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, December 6, 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	**Justification Defense Instructions** (Tab 2) Instructions from Judge Blanch (Tab 3) Utah Code 76-2-402 (Tab 4) Utah Code 76-2-405 (Tab 5) Utah Code 76-2-406 (Tab 6) *State v. Karr* (Tab 7) *State v. Berriel* (Tab 8) *State v. Walker* (Tab 9)	Mark Field
1:30	**Adjourn**	

Upcoming Meetings (held on the 1st Wednesday of each month unless otherwise noted)
2018 meetings:
January 10, 2018
February 7, 2018
March 7, 2018
April 4, 2018
May 2, 2018
June 6, 2018
July 11, 2018
August 1, 2018
September 12, 2018
October 3, 2018
November 7, 2018
December 5, 2018

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

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

1. Welcome **Judge Blanch**

Judge Blanch welcomed everyone to the meeting.

Ms. Jones moved to approve the minutes from the October 2017 meeting. Judge Blanch seconded. The motion passed unanimously.

2. CR 216 Jury Deliberations **Committee**

The committee reviewed the final edits to CR 216 Jury Deliberations, including the references on jury unanimity. After discussion, the committee approved the instruction.

Mr. Phelps moved to approve the revised instruction. Mr. Young seconded. The motion passed unanimously.

3. Defense of Habitation **Committee**

The committee discussed *State v. Karr*. Ms. Williams stated that none of the instructions regarding defense of habitation have been passed because the committee needed to continue to discuss them. Judge Blanch asked the committee if use of force and use of deadly force should

be separate instructions. He stated that because the presumption of reasonableness only applies to the use of deadly force, two instructions may be beneficial.

Mr. Field stated that if there is a question about the use of deadly force, both instructions should be used. Ms. Jones stated that a roadmap on using both instructions could be created that would inform the jury that even if they find all the elements, the jury must consider both defenses. Ms. Johnson asked if a jury would know that once the affirmative defense was raised, the State must rebut the defense. Judge McCullagh stated that a jury would only be given the instruction if the defense was raised. Ms. Johnson stated that because the jury would be given the instruction after the affirmative defense was raised, a roadmap is unnecessary because it could confuse the jury.

Judge Blanch recommended using the statutory language to create the instruction. He stated the Non-Deadly Force instruction could apply to the use of Deadly Force with the additional elements for Deadly Force. He stated that Deadly Force and presumption language should be bracketed and can be included in the Use of Force in Habitation instruction. Ms. Johnson stated that the majority of self-defense cases will not include Deadly Force, so the instructions should be distinct. Ms. Jones stated that Deadly Force would more likely be used in the defense of habitation.

Judge Blanch recommended combining the drafts to form one instruction. The committee discussed ways to use brackets to create one instruction that attorneys could modify.

The committee discussed whether the rebuttable presumption language should be included in the instruction. Ms. Johnson stated that the rebuttable presumption language should be included because it specifically modifies “reasonable belief” that appears throughout the instruction. Ms. Jones agreed and stated that a judge or attorney may forget to include a separate rebuttable presumption instruction.

Judge Blanch asked the committee if brackets should be used or if a separate instruction was better. Ms. Jones suggested two instructions: one regarding the Use of Non-Deadly Force and one for Use of Deadly Force. Ms. Kluznick agreed and stated that the presumption should be included in both instructions because Non-Deadly Force can be used when a person is in fear of peril of death. She stated the presumption would apply even if a person used less force than they were legally entitled to use.

Mr. Field asked if Deadly Force also includes Seriously Bodily Injury Force. Ms. Kluznick answered that Seriously Bodily Injury Force is Deadly Force. Mr. Field clarified that Serious Bodily Injury Force and Force Likely to Cause Death are both considered Deadly Force. Ms. Jones stated that in the Deadly Force instruction, both Serious Bodily Injury Force and Deadly Force should be included so the jury has a full spectrum of options.

