AGENDA

Standing Committee on the Model Utah Criminal Jury Instructions

June 6, 2018

12:00 – 1:30 p.m.

Council Room – 3rd Floor, N31

Matheson Courthouse

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

12:00	Welcome and Approval of Minutes	Action	Tab 1	Judge James Blanch
12:05	Assault Instructions • 76-5-102 • 76-5-103 • 77-36-1 • 77-36-1.1 • *Keene v. Bonser* • *State v. Salt*	Discussion/ Action	Tab 2	Sandi Johnson
12:45	Accomplice Liability Instructions • CR403. Party Liability • CR309A and 309B. Accomplice Liability • *State v. Grunwald* • 76-2-202	Discussion/ Action	Tab 3	Committee
1:15	HB 102 – Use of Force Amendments • New Instruction – Defense of Self or Others	Discussion/ Action	Tab 4	Committee
1:30	Adjourn	Action		Judge James Blanch

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:

July & August - Canceled
September 12, 2018
October 3, 2018
November 7, 2018
December 5, 2018

Assignments:

1. Assault, Burglary, Robbery – Sandi Johnson
2. DUI, Traffic – Judge McCullagh
3. Murder – Karen Klucznik & Mark Fields
4. Use of Force, Prisoner Offenses – Stephen Nelson
5. Wildlife Crimes – Judge Jones

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, May 2, 2018
12:00 p.m. to 1:30 p.m.
Judicial Council Room

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

1. Welcome and Approval of Minutes **Judge Blanch**

Judge Blanch welcomed everyone to the meeting.

Ms. Klucznik moved to approve the minutes from the April 2018 meeting. Judge McCullagh seconded. The minutes were unanimously approved.

2. Defense of Person(s) **Committee**

Ms. Johnson informed the committee that she had met with prosecutors and defense attorneys to create three (3) draft assault instructions; 1) Simple Assaults (regular and alternate language with DV), 2) Assault - Class A, and 3) Aggravated Assaults. Ms. Johnson's group discussed whether a Special Verdict Form (SVF) was warranted on DV cases. The group discussed the possibility of creating two options: One where DV is not going to be at issue; and another where it might be the disputed issue with a separate verdict form and not include it in the elements. Ms. Johnson's group anticipates the creation of another instruction defining cohabitant and including a SVF. Ms. Johnson stated that her working group did refer to Judge Taylor's recommended instructions as a starting point and used the standard MUJI-Crim instruction format.

CR___. Simple Assault [DV].

The committee discussed how to address cohabitancy in domestic violence cases. The committee discussed including cohabitancy in the elements instruction versus using a special verdict form. The committee decided to use bracketed language in the elements instruction and a committee note to address cohabitancy.

CR____. Simple Assault [DV]. Draft 5/2/18

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

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly;
   a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
   b. Committed an act with unlawful force or violence that
      i. caused bodily injury to (VICTIM'S NAME); or
      ii. created a substantial risk of bodily injury to (VICTIM'S NAME);
3. [That the defense of _____ does not apply;]
4. [(DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense.]

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

References
Utah Code §76-5-102
Utah Code §77-36-1
Utah Code §77-36-1.1

Committee Note
In domestic violence cases, practitioners should decide whether to include element #4 in this instruction or to use a special verdict form.

Judge Jones moved to approve instruction. Mr. Phelps seconded. The instruction was unanimously approved.

Assault Causing Serious Bodily Injury and/or Victim Pregnant [DV]

The committee discussed whether to create one instruction or multiple instructions because of the varying elements. The committee discussed whether cohabitancy requires a mental state, but the committee agreed that there was no guidance in caselaw or statute. Ms. Johnson volunteered to research the issue. Discussion on the instruction was tabled for the next meeting.

3. Party Liability **Committee**

The committee discussed the current Party Liability instructions in light of the *State v. Grunwald* case to determine whether changes are necessary. The *Grunwald* case discussed the MUJI-Crim instructions; however, Judge Blanch stated that the instruction considered in *Grunwald* is not the current MUJI instruction. Judge Jones drafted two different instructions based on a recent mail theft case. The current MUJI instruction puts the parties to the offense first, before it talks about the elements of the offense. Judge Jones' instruction reverses that order by listing the elements of the offense first. The order of the instruction at issue in *Grunwald* was ordered the way the current MUJI instruction is ordered. The committee discussed which order was less confusing.

Judge Jones suggested that another way to construct the instruction is to create a simple elements instruction with an element "party to the offense," and then defining "party to the offense." The current "party to the offense" MUJI instruction needs work because it does not include the mens rea the Court of Appeals talked about for the offense. The committee discussed the way in which the mens rea element should be included. Judge McCullagh suggested that the committee order the instruction as follows: 1) general instruction explaining party liability, and 2) elements instruction which is the roadmap. Judge Jones suggested the order of the instruction be as follows: 1) elements of crime, and 2) party liability. The committee discussed making the order as follows: 1) You must find that the principle actor committed the crime, then 2) Defendant was the principle actor, OR, with the intent of the principle actor, he did the following (elements of party liability).

