# AGENDA

## Standing Committee on the Model Utah Criminal Jury Instructions

February 7, 2018

**12:00 – 1:30 p.m.**

**Council Room – 3rd Floor, N31**

Matheson Courthouse

450 S. State St., Salt Lake City, UT

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|---|---|---|---|---|
| 12:00 | Welcome and Approval of Minutes | Action | Tab 1 | Judge James Blanch |
| 12:05 | CR109B. Further Admonition about Electronic Devices | Discussion/ Action | Tab 2 | Judge James Blanch |
| 12:15 | Justification Defenses<br>• Instructions 33, 34, 35, 36, 41 - with Karen's edits | Discussion/ Action | Tab 3 | All |
| 12:45 | Justification Defenses<br>• Remaining Instructions from Judge Blanch<br>• Defense of Property and Person(s) | Discussion/ Action | Tab 4 | Judge James Blanch<br>Mark Field |
| 1:30 | Adjourn | Action | | Judge James Blanch |

| | | | | |
|---|---|---|---|---|
| | References<br>• Utah Code 76-2-402<br>• Utah Code 76-2-405<br>• Utah Code 76-2-406<br>• *State v. Karr*<br>• *State v. Berriel*<br>• *State v. Walker*<br>• *State v. Mitcheson*<br>• *State v. Moritzsky*<br>• *State v. Patrick* | | Tab 5 | |

**Committee Web Page:** https://www.utcourts.gov/utc/muji-criminal/

**Meeting Schedule:** Meetings are held the 1st Wednesday of each month in the Matheson Courthouse, Judicial Council Room, from 12:00 to 1:30 unless otherwise stated.

**2018 Meetings:**

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

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| **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 September 6, 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

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

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

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

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

# Tab 3

**Instruction #33**

**CR____. 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~~ the person 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. The person reasonably believes
    a. T~~t~~hat the other's entry is made or attempted for the purpose of committing a felony in the habitation; and
    b. T~~t~~hat the force is necessary to prevent the commission of the felony.
    ~~2.~~

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**References:**
Utah Code § 76-2-405
*State v. Karr*, 364 P.3d 49 (Utah App. 2015)
*State v. Walker*, 391 P.3d 380 (Utah App. 2017)
*State v. Mitcheson*, 560 P.2d 1120 (Utah 1977)
*State v. Moritzsky*, 771 P.2d 688 (Utah App. 1989)
*State v. Patrick*, 217 P.3d 1150 (Utah App. 2009)

**Committee Note:**
This instruction should be used with instructions 34, 35, 36, and 41 (Need to update with actual instruction numbers)

**CR____. 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 does not apply ~~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. Even when the presumption is rebutted, the prosecution must still disprove the defense beyond a reasonable doubt.

**References:**

Utah Code § 76-2-405
*State v. Karr*, 364 P.3d 49 (Utah App. 2015)
*State v. Walker*, 391 P.3d 380 (Utah App. 2017)
*State v. Mitcheson*, 560 P.2d 1120 (Utah 1977)
*State v. Moritzsky*, 771 P.2d 688 (Utah App. 1989)
*State v. Patrick*, 217 P.3d 1150 (Utah App. 2009)

**Committee Note:**

This instruction should be used with instructions 33, 35, 36, and 41 (Need to update with actual instruction numbers)

**CR____. Defense of Habitation - Prosecution's Burden.**

The defendant carries no burden to prove the defense of Defense of Habitation. In other words, ~~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.

**References:**

Utah Code § 76-2-405
*State v. Karr*, 364 P.3d 49 (Utah App. 2015)
*State v. Walker*, 391 P.3d 380 (Utah App. 2017)
*State v. Mitcheson*, 560 P.2d 1120 (Utah 1977)
*State v. Moritzsky*, 771 P.2d 688 (Utah App. 1989)
*State v. Patrick*, 217 P.3d 1150 (Utah App. 2009)

**Committee Note:**

This instruction should be used with instructions 33, 34, 36, and 41 (Need to update with actual instruction numbers)

**CR____. 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.

**References:**
Utah Code § 76-2-405
*State v. Karr*, 364 P.3d 49 (Utah App. 2015)
*State v. Walker*, 391 P.3d 380 (Utah App. 2017)
*State v. Mitcheson*, 560 P.2d 1120 (Utah 1977)
*State v. Moritzsky*, 771 P.2d 688 (Utah App. 1989)
*State v. Patrick*, 217 P.3d 1150 (Utah App. 2009)

**Committee Note:**
This instruction should be used with instructions 34, 35, and 41 (Need to update with actual instruction numbers)

**Karen's response. Based on the plain language of the defense of habitation statute, it is not clear to me that the actor needs to believe he is in danger except under § 76-2-405 (1)(a).**

**CR___. Defense of Habitation – Reasonableness.**

When deciding whether the defendant acted reasonably under [Defense of Habitation] [Defense of Self or Other], you must use an objective standard based on the viewpoint of a reasonable person under the then-existing circumstances. Actual danger is not necessary for the defense[s] 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, then the defendant acted reasonably.

**References:**

Utah Code § 76-2-405
*State v. Karr*, 364 P.3d 49 (Utah App. 2015)
*State v. Walker*, 391 P.3d 380 (Utah App. 2017)
*State v. Mitcheson*, 560 P.2d 1120 (Utah 1977)
*State v. Moritzsky*, 771 P.2d 688 (Utah App. 1989)
*State v. Patrick*, 217 P.3d 1150 (Utah App. 2009)

**Committee Note:**

This instruction should be used with instructions 33, 34, 35, and 36 (Need to update with actual instruction numbers)

# Tab 4

**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. 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.

# 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 5

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

U.C.A. 1953 § 76-2-402

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

Currentness

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

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

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

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

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

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

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

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

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

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

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

  

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

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

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

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

(a) the nature of the danger;

(b) the immediacy of the danger;

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

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

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

**Credits**

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

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

**End of Document**

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**

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**

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**

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**

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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.

2017 WL 74867

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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**

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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).

560 P.2d 1120
Supreme Court of Utah.

The STATE of Utah, Plaintiff and Respondent,
v.
Gary Alfred MITCHESON,
Defendant and Appellant.

No. 14629.
|
Feb. 15, 1977.

**Synopsis**
Defendant was convicted before the Seventh District Court, Carbon County, Edward Sheya, J., of murder in the second degree, and he appealed. The Supreme Court, Crockett, J., held that defense of using force in the protection of one's habitation was available to defendant who allegedly used rifle in protection of his sister's home which he was occupying as a substitute home or habitation; and that defense of using force in protection of one's habitation was not necessarily inconsistent with defendant's assertion that discharge of gun and striking of deceased in the neck was an accident, and even if such defenses were inconsistent, such inconsistency would not deprive defendant of either defense.

Reversed and remanded.