Judge McCullagh asked what the difference was between “when” and “to the extent.” Ms. Johnson answered that “when” refers to when a person can use force and “to the extent” refers to how much force a person can use. Ms. Kluznick added that “when” means imminent and “to the extent” means the degree. Judge McCullagh read part of the statute that said, “to the extent he reasonably believes force is necessary” and stated the meanings are synonymous. Ms. Kluznick stated that for Non-Deadly Force, she agreed with Judge McCullagh that there is no difference. She stated that for Deadly Force, there is a difference. Ms. Jones stated that one is temporal and the other is circumstantial. Mr. Young stated that the concepts are different. Judge McCullagh restated his opinion that the concepts are similar. Ms. Kluznck stated the difference is important between Deadly Force and Non-Deadly Force.

The committee continued to draft the instruction for Non-Deadly Force in Defense of Habitation. Ms. Johnson stated that the title, "Defense of Habitation," should be used because "Defense of Habitation" would be used in the elements instruction.

Ms. Kluznick suggested removing "to defend [his][her] habitation" because a person may be defending something other than the habitation itself, such as a person inside the habitation. Judge McCullagh suggested capitalizing "Defense of Habitation." The committee agreed.

Mr. Phelps suggested adding language about the possessory interest of the habitation. Ms. Jones suggested creating a separate instruction. Judge Blanch asked Mr. Phelps to create an instruction regarding possessory interest to present to the committee.

Judge McCullagh stated that Deadly Force does not require a person have a reasonable fear of imminent death. He stated that the unlawful entry or attack on habitation is what a person must believe is occurring to use Deadly Force. He stated that a person does not need to be in fear of imminent death or bodily injury to use Deadly Force. He stated that a person can use as much force as necessary to prevent a person from entering their habitation and is not required to be fearful. Ms. Kluznick disagreed and stated that a person must be in fear of imminent death or bodily injury to use Deadly Force. Judge Blanch stated that the Legislature created the statutory language for the presumption and the circumstances under which it exists.

Judge McCullagh stated there is not a definition of what constitutes a reasonable belief. Ms. Kluznick disagreed and stated the definition was included in the first paragraph of the instruction. Judge McCullagh stated that the first paragraph only requires reasonable force to stop an unlawful entry, not a fear of imminent death. Ms. Kluznick stated that the presumption only applies if the entry was made with force or surreptitiously. Judge McCullagh reiterated that a person must only believe that an unlawful entry was occurring to use deadly force.

Judge Blanch stated that there are circumstances that a person is entitled use Deadly Force that have nothing to do with whether a person fears harm for themselves or others. He stated that when this language is used in the presumption, it implies that fear of imminent harm or death is required. Ms. Johnson stated that if a person is in fear of imminent harm or death, the person can use Deadly Force or Non-Deadly Force.

Judge Blanch stated that the committee would finalize the Defense of Habitation instructions at the next meeting.

4. Adjourn **Committee**

The meeting was adjourned at 1:25 p.m. The next meeting is Wednesday, December 5, 2017.

Tab 2

DEFENSE OF HABITATION

DRAFT (11-1-17)
CR ____. Use of Deadly Force in Defense of Habitation.

You must decide whether the defense of defense of habitation applies in this case. Under that defense, a person 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.

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 the defendant reasonably believes:
   a) 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
   b) that the force is necessary to prevent the assault or offer of personal violence; or
2. a person 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 force likely to cause death or serious bodily injury in defense of habitation 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, or in a violent and tumultuous manner, or surreptitiously or 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

DRAFT (11-1-17)
CR____. Use of Non-Deadly Force in Defense of Habitation.

You must decide whether the defense of Defense of Habitation applies in this case. Under that defense, a person is justified in using force against another person when and to the extent [he][she] reasonably believes the force is necessary to:

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

A person using force in defense of habitation is presumed to have acted reasonably 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

DRAFT (11-1-17)
CR____. Deadly Force in Defense of Habitation

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

Committee Note
Include note about using both instructions?

DEFENSE OF PROPERTY

DRAFT 1 – Judge Taylor's Subcommittee

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

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

DRAFT 2 – Statutory w/ KW's edits

CR____. Use of Force in Defense of Property.

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 defendant and the other person; and
- any other relevant factor.

References

Utah Code § 76-2-406

DEFENSE OF PERSON(S)

DRAFT – Statutory w/ KW's edits

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

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.

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

Committee Note

Include note on use of both instructions?

DRAFT – Statutory w/ KW's edits

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

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

Committee Note
Include note on use of both instructions?

DRAFT 1 - Judge Taylor's Subcommittee
CR ____. Unjustified Use of Force.