Judge Blanch asked that Judge Jones redraft her instructions on mail theft to make them more general and compare it to our current instruction and propose changes. Judge Jones' stated that she attempted to do that in the instructions she brought to the meeting. Those instructions will be included in the materials for the next meeting. Mr. Nelson noted that accomplice liability gets complicated in gang cases because people can be both an accomplice and a player at the same time and that will need to be addressed, possibly in a committee note.

4. Adjourn **Committee**

The meeting was adjourned at 1:31 p.m. The next meeting is Wednesday, June 6, 2018.

Tab 2

CR____. Simple Assault [DV]. Draft 5/2/18

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

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly;
    a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
    b. Committed an act with unlawful force or violence that
        i. caused bodily injury to (VICTIM'S NAME); or
        ii. created a substantial risk of bodily injury to (VICTIM'S NAME);
3. [That the defense of _____ does not apply;]
4. [(DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense.]

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

References
Utah Code §76-5-102
Utah Code §77-36-1
Utah Code §77-36-1.1

Committee Note
In domestic violence cases, practitioners should decide whether to include element #4 in this instruction or to use a special verdict form.

CR ____. Assault - Causing Substantial Bodily Injury [DV]

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

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, recklessly;
    a. Committed an act with unlawful force or violence;
3. The act caused substantial bodily injury to (VICTIM'S NAME);
4. [That the defense of _____ does not apply;]
5. [(DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense.]

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

References
Utah Code §76-5-102
Utah Code §77-36-1
Utah Code §77-36-1.1

Committee Note
In domestic violence cases, practitioners should decide whether to include element #5 in this instruction or to use a special verdict form.

CR ____. Assault – Pregnant Person

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

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly;
    a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
    b. Committed an act with unlawful force or violence that
        i. caused bodily injury to (VICTIM'S NAME); or
        ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. (VICTIM'S NAME) was pregnant; and
4. (DEFENDANT'S NAME) had knowledge of the pregnancy;
5. [That the defense of _____ does not apply;]
6. [(DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense.]

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

References
Utah Code §76-5-102
Utah Code §77-36-1
Utah Code §77-36-1.1

Committee Note
In domestic violence cases, practitioners should decide whether to include element #6 in this instruction or to use a special verdict form.

CR____. Aggravated Assault [DV]. Draft 5/2/18

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

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly;
    a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
    b. Made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
    c. Committed an act with unlawful force or violence that
        i. caused bodily injury to (VICTIM'S NAME); or
        ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. (DEFENDANT'S NAME)
    a. [Used a dangerous weapon; or]
    b. [Committed an act that impeded the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
        i. applying pressure to the neck or throat of (VICTIM'S NAME); or
        ii. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
    c. [Used other means or force likely to produce death or serious bodily injury]
4. [That the defense of _____ does not apply.]
5. [(DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense.]

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

References
Utah Code §76-5-103
Utah Code §77-36-1
Utah Code §77-36-1.1

Committee Note

In domestic violence cases, practitioners should decide whether to include element #5 in this instruction or to use a special verdict form.

CR____. DV Special Verdict Instructions

Having found (DEFENDANT'S NAME) guilty of [CRIME], you must now determine whether (DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense. To find (DEFENDANT'S NAME) was a cohabitant with (VICTIM'S NAME), you must find beyond a reasonable doubt, that (DEFENDANT'S NAME) and (VICTIM'S NAME) were 16 years of age or older, and at the time of the offense, (DEFENDANT'S NAME):

- [Is or was a spouse of (VICTIM'S NAME);]
- [Is or was living as if a spouse of (VICTIM'S NAME);]
- [Is related by blood or marriage to (VICTIM'S NAME) as (VICTIM'S NAME)'s parent, grandparent, sibling, or any other person related to (VICTIM'S NAME) by consanguinity or affinity to the second degree;]
- [Has or had one or more children in common with (VICTIM'S NAME);]
- [Is the biological parent of (VICTIM'S NAME)'s unborn child;]
- [Resides or has resided in the same residence as (VICTIM'S NAME);] or
- [Is or was in a consensual sexual relationship with (VICTIM'S NAME)].

The State must prove beyond a reasonable doubt that (DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense. Your decision must be unanimous and should be reflected on the special verdict form.

CR____. DV Special Verdict Definitions

"Reside" means to dwell permanently or for a length of time; to have a settled abode for a time; to dwell permanently or continuously.

"Residence" is defined as "a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit." It does not require an intention to make the place one's home. It is possible that a person may have more than one residence at a time.

