutes a defendant for that offense, "it is within the province of the jury to consider the means and manner by which the victim's injuries were inflicted along with the attendant circumstances in determining whether a defendant caused serious bodily injury," *see State v. Bloomfield*, 2003 UT App 3, ¶ 18, 63 P.3d 110 (citation and internal quotation marks omitted), or used means or force likely to produce such injury, *cf. id.*

¶27 In addition, Utah appellate courts have routinely noted in similar contexts that this type of fact-intensive question must be put to the jury. *See, e.g.*, *Mackin v. State*, 2016 UT 47, ¶ 28 ("Whether in the course of committing a robbery a defendant uses an item in a way that is capable of causing death or serious bodily injury is a question of fact for the jury."); *State v. Pham*, 2016 UT App 105, ¶¶ 20–22, 372 P.3d 734 (addressing whether a jury could reasonably conclude that a shooting resulted in serious bodily injury by creating a substantial risk of death, relying on *Bloomfield*, 2003 UT App 3, ¶ 18, 63 P.3d 110), *cert. granted*, 384 P.3d 567 (Utah Sept. 12, 2016); *State v. Ekstrom*, 2013 UT App 271, ¶¶ 18–26, 316 P.3d 435 (reversing the defendant's conviction because the statutory definition of "serious bodily injury" was not given to the jury tasked with deciding whether the defendant committed aggravated assault by using an item capable of causing serious bodily injury or by using other means or force likely to produce death or serious bodily injury).

¶28 The State nevertheless asserts that the Utah Supreme Court has limited the jury's role with regard to one type of serious bodily injury and the use of force likely to produce it. According to the State, "the Utah Supreme Court has long held that strangulation to unconsciousness constitutes serious bodily injury as a matter of law," and the State therefore asserts that a jury instruction incorporating that proposition must be upheld. We do not believe the cases cited by the State require that result.

¶29 In *State v. Fisher*, 680 P.2d 35 (Utah 1984), the Utah Supreme Court addressed a question of evidentiary sufficiency—namely, whether sufficient evidence supported the defendant's conviction of second degree murder under a statutory provision requiring that the defendant "inten[ded] to cause serious bodily injury." *Id.* at 37. Because the defendant "testified that he intentionally placed his hands on the victim's neck, that he intentionally squeezed her throat, and that he intended to get her to go unconscious," the defendant "intentionally committed an act that is dangerous to human life (strangulation), intending to cause serious bodily injury (protracted loss or impairment of both the heart and the brain, i.e., unconsciousness)." *Id.* (internal quotation marks omitted). Based on this reasoning, the supreme court concluded that the evidence amply supported the conviction, "holding that strangulation constitutes 'serious bodily injury.' " *Id.* at 37–38.

***6** ¶30 Notwithstanding the categorical sweep of *Fisher*'s language, the opinion held that strangulation with intent to cause unconsciousness was, at least under the circumstances of that case, "virtually conclusive" of "intent to inflict serious bodily injury." *Id.* But the *Fisher* court did not hold—or even address—whether juries in subsequent cases should be instructed that *if* a defendant strangles another with intent to cause unconsciousness, the jury *must find* that the defendant intended to cause serious bodily injury. *See id.* at 36–38. In light of the categorical phrasing in *Fisher*, the trial court's decision to instruct the jury as it did was understandable. Nevertheless, it was incorrect.

¶31 "[T]here is a distinction between determining whether the evidence [is] sufficient to support a plea or conviction ... and instructing the jury as a matter of law that an element of the offense has been established...." *State v. Moore*, 699 N.W.2d 733, 737 (Minn. 2005). While the State would have us interpret *Fisher* as addressing both questions, the supreme court's discussion does not indicate that it was addressing the latter issue or that it intended its conclusion, based on the facts of that case, to be used as a jury instruction in future cases. We see no reason to read *Fisher* so broadly, particularly when doing so risks "violating the requirement that criminal convictions must 'rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " *Id.* (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). The State's reliance on *Fisher* is thus misplaced.

¶32 The State's reliance on *State v. Speer*, 750 P.2d 186 (Utah 1988), is similarly unavailing. In *Speer*, the defendant was convicted of aggravated assault and aggravated burglary. *Id.* at 188. At issue on appeal was whether the jury should also have been instructed on lesser offenses. *Id.* at 190–91. That determination turned on whether "there [was] a rational basis for a verdict

acquitting the defendant of the offense[s] charged and convicting him of the included offense[s]." *Id.* at 190 (citation and internal quotation marks omitted).

¶33 Citing evidence of strangulation or attempted strangulation, the Utah Supreme Court concluded that the requisite rational basis was lacking. *Id.* at 191. Because the "defendant admitted choking [the victim] about the throat until, by her testimony, she almost passed out," there was "uncontroverted testimony establish[ing] that [the defendant] used force likely to cause death or serious bodily injury." *Id.* (citation and internal quotation marks omitted). There was thus "no theory of the evidence that would have supported a verdict acquitting [the defendant] of aggravated burglary or aggravated assault and convicting him of the lesser offenses." *Id.* In support of this conclusion, the supreme court stated in a footnote, "See *State v. Fisher*, 680 P.2d 35, 37 (Utah 1984), where we held that strangulation constitutes 'serious bodily injury.' " *Speer*, 750 P.2d at 191 & n.4.

¶34 The Utah Supreme Court thus concluded, based on the circumstances before it, that the evidence did not trigger the trial court's obligation to provide lesser offense instructions. *Id.* at 190–91. But as in *Fisher*, the supreme court neither held nor addressed whether juries in subsequent cases would be required to find that strangulation or attempted strangulation constituted serious bodily injury or force likely to cause such injury. *See id.* And as set forth above, such a requirement would be improper.