West Headnotes (5)

[1] **Homicide**
Defense of Dwelling or Habitation

In view of salutary purpose of statute providing for defense of using force in the protection of one's habitation, of preserving peace and good order of society, it should be interpreted and applied in broad sense to accomplish that purpose; therefore, it would include not only a person's actual residence, but also whatever place he may be occupying peacefully as a substitute home or habitation. U.C.A.1953, 76-2-405.

1 Cases that cite this headnote

[2] **Homicide**
Defense of Dwelling or Habitation

Defense of using force in the protection of one's habitation was available to defendant who allegedly used rifle in protection of his sister's home which he was occupying as a substitute home or habitation. U.C.A.1953, 76-2-405.

Cases that cite this headnote

[3] **Homicide**
Defense of Dwelling or Habitation

**Homicide**
Accident or Misfortune

In prosecution for murder in the second degree, defense of using force in the protection of one's habitation was not necessarily inconsistent with defendant's assertion that discharge of gun and striking of decedent in the neck was an accident; even if such defenses were inconsistent, such inconsistency would not deprive defendant of either defense. U.C.A.1953, 76-2-405.

Cases that cite this headnote

[4] **Criminal Law**
Special Pleas in Bar in General

In a criminal case, defendant need not specially plead his defenses.

Cases that cite this headnote

[5] **Criminal Law**
Plea of Not Guilty

**Criminal Law**
Extent of Burden on Prosecution

In criminal case, the entry of plea of not guilty places upon state the burden of proving every element of offense beyond reasonable doubt; this gives defendant the benefit of every defense thereto which may cause a reasonable doubt to exist as to his guilt, arising either from the evidence, or lack of evidence, in the case, and this is true whether his defenses are consistent or not.

  

1 Cases that cite this headnote

**Attorneys and Law Firms**

***1121** Don Blackham, of Blackham & Boley, Salt Lake City, for defendant-appellant.

Vernon B. Romney, Atty. Gen., Earl F. Dorius, Asst. Atty. Gen., Salt Lake City, Ronald B. Boutwell, Carbon County Atty., Price, for plaintiff and respondent.

**Opinion**

CROCKETT, Justice:

The defendant, Gary Alfred Mitcheson, was convicted of murder in the second degree for shooting Richard Herrera in the front yard of 432 South Fourth East, Price, Utah, at about 3:30 a.m. on February 7, 1976. He was sentenced to a term of five years to life in the state prison.

On his appeal the point of critical concern is his charge that the trial court erred in refusing his request to instruct the jury on the defense of using force in the protection of one's habitation. [1]

The deceased, Richard Herrera, sold his car (a 1967 Chevrolet van) to Alfred Mitcheson, defendant's father, on December 15, 1975. The original wheels and tires had been changed for what are called 'Mag Wheels' and tires, which have a wider tread. Some time after the father had taken possession of the van, a dispute arose between the parties over those wheels. The father, supported by the defendant, claimed that they had been included in the sale, but the deceased and his brother, Ernie Herrera, claimed they only agreed to loan the 'Mag Wheels' and tires temporarily.

On several occasions in January, 1976, the two brothers requested that the wheels and tires be returned, but the defendant and his father did not comply. On one of those occasions the Herrera brothers and some friends went to the father's home to remove the wheels. The father protested and called the police. When they arrived they told the Herreras, the deceased and his brother, to leave the wheels alone and that any disagreement should be settled by going to court.

A few days thereafter, on February 6, 1976, the defendant was parked in the van at a drive-in restaurant when the deceased came up to the van, opened the door and hit the defendant on the jaw and eye; and made threats to the defendant to the effect that I will 'put you under.' A couple of hours later the defendant and some of his friends went to the home of Jerry Giraud, where they saw the deceased's car parked. There was a conversation in which the defendant offered to fight the deceased, which was then refused. But, they agreed to meet in the town park and fight at 2:00 o'clock the next afternoon.

Defendant and his friend, Wendell Johnson, drove to his father's house, where the defendant obtained a rifle. He and Johnson then arranged for a poker game to be held at the home of defendant's sister, Debbie, and went there in the van where they proceeded to play cards. Still later that night, at about 3:30 a.m., the deceased, Richard Herrera, and some of his friends drove up to this house for the stated purpose of removing the wheels from the van. When they entered upon her premises Debbie told them to leave. They did not comply. A considerable commotion ensued, including her screaming at them to get off her premises. Defendant came to the doorway of the house with the rifle. He fired a shot and Richard Herrera fell with a bullet wound in his neck from which he shortly expired.

The essence of the defense, and the basis for the requested instructions, was that the defendant was using the rifle as a backup resource in protection of the peace and security of his habitation and that its discharge and the striking of the deceased was an accident. The argument that the defendant was not entitled to that instruction ***1122** is: (1) that the sister's home was not his habitation; and (2) that it was inconsistent with his own testimony and theory of defense that the shooting was an accident.

Defense of Habitation

The pertinent statute is 76-2-405, U.C.A.1953, which provides in part:

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

  

(1) The entry is made or attempted in a violent and tumultuous manner 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 therein . . ..

That statute has its roots in the ancient and honored doctrine of the common law that a man's home is his castle, and that even the peasant in his cottage, may peaceably abide within the protective cloak of the law, and no one, not even the king nor all his armies can enter to disturb him. [2]

**[1]** **[2]** In view of the salutary purpose of that statute, of preserving the peace and good order of society, it should be interpreted and applied in the broad sense to accomplish that purpose. Thus it would include not only a person's actual residence, but also whatever place he may be occupying peacefully as a substitute home or habitation, [3] such as a hotel, motel, or even where he is a guest in the home of another; [4] and so would apply to the defendant in his sister's home.

Issue of the Inconsistent Defenses

**[3]** It is our judgment that the position of the defendant: that he was defending what he regarded as his habitation, is not necessarily inconsistent with his assertion that the discharge of the gun and the striking of the deceased in the neck was an accident. Furthermore, even if they were inconsistent, that should not deprive the defendant of either defense.

**[4]** **[5]** In a criminal case the defendant need not specially plead his defenses. The entry of a plea of not guilty places upon the State the burden of proving every element of the offense beyond a reasonable doubt. [5] This gives the defendant the benefit of every defense thereto which may cause a reasonable doubt to exist as to his guilt, arising either from the evidence, or lack of evidence, in the case; and this is true whether his defenses are consistent or not. [6]

On the basis of what has been said herein, it is our opinion that if the requested instruction had been given and the jury had so considered the evidence, there is a reasonable likelihood that it may have had some effect upon the verdict rendered. Therefore the defendant's request should have been granted. Accordingly, it is necessary that the judgment be reversed and ***1123** that the case be remanded for a new trial. [7] No costs awarded.

ELLETT, C.J., and MAUGHAN, WILKINS and HALL, JJ., concur.