When determining whether (DEFENDANT'S NAME) and (VICTIM'S NAME) resided in the same residence, factors to consider are:

- the amount of time one spends at the shared abode and the amount of effort expended in its upkeep;
- whether a person is free to come and go as he pleases, treating the place as if it were his own home;
- whether there has been a sharing of living expenses or sharing of financial obligations for the maintenance of a household;
- whether there has been sexual contact evidencing a conjugal association;
- whether furniture or personal items have been moved into a purported residence;
- voting, owning property, paying taxes, having family in the area, maintaining a mailing address, being born or raised in the area, working or operating a business, and having children attend school in the forum.

In deciding whether (DEFENDANT'S NAME) and (VICTIM'S NAME) were residing in the same residence, you are not limited to the circumstances listed above, but you may also apply the common, ordinary meaning of the definition to all of the facts and circumstances of this case.

References

Keene v. Bonser, 2005 UT App 37
State v. Salt, 2015 UT App 72

SVF ____. Domestic Violence

(LOCATION) JUDICIAL DISTRICT COURT, [_____DEPARTMENT,]
IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- (DEFENDANT'S NAME), Defendant.	: : : : : :	SPECIAL VERDICT Count(s) (#) Case No. (**)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of [CRIME]. We also unanimously find the State:

_____ Has

_____ Has Not

proven beyond a reasonable doubt (DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense.

DATED this _____ day of (MONTH), (YEAR).

_____

Foreperson

References

Utah Code §77-36-1
Utah Code §78B-7-102(2)

Effective 5/12/2015

76-5-102 Assault -- Penalties.

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another; or

(b) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

(a) the person causes substantial bodily injury to another; or

(b) the victim is pregnant and the person has knowledge of the pregnancy.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

Amended by Chapter 430, 2015 General Session

Effective 5/9/2017

76-5-103 Aggravated assault -- Penalties.

(1) Aggravated assault is an actor's conduct:
  (a) that is:
    (i) an attempt, with unlawful force or violence, to do bodily injury to another;
    (ii) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
    (iii) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another; and
  (b) that includes the use of:
    (i) a dangerous weapon as defined in Section 76-1-601;
    (ii) any act that impedes the breathing or the circulation of blood of another person by the actor's use of unlawful force or violence that is likely to produce a loss of consciousness by:
      (A) applying pressure to the neck or throat of a person; or
      (B) obstructing the nose, mouth, or airway of a person; or
    (iii) other means or force likely to produce death or serious bodily injury.

(2) Aggravated assault that is a violation of Section 76-5-210, Targeting a law enforcement officer, and results in serious bodily injury is a first degree felony.

(3) Any act under this section is punishable as a third degree felony, except that an act under this section is punishable as a second degree felony if:
  (a) the act results in serious bodily injury; or
  (b) an act under Subsection (1)(b)(ii) produces a loss of consciousness.

Amended by Chapter 388, 2017 General Session
Amended by Chapter 454, 2017 General Session

Effective 5/9/2017

77-36-1 Definitions.

As used in this chapter:

(1) "Cohabitant" means the same as that term is defined in Section 78B-7-102.

(2) "Department" means the Department of Public Safety.

(3) "Divorced" means an individual who has obtained a divorce under Title 30, Chapter 3, Divorce.

(4) "Domestic violence" or "domestic violence offense" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another. "Domestic violence" or "domestic violence offense" also means commission or attempt to commit, any of the following offenses by one cohabitant against another:

(a) aggravated assault, as described in Section 76-5-103;

(b) assault, as described in Section 76-5-102;

(c) criminal homicide, as described in Section 76-5-201;

(d) harassment, as described in Section 76-5-106;

(e) electronic communication harassment, as described in Section 76-9-201;

(f) kidnapping, child kidnapping, or aggravated kidnapping, as described in Sections 76-5-301, 76-5-301.1, and 76-5-302;

(g) mayhem, as described in Section 76-5-105;

(h) sexual offenses, as described in Title 76, Chapter 5, Part 4, Sexual Offenses, and Section 76-5b-201, Sexual exploitation of a minor -- Offenses;

(i) stalking, as described in Section 76-5-106.5;

(j) unlawful detention or unlawful detention of a minor, as described in Section 76-5-304;

(k) violation of a protective order or ex parte protective order, as described in Section 76-5-108;

(l) any offense against property described in Title 76, Chapter 6, Part 1, Property Destruction, Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass, or Title 76, Chapter 6, Part 3, Robbery;

(m) possession of a deadly weapon with intent to assault, as described in Section 76-10-507;

(n) discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, as described in Section 76-10-508;

(o) disorderly conduct, as defined in Section 76-9-102, if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with a domestic violence offense otherwise described in this Subsection (4). Conviction of disorderly conduct as a domestic violence offense, in the manner described in this Subsection (4)(o), does not constitute a misdemeanor crime of domestic violence under 18 U.S.C. Sec. 921, and is exempt from the provisions of the federal Firearms Act, 18 U.S.C. Sec. 921 et seq.; or

(p) child abuse as described in Section 76-5-109.1.