[9] **[10]** ¶35 While the strength of the State's evidence may be a crucial factor with regard to lesser offense instructions, it does not provide grounds for removing an element of an offense from the jury's consideration. *See Rose v. Clark*, 478 U.S. 570, 581–82 & n.10, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (noting that "[s]tates are not constitutionally required to instruct juries about lesser included offenses where such instructions are not warranted by the evidence," but even when the evidence is "overpowering," instructing the jury that an element of the offense may be presumed would still be error), *abrogated on other grounds by Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). An appellate court may hold that a defendant is not entitled to a lesser included offense instruction because, under the circumstances of that case, there is no "question of fact as to whether [the injury] is mere bodily harm or great bodily harm"—it "constitutes great bodily harm." *State v. Brice*, 276 Kan. 758, 80 P.3d 1113, 1117 (2003) (citation and internal quotation marks omitted). But an appellate court's statement that an injury is "great bodily harm" as a matter of law is not "precedent[ ] for the trial judge's *instructing the jury* that [such an injury] is great bodily harm." *Id.* at 1123. "It [may seem] a fine point, but [it is] one that due process requires." *Id.*

***7** ¶36 Thus, here again, the State's argument fails. The Utah Supreme Court did not write "strangulation to unconsciousness" into the Legislature's definition of "serious bodily injury." And the instruction to that effect violated Walker's federal constitutional rights because it "foreclose[d] independent jury consideration of whether the facts proved established [a] certain element[ ] of the offense[ ]" and thus "relieved the State of its burden of ... proving by evidence every essential element of [the] crime beyond a reasonable doubt." *See Carella v. California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (per curiam).

[11] **[12]** ¶37 "If a defendant preserves a claim of federal constitutional error at trial and establishes a constitutional violation on appeal, the burden shifts to the State to demonstrate that the error was harmless beyond a reasonable doubt." *State v. Sanchez*, 2016 UT App 189, ¶ 33, 380 P.3d 375 (citing cases, including *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *State v. Calliham*, 2002 UT 86, ¶ 45, 55 P.3d 573), *petitions for cert. filed*, Oct. 27, 2016 (No. 20160891) and Oct. 31, 2016 (No. 20160911); *see also Neder v. United States*, 527 U.S. 1, 6, 8–15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Here the State has not argued that the jury instruction, if improper, was harmless beyond a reasonable doubt. Thus, the State has not carried its burden in that regard. *See State v. Draper–Roberts*, 2016 UT App 151, ¶ 39, 378 P.3d 1261.

¶38 Moreover, the improper instruction may well have played a role in the jury's decision-making process. As Walker asserts, a juror could "naturally understand [Instruction 18] to mean that, as a matter of law, (1) strangulation constitutes force likely to cause serious bodily injury, and (2) unconsciousness caused by strangulation constitutes serious bodily injury." While the instruction did not lead the jury to convict Walker of the most serious offense, the second degree felony, the record demonstrates that the instruction still may have

been meaningful as to Walker's conviction of the third degree felony.

¶39 During the trial, the jury heard unrebutted expert testimony that individuals may promptly recover from temporary unconsciousness induced by brief pressure on the carotid sinus. The jury also heard undisputed testimony that Wife was choked for approximately ten to fifteen seconds, regained consciousness fairly quickly, declined to go to the hospital immediately thereafter, was not given specialized treatment during a subsequent doctor visit, and was unaware of any long-term physical or medical complications resulting from the altercation.

¶40 In closing argument, the prosecutor emphasized Instruction 18, stating that the "paramount issue" was whether Wife "suffer[ed] serious bodily injury" and that "this is the part where I'm going to ask you to follow the law." After discussing the statutory definitions of bodily injury and serious bodily injury, the prosecutor continued: "[T]he next instruction gives you a further definition of what the law recognizes as serious bodily injury. It says, you are instructed that strangulation to the point of unconsciousness constitutes serious bodily injury." "Do you see what I mean," the prosecutor asked, "when I said this just comes down to your ability to follow the law?"

¶41 After the case was submitted, the jury's sole question sought guidance on the meaning of "constitutes" as used in Instruction 18: "[S]trangulation to the point of unconsciousness *constitutes* serious bodily injury." (Emphasis added.) Given the jury's question, the prosecution's closing argument, and the evidence at trial, we conclude that the jury instruction was not harmless beyond a reasonable doubt with regard to whether Walker used means or force likely to produce death or serious bodily injury. *See State v. Crowley*, 2014 UT App 33, ¶¶ 18–19, 320 P.3d 677.

CONCLUSION

***8** ¶42 The jury instruction given in this case relieved the State of its burden of proving, beyond a reasonable doubt, the facts necessary to establish every element of the crime for which Walker was convicted. The instruction thus violated Walker's Sixth and Fourteenth Amendment rights. Because the State has not demonstrated that the instruction was harmless beyond a reasonable doubt, we vacate Walker's conviction for aggravated assault and remand for a new trial.

All Citations

--- P.3d ----, 2017 WL 74867, 2017 UT App 2

Footnotes

1 "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly." *Mackin v. State*, 2016 UT 47, ¶ 2 n.1 (citation and internal quotation marks omitted).

2 We reference the statutory provisions in effect in early 2014, when the events at issue occurred.

3 Moreover, following *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313, 124 S.Ct. 2531 (emphasis omitted).