**All Citations**

560 P.2d 1120

Footnotes

1 Sec. 76-2-405, U.C.A.1953.

2 See Semayne's Case (1604) 5 Coke 91, 77 Eng. Reprint 194, where it was stated that 'the house of everyone is to him his castle and fortress, as well for his defense against injury and violence, as for his repose; and although the life of a man is a thing precious and favored in law . . . if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defense of himself and his house, it is not felony and he shall lose nothing . . . (citing other older authorities).'

3 Smart v. State, 244 Ind. 69, 190 N.E.2d 650; Huff v. State, 113 Ga.App. 257, 147 S.E.2d 840; 40 C.J.S. Homicide s 109.

4 As to the guest in another's home, see State v. Osborne, 200 S.C. 504, 21 S.E.2d 178.

5 State v. Hendricks, 123 Utah 267, 258 P.2d 452; State v. Renzo, 21 Utah 2d 205, 443 P.2d 392.

6 People v. West, 139 Cal.App.2d Supp. 923, 293 P.2d 166; Whittaker v. U.S., 108 U.S.App.D.C. 268, 281 F.2d 631; State v. Lora, 305 S.W.2d 452 (Mo.); 22 C.J.S. Criminal Law s 54. In this regard compare Rule 12(b), U.R.C.P., which provides that there may be inconsistent defenses in civil cases.

7 That upon reversal for error defendant is not entitled to go free, but to a new trial, see State v. Lawrence, 120 Utah 323, 234 P.2d 600; United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627.

  

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771 P.2d 688
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Respondent,
v.
Joseph MORITZSKY, Defendant and Appellant.

No. 880395–CA.
|
March 23, 1989.

**Synopsis**
Defendant was convicted in the Uintah County Court, Dennis L. Draney, J., of aggravated assault, and he appealed. The Court of Appeals, Orme, J., held that defendant did not receive effective assistance of counsel in aggravated assault trial where his counsel obtained a defense of habitation instruction in accord with inapplicable pre–1985 version of applicable statute which failed to incorporate statutory presumption that defendant acted reasonably assuming it found the defense otherwise applicable.

Reversed and remanded.

West Headnotes (2)

**[1] Assault and Battery**
Defense of property
**Assault and Battery**
Presumptions and burden of proof
**Homicide**
Defense of Dwelling or Habitation
**Homicide**
Excuse or Justification

Where a defendant entitled to assert defense of habitation establishes that he used force in defense of his habitation against unlawful entry or attempted entry and, in case of deadly force, that unlawful entry was violent, tumultuous, surreptitious, in stealth, or for purpose of committing a felony, defendant's actions and beliefs will be presumed reasonable and State must rebut presumption to invalidate the defense. U.C.A.1953, 76–2–405.

4 Cases that cite this headnote

**[2] Criminal Law**
Offering instructions

Defendant did not receive effective assistance of counsel in aggravated assault trial where his counsel obtained a defense of habitation instruction in accord with inapplicable pre–1985 version of statute which failed to incorporate statutory presumption of reasonableness of defendant's actions and beliefs assuming jury found the defense otherwise applicable. U.C.A.1953, 76–2–405.

20 Cases that cite this headnote

**Attorneys and Law Firms**

***689** Kirk C. Bennett, West Valley City, for defendant and appellant.

R. Paul Van Dam, Atty. Gen., Charlene Barlow (argued), Asst. Atty. Gen., for plaintiff and respondent.

Before BILLINGS, JACKSON and ORME, JJ.

## OPINION

ORME, Judge:

Defendant Joseph Moritzsky appeals his jury conviction of aggravated assault, a third degree felony in violation of Utah Code Ann. § 76–5–103 (1978). Defendant urges, through new counsel, reversal of his conviction due to his trial counsel's failure to request the appropriate "defense of habitation" jury instruction. Defendant claims counsel's failure rendered his assistance ineffective in contravention of the Sixth Amendment. We agree, and reverse defendant's conviction.

## FACTS

  

The relevant facts are gleaned mainly from the testimony of defendant and the victim of the charged assault, Gary Olson. Defendant and Olson were partners in a horse training venture, which they conducted in a "camp" outside of Vernal, Utah. Defendant moved a trailer he owned to the camp, in which he lived with his girlfriend and her small child. Olson continued to live in Vernal and commuted to the camp almost daily to work with the horses.

On April 1, 1987, Olson and two friends arrived at the camp at around 7:00 p.m., and defendant invited them into his trailer. Olson had been drinking beer since early that morning, and brought half a fifth of whiskey with him to the camp. Olson, defendant, and the others drank the whiskey, and after a short stay the two visitors left the camp. Defendant and Olson then began to bicker over a horse they were training for a client. Olson wanted to take the horse to his home in Vernal; defendant wanted to keep the horse at the camp. Heated words were exchanged. Defendant testified that although Olson took off his hat and coat and threw them on the ground, indicating his intention to fight defendant, no physical violence occurred at this time. To avoid a fight, defendant told Olson to take the horse. Although the foregoing facts are essentially undisputed, the events following this confrontation are recalled quite differently by defendant and Olson.

Defendant claims the argument over the horse occurred outside the trailer. After deciding to allow Olson to take the horse, defendant went back into the trailer, drank a few beers, and had dinner. Believing Olson had mounted the horse and simply ridden off into the sunset, defendant went to bed. About an hour and a half after the argument, defendant was awakened by the sound of a person in the trailer. Defendant got out of bed, wrapped a towel around his otherwise naked self, and exited the bedroom to investigate the disturbance. Defendant found that a rope used to secure the trailer door had been broken, and Olson was standing in the front room. Defendant, believing Olson had returned intending to start a fight, tried to avoid further confrontation by offering Olson another beer. Olson responded by shoving defendant. Defendant told Olson not to shove him, and retrieved some wood for the fire. Olson shoved defendant again, harder than the first time. Defendant did not want to fight Olson in the small living room of the trailer while wearing only a towel. Accordingly, defendant went into his bedroom, retrieved his Colt .45 caliber pistol, came back into the front room, and fired a warning shot into the trailer ceiling. Olson quickly attempted to exit the trailer, and defendant helped him along with a shove out the door. Olson landed on the ground and got up cursing defendant, who then fired a second warning shot into the ground in front of Olson. Defendant told Olson to leave him alone or Olson would be ***690** shot. Olson did not heed this warning, and defendant shot Olson in the foot when he stepped toward defendant, who was standing in the trailer doorway.

Olson recalls the evening's events somewhat differently. Olson claims the argument over the horse occurred inside the trailer, and during the argument defendant shoved Olson out of the trailer. Olson admits shoving defendant during the argument and eventually going back into the trailer, but claims he reentered only 20 minutes after being shoved out. Olson claims he went back into the trailer to retrieve a halter he needed to ride the horse home, and was shot while still inside the trailer.