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)

DRAFT 2 - Statutory w/ KW's edits
CR ____. Unjustified Use of Force in Defense of Person(s).

The defendant is not justified in using force against another person if the defendant:
1. initially provokes the use of force by the other person, with the intent to use that 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 [he][she] 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)

DRAFT 1 – Judge Taylor's Subcommittee
CR ____. Reasonable Belief.

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)

DRAFT 2 – Statutory w/ KW's edits
CR ____. Reasonable Belief in Defense of Person(s).

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)

DRAFT – Statutory w/ KW's edits
CR___. Definition of Forcible Felony in Defense of Person(s).

A forcible felony in CR____ 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 3

INSTRUCTION NO. 29

_____ is charged in County I with committing Discharge of a Firearm with Injury, on or about April 28th, 2016, in Salt Lake County. You cannot convict him of this offense unless, based on this evidence, you find beyond a reasonable doubt each of the following elements:

1. _____;
2. Intentionally, knowingly, or recklessly discharged a firearm in the direction of any person or persons;
3. Knowing or having reason to believe that any person may be endangered by the discharge of the firearm; and,
4. _____ caused bodily injury to another; and,
5. The defense of Defense of Habitation, as defined in Instructions 33 to 36, does not apply; and
6. The defense of Defense of Self or Other, as defined in Instructions 37 to 39, 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.

INSTRUCTION NO. 30

Counts 2 through 4 charge the defendant with Discharge of a Firearm in the Direction of Any Person or Persons. Discharge of a Firearm Near a Highway or in the Direction of Any Dwelling or Building is a lesser included offense of that charge. The elements of Discharge of a Firearm in the Direction of Any Person or Persons are set forth in Instruction 31. The elements of Discharge of a Firearm Near a Highway or in the Direction of Any Dwelling or Building are set forth in Instruction 32. Counts 2 through 4 each contain identical elements, but you must consider each count separately in deciding whether the prosecution has met its burden of proof with respect to each count. As you deliberate, you must determine for each of these three counts whether the defendant is:

1. Guilty of Discharge of a Firearm in the Direction of Any Person or Persons; or,
2. Guilty of Discharge of a Firearm Near a Highway or in the Direction of Any Dwelling or Building; or,
3. Not guilty of either offense;

The law does not require you to make these determinations in any particular order. However, you cannot find the defendant guilty of both offenses. In other words, for each of counts 2 through 4 of the Information, you can only return one verdict.

INSTRUCTION NO. 31

_____ is charged in Counts 2 through 4 with committing Discharge of a Firearm in the Direction of any Person or Persons, on or about April 28th, 2016, in Salt Lake County. You cannot convict him of this offense unless, based on the evidence and considering each count separately, you find beyond a reasonable doubt each of the following elements:

1. _____;
2. Intentionally, knowingly, or recklessly discharged a firearm in the direction of any person or persons knowing or having reason to believe that any person may be endangered by the discharge of the firearm, OR with intent to intimidate another, intentionally, knowingly, or recklessly discharged a firearm in the direction of any vehicle; and
3. The defense of Defense of Habitation, as defined in Instructions 33 to 36, does not apply; and
4. The defense of Defense of Self or Other, as defined in Instructions 37 to 39, does not apply.

After you carefully consider all the evidence in this case with respect to each of counts 2 through 4 separately, 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.

INSTRUCTION NO. 32

As to Counts 2 through 4, you must determine whether _____ is guilty of committing the lesser included offense of Discharge of a Firearm Near a Highway or in the Direction of Any Dwelling or Building, on or about April 28th, 2016, in Salt Lake County. You cannot convict him of this offense unless, based on the evidence and considering each count separately, you find beyond a reasonable doubt each of the following elements:

1. _____;
2. Acting intentionally, knowingly, or recklessly;
3. Discharged a dangerous weapon or firearm;
4. From, upon, or across a highway, or without written permission to discharge the dangerous weapon from the owner or person in charge of the property within 600 feet of a house, dwelling or any other building; and
5. The defense of Defense of Habitation, as defined in Instructions 33 to 36, does not apply; and
6. The defense of Defense of Self or Other, as defined in Instructions 37 to 39, does not apply.

After you carefully consider all the evidence in this case with respect to each of counts 2 through 4 separately, 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.