In defense to the charge of aggravated assault, defendant raised self-defense, defense of property, and defense of habitation. The jury was instructed on each of these defenses. Having heard the conflicting testimony, the jury found defendant guilty of aggravated assault. Defendant seeks reversal of his conviction based on what he perceives as the ineffectiveness of his counsel. Defendant claims that given the above testimony, a properly instructed jury could conclude that defendant was defending his habitation when he shot Olson in the foot. However, the defense of habitation instruction requested by defendant's counsel and given to the jury failed to incorporate a statutory presumption that defendant acted reasonably, if the jury found he was otherwise entitled to assert the defense. *See* Utah Code Ann. § 76–2–405 (1988). Defendant claims that due to his counsel's failure to request the correct instruction, he was denied the right to effective assistance of counsel guarantied him under the Sixth Amendment to the United States Constitution.

## INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's Sixth Amendment challenge to his conviction will be successful only if he can prove that (1) his counsel rendered an objectively deficient performance, demonstrated by specific acts or omissions; and (2) counsel's error prejudiced defendant, i.e., a "reasonable

  

probability" exists that, but for counsel's acts or omissions, the verdict would have been more favorable to defendant. *See, e.g., State v. Verde,* 770 P.2d 116, 119 (1989); *State v. Frame,* 723 P.2d 401, 405 (Utah 1986); *State v. Geary,* 707 P.2d 645, 646 (Utah 1985); *State v. Pursifell,* 746 P.2d 270, 275 (Utah Ct.App.1987). On appeal, defendant must overcome the strong presumption that his counsel's assistance was adequate. *See Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). The formidable nature of this burden is demonstrated by the fact that the parties have been unable to draw our attention to even a single reported Utah case where a criminal conviction was actually overturned on the basis of ineffective assistance of counsel. [1]

Nonetheless, the right to *effective* assistance of counsel is an important aspect of a criminal defendant's Sixth Amendment rights. Appellate courts must review each case carefully to prevent the infrequent meritorious claim from being reflexively swept into the tide of affirmance by the chronicles of probability. Our task is not to mechanically apply the two-part standard set forth above, but instead to "focus upon the fundamental fairness of the proceeding challenged. The purpose of the inquiry is simply to insure that defendant receives a fair trial." *Frame,* 723 P.2d at 405. It is with these observations in mind that we review the merits of defendant's claim. Because of its crucial role in this case, however, we first turn our attention to Utah's defense of habitation statute.

## DEFENSE OF HABITATION

Utah Code Ann. § 76–2–405 (1988) provides that defense of one's habitation may justify the use of force. The section provides as follows:

> ***691** (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.

**[1]** The presumption provided in subsection (2) was added in 1985. *See* 1985 Utah Laws ch. 252, § 1. While not a model of clarity—subsection (1) 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. *See In re R.J.Z.,* 736 P.2d 235, 236 (Utah 1987) ("legislature intended that a legal presumption of reasonableness would arise"). Where a defendant entitled to assert the defense establishes the factors articulated in subsection (2), the presumption is necessarily triggered and the burden shifts to the State to rebut it, i.e., to prove that in fact defendant's beliefs and actions under subsection (1) were not reasonable. *See id.* at 236–37 ("The first step in deciding whether any defendant is justified under section 76–2–405 is to determine what burden of proof the defendant and the State are respectively required to carry. It is impossible to allocate the burden of proof without first determining whether the defendant is entitled to the statutory presumption.").

In sum, before subsection (2) was added, a defendant had to show that he was defending his habitation and reasonably believed that the force he used was necessary to terminate an unlawful entry or attack. If deadly force were used, he also had to show a violent, tumultuous, surreptitious, or stealthy entry; reasonable belief that the entry was to do violence or commit a felony; and reasonable belief that the force used was necessary to

  

prevent the violence or felony.[2] With the addition of subsection (2), a defendant need only show that he used force in defense of his habitation against unlawful entry or attempted entry and, in the case of deadly force, that the unlawful entry was violent, tumultuous, surreptitious, in stealth, or for the purpose of committing a felony. If the evidence establishing these facts is believed, defendant's pertinent actions and beliefs will be presumed reasonable and the State must rebut the presumption to invalidate the defense.

## COUNSEL'S PERFORMANCE

**[2]** Defendant's claim of ineffective assistance of counsel is specific in this case: Defendant's trial counsel requested and obtained a defense of habitation instruction in ***692** accordance with the inapplicable pre–1985 version of § 76–2–405, i.e., an instruction which left the jury—assuming it found the defense otherwise applicable—to *determine* reasonableness rather than requiring it to *presume* reasonableness.

The State, relying on two main arguments, would have us regard counsel's performance as not being objectively deficient. First, the State claims the evidence did not entitle defendant to any defense of habitation instruction, making it irrelevant what particular instruction was employed. *See State v. Speer,* 750 P.2d 186, 191 (Utah 1988) (counsel's performance was not deficient in failing to request a jury instruction to which defendant was not entitled). Second, the State contends counsel has broad discretion in making tactical decisions and accordingly we should not second-guess counsel's judgment. *See, e.g., Speer,* 750 P.2d at 191; *State v. Pursifell,* 746 P.2d 270, 275 (Utah Ct.App.1987). Neither argument is persuasive in this case.

Our review of the admittedly conflicting testimony convinces us that defendant is indeed entitled to raise the defense and have the jury instructed on the presumption. Defendant testified that he lives in the trailer with his girlfriend and her small child; thus, the shooting occurred at his habitation. Defendant also testified that Olson entered his habitation at night, without permission, and that Olson thereafter pushed defendant twice. This testimony, if believed, brings defendant within the scope of § 76–2–405 and triggers the presumption of reasonableness.

Nor can counsel's action be chalked up to trial tactics or the like. It appears to us that counsel merely overlooked the statutory presumption by failing to check the "pocket-part" of the Utah Code, where the 1985 amendment to § 76–2–405 is found. Obviously, there is no tactical explanation for requesting a defense of habitation instruction without inclusion of the beneficial presumption. Under these facts, this is simply not a matter entrusted to counsel's professional judgment. The lack of any conceivable tactical basis for this omission distinguishes this case from many of the previous cases where ineffective assistance of counsel claims were rejected. *See, e.g., State v. Frame,* 723 P.2d 401, 406 (Utah 1986); *State v. Pursifell,* 746 P.2d 270, 275 (Utah Ct.App.1987).

An appropriate defense of habitation instruction was necessary to insure that defendant received a fair trial under the standard articulated in *R.J.Z.* The jury should have been instructed to determine if Olson's entry was unlawful and forcible, violent, or otherwise qualifying for the presumption that defendant acted reasonably under § 76–2–405(2). By failing to request a defense of habitation instruction incorporating the presumption, counsel's performance was objectively deficient.

## PREJUDICE

We must next determine if counsel's deficient performance, as established above, undermines our confidence in the verdict against defendant. *See, e.g., Frame,* 723 P.2d at 405. Specifically, we must decide if a reasonable probability exists that the jury's verdict would have been more favorable to defendant had the proper instruction been given. *See Verde,* 771 P.2d at 118 n. 2, 124 n. 15. Since the availability of the presumption appears to be of considerable importance to defendant as outlined above, it is difficult for us to envision how counsel's failure to request the appropriate instruction would not be prejudicial. The State suggests two possibilities. First, the State renews its claim that defendant was not entitled to any defense of habitation instruction given the testimony at trial. The suggestion is curious since trial counsel and the trial court saw fit to instruct the jury on the defense of habitation doctrine, albeit without the applicable presumption. In any event, as analyzed in the preceding section in the context of counsel's performance,

  

the evidence clearly warranted a defense of habitation instruction.

Second, the State claims that even if an instruction incorporating the presumption had been given, and the jury had also found that defendant was defending his habitation, defendant's own testimony conclusively rebuts the presumption in his favor. ***693** We cannot agree. Defendant testified he believed Olson wanted to fight him, and retrieved his gun to discourage Olson's aggression and encourage his departure. In fact, defendant fired two warning shots before firing the shot that struck Olson's foot. This shot was fired either while Olson was in the trailer or while he was standing outside but coming toward defendant and his habitation, depending on which story is believed. Defendant testified that Olson was shot only after ignoring defendant's warnings that he would be shot if he did not leave defendant alone. While defendant admitted that he probably told an investigating police officer that he was not afraid of Olson and thought he could "kick Olson's ass," a properly instructed jury might well regard this statement, in context, as the criminal law equivalent of "puffing" [3] and not conclusive evidence that defendant lacked a reasonable fear of imminent peril. Based on our review of the evidence, we find a reasonable probability that the jury's verdict would have been more favorable to defendant had the proper instruction been given. Accordingly, we cannot say with confidence that defendant received a fair trial, and his conviction must be reversed.

We hold that the Sixth Amendment requires defendant to be retried before a properly instructed jury. We accordingly reverse and remand for such proceedings.

BILLINGS and JACKSON, JJ., concur.

**All Citations**

771 P.2d 688

Footnotes

1 In a recent case, however, one member of this court favored reversal of a conviction on ineffective assistance of counsel grounds. *See State v. Morehouse,* 748 P.2d 217, 220–23 (Utah Ct.App.1988) (Jackson, J., dissenting).

2 To mount a successful affirmative defense of this sort, defendant's burden of proof is quite limited. He need not prove the defense beyond a reasonable doubt, by clear and convincing evidence, nor even by a mere preponderance. He need only create a reasonable doubt as to his guilt. *See generally State v. Knoll,* 712 P.2d 211, 213–215 (Utah 1985).

3 Generally, "puffing" is used in the commercial law context to describe "[a]n expression of opinion by seller not made as a representation of fact." Black's Law Dictionary 1109 (5th ed. 1979). The legal effect of such a statement was adeptly explained in 1923 by Justice Thurman: "For a dealer to say that the article he offers for sale 'will sell like hot cakes' may have a tendency to induce an ardent lover of hot cakes to make an improvident purchase, ... it affords [the buyer] no grounds of action or defense if the statement proves to be false." *Detroit Vapor Stove Co. v. J.C. Weeter Lumber Co.,* 61 Utah 503, 215 P. 995, 996 (1923). Defendant's statement, taken in context, might well be regarded by a jury as "macho" hyperbole rather than a definitive admission that defendant had no fear of Olson.

217 P.3d 1150
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Darrell PATRICK, Defendant and Appellant.

No. 20050761–CA.
|
Aug. 20, 2009.

**Synopsis**

**Background:** Defendant was convicted in a jury trial in the Second District, Ogden Department, Roger S. Dutson, J., of first degree felony murder. Defendant appealed.

**[Holding:]** The Court of Appeals, Thorne, P.J., held that evidence failed to establish defense of habitation so as to support conviction for first degree felony murder.

Affirmed.

West Headnotes (6)

**[1] Criminal Law**
In General;Necessity of Motion

Claim that defendant was entitled to directed verdict under defense of habitation statute could not be considered for appellate review; defendant's first motion for directed verdict did not invoke defense of habitation statute at all, much less assert his present argument that statute's presumption of reasonableness had been established and not rebutted by state's evidence, nor did defendant argue on appeal that district court committed plain error when it failed to apply defense of habitation presumption at close of state's case-in-chief. West's U.C.A. § 76–2–405.

3 Cases that cite this headnote

**[2] Homicide**
Defense of property

Evidence failed to establish defense of habitation so as to support conviction for first degree felony murder; one reasonable interpretation of evidence was that victim entered home lawfully in light of his familial relationship to his mother and step-father defendant and longstanding practices of parties. West's U.C.A. § 76–2–405(2).

Cases that cite this headnote

**[3] Criminal Law**
Adding to or changing grounds of objection

Defendant failed to preserve for appellate review claim that district court improperly allowed evidence of his prior acts to be introduced against him; defendant's arguments below and on appeal focused exclusively on rule governing admission of evidence of "other crimes, wrongs or acts," but district court admitted challenged evidence under rule governing admission of character evidence generally and when character trait has been placed in issue. Rules of Evid., Rule 404(a, b).

1 Cases that cite this headnote

**[4] Criminal Law**
Comments on Evidence or Witnesses

Generally, parties have wide latitude in closing arguments to characterize the evidence and the proper application of the law to the evidence.

Cases that cite this headnote

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

A party must preserve arguments about the propriety of closing arguments by objecting to the offending statements at the time they are made.

Cases that cite this headnote

  

**[6] Criminal Law**
Necessity of specific objection

Defendant failed to preserve for appellate review claim that State misstated law and facts in its closing argument; defendant's general objection did not give district court notice of how State's argument might have misstated law and, thus, did not give district court opportunity to rule on that issue.

2 Cases that cite this headnote

**Attorneys and Law Firms**

***1151** David O. Drake, Midvale, for Appellant.

Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee.

Before Judges THORNE, BENCH, and McHUGH.

OPINION

THORNE, Associate Presiding Judge:

¶ 1 Darrell Patrick appeals from his conviction of one count of murder, a first degree felony, *see* Utah Code Ann. 76–5–203 (2008). [1] We affirm.

BACKGROUND

¶ 2 This case arises out of the September 3, 2004 shooting death of Shawn Scott. It is undisputed that Scott was shot by Patrick, his step-father, and that the shooting occurred in the home shared by Patrick and Evelyn Kay Patrick (Kay), who is Patrick's wife and Scott's mother. After a five-day trial, a jury rejected Patrick's claims of self-defense, defense of others, and defense of habitation, and convicted Patrick of murder.

¶ 3 Scott's death was the culmination of a dispute over paintings that Kay had previously given to Scott and his wife, Cindy. Scott and Cindy had separated, and Kay had gone to Cindy's residence and retrieved the paintings. Kay then located Scott at a local bar and told him what she had done. Scott told Kay to return the paintings within the hour or he would hurt her and Patrick. Kay returned home, told Patrick about the dispute and Scott's threat, and reported the threat with a call to 911.