INSTRUCTION NO. 33

DEFENSE OF HABITATION

You must decide whether the defense of Defense of Habitation applies in this case.

Under that defense, a person is justified in using force against another when and to the extent that he reasonably believes that force is necessary to:

1. Prevent or terminate the other's unlawful entry into or attack upon his habitation; or
2. Terminate the other person's unlawful entry into the habitation; or
3. Prevent the other person's attack upon the habitation; or
4. Terminate the other person's attack upon the 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 other's entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes:
    a. That the other's entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation; and
    b. That the force is necessary to prevent the assault or offer of personal violence; or
2. A person reasonably believes that the other's 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.

INSTRUCTION NO. 34

DEFENSE OF HABITATION
PRESUMPTION

The person using force or deadly force in defense of habitation 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,

1. Is made or attempted by use of force, or in a violent and tumultuous manner, or,
2. Is made surreptitiously; or,
3. Is made by stealth, or,
4. Is made for the purpose of committing a felony.

The prosecution has the burden of proving this presumption is not applicable beyond a reasonable doubt.

The prosecution can rebut the presumption if it proves beyond a reasonable doubt one or more of the following things: (1) that the entry into the habitation was lawful; (2) that the entry into the habitation was not made by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony; or (3) that the defendant's actions and beliefs were not reasonable.

INSTRUCTION NO. 35

DEFENSE OF HABITATION
PROSECUTION'S BURDEN

In order to rely upon the defense of Defense of Habitation, the defendant is not required to prove he was justified in using force or force likely to cause death or serious bodily injury. Rather, the prosecution must prove beyond a reasonable doubt that the defendant was not justified in using force or force likely to cause death or serious bodily injury. The prosecution carries the burden of proof beyond a reasonable doubt. If the prosecution has not carried this burden, then you must find the defendant not guilty.

INSTRUCTION NO. 36

HABITATION DEFINITION

The defense of Defense of Habitation is not limited to a habitation the defendant owns. The defense of Defense of Habitation may apply to whatever place the defendant may be occupying peacefully as a substitute home or habitation, such as a hotel, motel, or even where he is a guest of the home of another.

INSTRUCTION NO. 37

DEFENSE OF SELF OR OTHER

You must decide whether the defense of Defense of Self or Other applies in this case. Under that defense, a person is justified in using force against another when and to the extent that he reasonably believes that force is necessary to defend himself, or a third party, 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:

1. 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,
2. To prevent the commission of a forceable felony.

INSTRUCTION NO. 38

In determining imminence or reasonableness for purposes of applying the defense of Defense of Self or Other, you may consider, but are not limited to considering, 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.

INSTRUCTION NO. 39

In determining whether the defendant acted in Defense of Self or Other, the defendant is not required to prove he was justified in using force or force likely to cause serious bodily injury or death. Rather, the prosecution must prove beyond a reasonable doubt that the defendant was not justified in using force or force likely to cause death or serious bodily injury. If the prosecution has not carried this burden, then you must find the defendant not guilty.

INSTRUCTION NO. 40

A person does not have a duty to retreat from force or threatened force, or commission of a burglary, before using force in defense of himself or a third party as long as that person is in a place where he has lawfully entered or remained.

INSTRUCTION NO. 41

When deciding whether the defendant acted reasonably under either of the defenses – Defense of Habitation or Defense of Self or Other – reasonableness of a belief that a person is justified in using force that would cause death or serious bodily injury against another is an objective standard and shall be determined from the viewpoint of a reasonable person under the then-existing circumstances. Actual danger is not necessary for one or both of these defenses to apply, if you determine a reasonable person under the circumstances facing the defendant would be justified in believing himself or others to be in danger.

Tab 4

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

U.C.A. 1953 § 76-2-402

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

Currentness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) the nature of the danger;

(b) the immediacy of the danger;

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

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

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

Credits

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

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

End of Document

Tab 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 § 76-2-405

§ 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 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 § 76-2-406

§ 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

End of Document

Tab 7

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 8

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 9

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

Attorneys and Law Firms

Lori J. Seppi and Michael R. Sikora, Attorneys for Appellant.

Sean D. Reyes and Marian Decker, Salt Lake City, Attorneys for Appellee.

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).