¶ 4 Shortly thereafter, an unarmed Scott arrived at the Patrick and Kay's home, entered through the front door, and was involved in a verbal altercation with Kay. Kay told Scott to get out of the house, and a shoving match ensued. The exact details of the ensuing physical altercation between Scott, Kay, and Patrick are disputed, but it is undisputed that Patrick ultimately fired one shot from a handgun that struck Scott in the chest. Patrick then called 911 to report the shooting. Police arrived on the scene while Scott was still alive. Scott died a short time later.

¶ 5 Patrick was charged with murder and bound over for trial. Both sides filed pretrial motions regarding character evidence, with the State seeking to admit prior acts by Patrick and Patrick seeking to admit prior acts by Scott. In a written ruling issued on May 26, 2005, the district court allowed the State to present evidence of Patrick's prior acts involving Kay, Scott, and Cindy, ruling that "the issue is not whether these facts are to show a propensity to commit the offense, but relate to [Patrick's] self defense issue, ***1152** which by its nature raises the issue of peacefulness and reasonableness of [his] conduct." The district court denied Patrick's request to admit evidence of Scott's two prior felony sex offenses but allowed Patrick to present evidence of Scott's prior acts to the extent those acts might relate to Patrick's state of mind at the time of the shooting.

¶ 6 At the close of the State's case-in-chief, which relied primarily on Kay's testimony about the shooting, Patrick moved for a directed verdict on his claim of self-defense. Patrick's motion asserted that the State had failed in its burden to prove beyond a reasonable doubt that Patrick had not acted in self-defense. The district court denied Patrick's motion.

¶ 7 At the close of all of the evidence, Patrick again made a motion for a directed verdict asserting a failure by the State to disprove self-defense. Patrick's motion also asserted that the undisputed facts of the case gave rise to a presumption of the reasonableness of his actions under the defense of habitation statute and that the State had failed to rebut that presumption. The district court again denied Patrick's motion, stating that "it would be improper for

  

the court to take this out of the jury's hands because there is some evidence [of guilt]" and that the amount of evidence required to defeat a directed verdict motion "is very minimal."

¶ 8 Both sides proceeded to make their closing arguments, each of which addressed the factors that, if established, would give rise to a presumption of the reasonableness of Patrick's actions under the defense of habitation statute. In addressing whether Scott's entry into Patrick's home was unlawful—one of the presumption factors—the State asserted that Scott's entry could not be deemed unlawful if his initial entry was permissive even if Scott subsequently ignored Kay and Patrick's demands that he leave. As characterized by the State, "[a]n unlawful entry is unlawful at the time he crosses the threshold." At this point in the State's closing, Patrick objected, stating as the grounds for his objection merely that the State had made a "misstatement of the law." Patrick did not offer any argument as to what the misstatement of law might be, nor did he raise any objection that the State was misrepresenting the facts in evidence. The district court overruled the objection, noting that the jury had been instructed on the law pertaining to the issue.

¶ 9 The jury convicted Patrick of murder. Patrick filed a motion for new trial on the grounds of improper closing argument, newly discovered evidence, and surprise and faulty evidence submitted by the State. While this motion was pending, Patrick filed a notice of appeal from his conviction. The district court eventually denied Patrick's new trial motion, at which time Patrick's notice of appeal was deemed timely filed. *See generally* Utah R.App. P. 4(b).

## ISSUES AND STANDARDS OF REVIEW

¶ 10 On appeal, Patrick first argues that he was entitled to a directed verdict under Utah's defense of habitation statute, *see* Utah Code Ann. § 76–2–405 (2008), and that the district court erred in denying his motions for a directed verdict. Patrick also argues that under the defense of habitation statute, his conviction is not supported by the evidence. In criminal cases, our review of a district court's ruling on a motion for a directed verdict and of the sufficiency of the evidence to support a jury verdict involves "basically the same analysis." *See State v. Hirschi,* 2007 UT App 255, ¶¶ 15–16, 167 P.3d 503. As to both issues, we review the evidence and all inferences that may reasonably be drawn from it to ensure that there was some basis upon which a reasonable jury could reach a verdict of guilt beyond a reasonable doubt. *See id.* ¶¶ 15–16 & n. 7.

¶ 11 Patrick next argues that the district court erred in making evidentiary rulings pertaining to prior acts committed by Patrick and Scott. "We review a trial court's decision to admit evidence of other crimes, wrongs, or bad acts for an abuse of discretion." *State v. Northcutt,* 2008 UT App 357, ¶ 4, 195 P.3d 499 (internal quotation marks omitted); *see also State v. Decorso,* 1999 UT 57, ¶ 18, 993 P.2d 837. However, we do not address arguments that are not preserved below. *See* ***1153** *State v. Robison,* 2006 UT 65, ¶ 22, 147 P.3d 448 (addressing unbriefed arguments); *State v. Diaz–Arevalo,* 2008 UT App 219, ¶ 10, 189 P.3d 85 (addressing preservation), *cert. denied,* 199 P.3d 970 (Utah 2008).

¶ 12 Finally,[2] Patrick argues that he is entitled to a new trial because of prosecutorial misconduct committed during the State's closing argument. We review inadequately preserved claims of prosecutorial misconduct only for plain error. *See Salt Lake City v. Christensen,* 2007 UT App 254, ¶ 17, 167 P.3d 496.

## ANALYSIS

### I. Utah's Defense of Habitation Statute

**[1]** ¶ 13 Patrick's first set of arguments on appeal involves Utah's defense of habitation statute, Utah Code section 76–2–405. *See* Utah Code Ann. § 76–2–405. Section 76–2–405 governs the use of force to defend a dwelling against unlawful entry or attack. *See id.* § 76–2–405(1). Section 76–2–405 further establishes, under certain circumstances, a presumption that a person who uses force to defend a dwelling has "acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury." *See id.* § 76–2–405(2).[3] Patrick raises several arguments on appeal in an attempt to establish that, as a matter of law, his shooting of Scott was justified as a defense of habitation.

¶ 14 Each of Patrick's arguments invoking section 76–2–405 presumes that the evidence presented to the jury

gave rise to the presumption of reasonableness enunciated in section 76–2–405(2) and that there was insufficient evidence to rebut the presumption. Patrick argues that the unrebutted presumption of reasonableness establishes his innocence of Scott's murder as a lawful defense of habitation. Thus, argues Patrick, the district court erred in denying his motions for directed verdict made at the close of the State's case-in-chief and at the close of all evidence. Patrick also argues that the lack of evidence rebutting the presumption renders the jury verdict against him unsupported by the evidence.

¶ 15 We decline to review the district court's denial of Patrick's first motion for directed verdict, made at the close of the State's case-in-chief, because any error now asserted by Patrick was not preserved in the district court. Patrick's arguments on appeal rely solely on the presumption created by the defense of habitation statute, *see id.,* while his first motion for directed verdict in the district court asserted only that the State had not met its burden on Patrick's separate claim of self-defense, *see id.* § 76–2–402. "In order to preserve an issue for appeal, a defendant must raise the issue before the district court in such a way that the court is placed on notice of potential error and then has the opportunity to correct or avoid the error." *State v. Diaz–Arevalo,* 2008 UT App 219, ¶ 10, 189 P.3d 85, *cert. denied,* 199 P.3d 970 (Utah 2008).

¶ 16 Patrick's first motion for directed verdict did not invoke the defense of habitation statute at all, much less assert his present argument that the statute's presumption of reasonableness had been established and not rebutted by the State's evidence. Nor does Patrick argue on appeal that the district court committed plain error when it failed to apply the defense of habitation presumption at the close of the State's case-in-chief. *See generally State v. Person,* 2006 UT App 288, ¶ 10, 140 P.3d 584 (discussing the requirement ***1154** of raising the plain error doctrine to obtain review of unpreserved issues). For these reasons, we decline to address Patrick's arguments challenging the district court's denial of his first motion for directed verdict.

**[2]** ¶ 17 We address Patrick's two remaining defense of habitation arguments—that the district court erred in denying his second motion for directed verdict and that the evidence is insufficient to support the jury's verdict—together, as they involve "basically the same analysis." *See State v. Hirschi,* 2007 UT App 255, ¶¶ 15–16, 167 P.3d 503. [4] As to both claims, we review the evidence, and all inferences that may reasonably be drawn from it, to ensure that it provides a proper basis for conviction and is not so " 'inconclusive ... that reasonable minds must have entertained a reasonable doubt' " as to Patrick's guilt. *Id.* ¶ 23 (omission in original) (quoting *State v. Hamilton,* 827 P.2d 232, 236 (Utah 1992)).

¶ 18 Patrick's arguments underestimate the jury's broad prerogative to evaluate the reasonableness of a defendant's actions for purposes of applying a justification defense. The breadth of the jury's role in evaluating justification defenses is illustrated in *State v. Law,* 106 Utah 196, 147 P.2d 324 (1944). In *Law,* the defendant was convicted of voluntary manslaughter after fatally stabbing an unarmed man in a fight. *See id.* at 325–26. The defendant, who presented no evidence at trial, challenged the district court's denial of his request for a directed verdict at the close of the State's case-in-chief. *See id.* at 325. On appeal, the defendant argued that "in view of the disparity in the size and strength of the two men [5] and the situation that [the defendant] found himself with deceased on top of him choking and striking him, ... the use of the knife in the manner it was used was legally justifiable or excusable," *id.* at 326, and that the matter should not have been submitted to the jury, *see id.* The supreme court disagreed, stating that "[u]nless the evidence is so conclusive that every reasonable mind must say that the means and the force used were necessary to defend against aggression the question of whether the killing was in self-defense is a question for the jury to determine." *Id.* at 327; *see also State v. Pascual,* 804 P.2d 553, 556 (Utah Ct.App.1991) (" 'The matter of self defense in determining whether homicide was justifiable [is] a question for the jury.' " (alteration in original) (quoting *Law,* 147 P.2d at 327)).

¶ 19 Turning to the presumption factors as they apply in Patrick's case, one reasonable interpretation of the evidence is that Scott entered the home lawfully in light of his familial relationship to Kay and Patrick and the longstanding practices of the parties. Such an interpretation, if adopted by the jury, would preclude a finding of the statutory presumption of reasonableness. *See* Utah Code Ann. § 76–2–405(2) (allowing presumption to arise only "if the entry or attempted entry is unlawful"). Alternatively, even if the presumption had been created, the jury could have examined the totality of the factual circumstances surrounding the shooting and reasonably determined that the State had successfully rebutted the

presumed reasonableness of Patrick's actions. Either or both of these reasonable interpretations of the evidence, if adopted by the jury,[6] would ***1155** provide a basis for its determination of Patrick's guilt beyond a reasonable doubt.

¶ 20 Patrick makes essentially the same argument under the defense of habitation statute as did the defendant in *Law* under the self-defense statute: that the evidence is so one-sided that it should not have been submitted to the jury. We disagree. As in *Law,* the evidence of Patrick's actions is susceptible to more than one reasonable interpretation and presents a question of fact for the jury. *Cf. Law,* 147 P.2d at 327–28. Patrick requested jury instructions on the defense of habitation statute and its presumption, and the jury was so instructed. But based on the evidence presented, a reasonable jury could have found that Patrick's killing of Scott was not justified as a defense of habitation. Accordingly, Patrick was not entitled to a directed verdict, nor will we disturb the jury verdict for insufficiency of the evidence. *See Hirschi,* 2007 UT App 255, ¶¶ 15–16 & n. 7, 167 P.3d 503.

## II. Character Evidence

**[3]** ¶ 21 Patrick next challenges the district court's May 26, 2005 ruling on character evidence issues, arguing that the district court improperly allowed evidence of Patrick's prior acts to be introduced against him.[7] Patrick's arguments below and on appeal focus exclusively rule 404(b) of the Utah Rules of Evidence. *See* Utah R. Evid. 404(b) (governing admission of evidence of "other crimes, wrongs or acts"). However, upon examination of the district court's ruling, it is apparent that the district court admitted the challenged evidence not under rule 404(b), but rather, under rule 404(a). *See id.* R. 404(a) (governing admission of character evidence generally and when a character trait has been placed in issue).

¶ 22 The character evidence issue came before the district court on competing motions in limine, with the State seeking to admit the evidence under rule 404 and Patrick seeking to exclude it. At the motion hearing, Patrick argued that the evidence was inadmissible under rule 404(b), and the State countered that it should be admitted under rule 404(a). The district court adopted the State's position, indicating in its ruling that it was admitting the evidence to demonstrate character traits that were inherently raised in Patrick's self-defense claims rather than to show Patrick's action in conformity with his prior acts. The court stated, "[T]he issue is not whether these facts are to show a propensity to commit the offense, but relate to [Patrick's] self defense issue, which by its nature raises the issue of peacefulness and reasonableness of [his] conduct ...."[8]

¶ 23 Patrick's argument, below and on appeal, that the evidence is inadmissible when analyzed solely under rule 404(b) does not address the district court's ruling admitting the evidence under rule 404(a). In order to demonstrate error by the district court, Patrick would have to demonstrate *either* that the evidence was not admissible under 404(a) *or* that rule 404(b) trumps 404(a) such that evidence inadmissible under rule 404(b) may not be admitted even if it might otherwise be admissible under rule 404(a).[9] These arguments were neither raised below nor are ***1156** they argued on appeal, and thus, we do not consider them. *See State v. Robison,* 2006 UT 65, ¶ 22, 147 P.3d 448 ("Other than for jurisdictional reasons [the court of appeals] should not normally search the record for unargued and unbriefed reasons to reverse a [district] court judgment." (alterations in original) (internal quotation marks omitted)); *State v. Diaz–Arevalo,* 2008 UT App 219, ¶ 10, 189 P.3d 85 (stating requirement that issues must be preserved for appeal by presentation to the district court), *cert. denied,* 199 P.3d 970 (Utah 2008).

¶ 24 The district court admitted the challenged evidence under rule 404(a), and Patrick has neither preserved nor argued any error in the district court's application of that rule. Accordingly, we will not disturb the district court's ruling.

## III. Prosecutorial Misconduct

**[4]** **[5]** **[6]** ¶ 25 Finally, Patrick argues that the State misstated the law and the facts in its closing argument. Generally, parties have wide latitude in closing arguments to characterize the evidence and the proper application of the law to the evidence. *See, e.g., State v. Hopkins,* 782 P.2d 475, 478 (Utah 1989) ("Counsel is afforded considerable latitude in closing argument to the jury and may fully recount the evidence adduced and the reasonable inferences to be drawn therefrom."). And, as with most other trial issues, a party must preserve

  

arguments about the propriety of closing arguments by objecting to the offending statements at the time they are made. *See State v. Nelson–Waggoner,* 2004 UT 29, ¶ 30, 94 P.3d 186 ("[W]e generally will not examine the State's closing argument if the defendant failed to timely object to it ...."). Here, Patrick did not preserve his arguments for appeal by raising a timely and adequate objection.

¶ 26 During closing arguments, the State addressed Scott's entry into the Patrick residence and argued that it was not unlawful. Patrick now complains that the State misrepresented the facts by asserting that "[t]here is nothing in any of the evidence but [Patrick's] statements that this entry was unlawful." Patrick also argues that the State misstated the law when it argued that Scott's permissive entry into the Patrick home could not have become unlawful upon Scott's refusal to leave as directed but, instead, could be deemed unlawful only if it was "unlawful at the time he crosse[d] the threshold [of the Patrick home]." Patrick's only objection at the time was that the State's argument was "a misstatement of the law." The district court overruled Patrick's objection, noting that it had instructed the jury on the law and that the jury could review that instruction. [10]

¶ 27 Clearly, Patrick's "misstatement of the law" objection did not raise or preserve the argument that the State had misrepresented the facts adduced at trial. We also conclude that Patrick's general objection that the State had misstated the law is insufficient to preserve his argument pertaining to the proper interpretation of the unlawful entry provisions of the defense of habitation statute. *See Diaz–Arevalo,* 2008 UT App 219, ¶ 10, 189 P.3d 85 ("In order to preserve an issue for appeal, a defendant must raise the issue before the district court in such a way that the court is placed on notice of potential error and then has the opportunity to correct or avoid the error."), *cert. denied,* 199 P.3d 970 (Utah 2008). Patrick's general objection did not give the district court notice of how the State's argument might have misstated the law and, thus, did not give the district court the opportunity to rule on that issue.

¶ 28 Patrick's objection during the State's closing argument was insufficient to preserve either of the issues he now attempts to argue. Accordingly, we decline to address Patrick's arguments because they are unpreserved. [11] *See id.*

## CONCLUSION

¶ 29 The district court appropriately denied Patrick's motions for a directed verdict, ***1157** and the jury had sufficient evidence upon which to find Patrick guilty beyond a reasonable doubt. Patrick has failed to demonstrate any error in the district court's May 26, 2005 evidentiary ruling. Patrick has also failed to preserve for appeal any argument pertaining to alleged misstatements of law or fact made by the State in its closing arguments. Accordingly, we affirm Patrick's conviction.

¶ 30 WE CONCUR: RUSSELL W. BENCH, and CAROLYN B. McHUGH, Judges.

**All Citations**

217 P.3d 1150, 2009 UT App 226

Footnotes

1 The statutes cited in this opinion have not been amended in any relevant way since the commission of Patrick's crime, and we cite to the most current version of those statutes.

2 Patrick additionally raises arguments attacking the district court's denial of his motion for new trial. However, we lack jurisdiction to consider these arguments because Patrick filed his notice of appeal prior to the district court's order denying the new trial motion and Patrick then failed to file a new or amended notice of appeal "within the prescribed time measured from the entry of the order." *See* Utah R.App. P. 4(b)(2). Accordingly, Patrick's notice of appeal "is effective to appeal only from the underlying judgment." *See id.*

3 Section 76–2–405(2) states, in its entirety,

> 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(2) (2008).

4 As explained in *State v. Hirschi,* 2007 UT App 255, 167 P.3d 503, review of a district court's ruling on a motion to dismiss necessarily includes the analysis employed to review a jury verdict for sufficiency of the evidence:

> For a trial court to determine whether " 'some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt,' " that court necessarily needs to determine if " 'the evidence [presented] is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.' "

*Id.* ¶ 16 n. 7 (alteration in original) (citation omitted).

5 In *Law,* the testimony was that the victim "was a well muscled man, weighing at least 220 pounds, 'six feet easy' and a powerful strapping man. [The witness] 'would judge Law to weigh 125 pounds and about five feet six' in height." *State v. Law,* 106 Utah 196, 147 P.2d 324, 326 (1944). Similarly, in this case, Patrick argues that Scott was much larger and stronger than either Patrick or Kay.

6 We note that Patrick did not request a special verdict form that might have revealed greater detail about the jury's decision.

7 This section of Patrick's appellate brief also summarily asserts that the district court erred in excluding evidence of two prior sex offense convictions against Scott and in allowing trial testimony that Patrick had previously displayed a gun during an argument. We agree with the State that neither of these arguments is adequately briefed, and we decline to address them. *See, e.g., State v. Gomez,* 2002 UT 120, ¶ 20, 63 P.3d 72 (rejecting inadequately briefed arguments).

8 We do not necessarily agree with the district court's conclusion in this regard, *see generally State v. Leber,* 2007 UT App 273, ¶ 12, 167 P.3d 1091 ("[W]e note that a self-defense claim generally does not put character at issue."), *cert. granted,* 186 P.3d 957 (Utah 2008), but Patrick does not challenge the district court's conclusion on appeal.

9 *State v. Leber,* 2007 UT App 273, 167 P.3d 1091, *cert. granted,* 186 P.3d 957 (Utah 2008), examined the interplay between rules 404(a) and 404(b) and concluded that bad acts evidence may be admitted under rule 404(a) when character is in issue without regard to the rule 404(b) analysis that would be required if character was not in issue. *See id.* ¶¶ 6–15. We note that *Leber* was issued well after the district court's decision in this case and is currently under review by the Utah Supreme Court upon writ of certiorari, and we do not rely on its substantive reasoning in reaching our decision today.

10 We note that Patrick is not challenging the jury instructions on appeal.

11 Patrick does not argue that we should reach his arguments under either the plain error or exceptional circumstances doctrines, and we do not do so. *See generally State v. Person,* 2006 UT App 288, ¶ 10, 140 P.3d 584 (discussing the requirement of raising the plain error doctrine to obtain review of unpreserved issues).