(5) "Jail release agreement" means the same as that term is defined in Section 77-20-3.5.

(6) "Jail release court order" means the same as that term is defined in Section 77-20-3.5.

(7) "Marital status" means married and living together, divorced, separated, or not married.

(8) "Married and living together" means a man and a woman whose marriage was solemnized under Section 30-1-4 or 30-1-6 and who are living in the same residence.

(9) "Not married" means any living arrangement other than married and living together, divorced, or separated.

(10) "Protective order" includes an order issued under Subsection 77-36-5.1(6).

(11) "Pretrial protective order" means a written order:

(a) specifying and limiting the contact a person who has been charged with a domestic violence offense may have with an alleged victim or other specified individuals; and
(b) specifying other conditions of release pursuant to Subsection 77-20-3.5(3), Subsection 77-36-2.6(3), or Section 77-36-2.7, pending trial in the criminal case.

(12) "Sentencing protective order" means a written order of the court as part of sentencing in a domestic violence case that limits the contact a person who has been convicted of a domestic violence offense may have with a victim or other specified individuals pursuant to Sections 77-36-5 and 77-36-5.1.

(13) "Separated" means a man and a woman who have had their marriage solemnized under Section 30-1-4 or 30-1-6 and who are not living in the same residence.

(14) "Victim" means a cohabitant who has been subjected to domestic violence.

Amended by Chapter 289, 2017 General Session
Amended by Chapter 332, 2017 General Session

Effective 5/12/2015

77-36-1.1 Enhancement of offense and penalty for subsequent domestic violence offenses.

(1) For purposes of this section, "qualifying domestic violence offense" means:

(a) a domestic violence offense in Utah; or

(b) an offense in any other state, or in any district, possession, or territory of the United States, that would be a domestic violence offense under Utah law.

(2) A person who is convicted of a domestic violence offense is:

(a) guilty of a class B misdemeanor if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class C misdemeanor; and

(ii)

(A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense;

(b) guilty of a class A misdemeanor if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class B misdemeanor; and

(ii)

(A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense; or

(c) guilty of a felony of the third degree if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class A misdemeanor; and

(ii)

(A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense.

Amended by Chapter 426, 2015 General Session

User Name: Sandi Johnson
Date and Time: Wednesday, May 30, 2018 7:51:00 PM EDT
Job Number: 67566689

Document (1)

1. *Keene v. Bonser, 2005 UT App 37*

Client/Matter: -None-
Search Terms: "cohabitant" /p "define" /p "reside"
Search Type: Terms and Connectors
Narrowed by:

Content Type	Narrowed by
Cases	Court: Utah

Positive
As of: May 30, 2018 11:51 PM Z

Keene v. Bonser

Court of Appeals of Utah

January 27, 2005, Filed

Case No. 20030841-CA

Reporter
2005 UT App 37 *; 107 P.3d 693 **; 2005 Utah App. LEXIS 22 ***; 518 Utah Adv. Rep. 13

Andrea N. Keene, Petitioner and Appellee, v. Ashley J. Bonser, Respondent and Appellant.

Prior History: [*1]** Eighth District, Manila Department. The Honorable John R. Anderson.

Disposition: Reversed and remanded.

Core Terms

cohabitant, reside, trailer, district court, parties, protective order, legal conclusion, purpose of the act, domestic violence, dictionary, factors, dwell, detailed findings, factual finding, definitions, permanently, legal residence, temporary, clothes, spouse, abode, boat

Case Summary

Procedural Posture

Appellant challenged a decision of the Eighth District, Manila Department (Utah), which issued a protective order against him pursuant to Utah Code Ann. § 30-6-4.2. The court found that appellant had resided in the same residence as appellee making him a cohabitant under the Cohabitation Abuse Act, *Utah Code Ann. § 30-6-1 to -15* (1998 & Supp. 2004).

Overview
Appellant raised arguments against the district court's conclusion that he was a "cohabitant" under the Act. The court held that under the Act, a court must make a factual determination on a case-by-case basis looking into the relationship the person had with the purported residence. The court remanded, and held that the district court failed to set forth any specific findings of fact that appellant was a cohabitant under the Act. There were disputes between the parties concerning the facts that would show whether they resided or had resided together to a degree that would warrant the conclusion that they were cohabitants under the Act. There was disputed evidence regarding how often appellant visited appellee or how permanently he had settled in with her. It was indicated that appellant kept several items of personal property at appellee's trailer, and the court's review of the transcript suggested that the factual call could go either way. The same problem existed as to whether appellant treated the trailer as if it were his home. Therefore, the remand was for the entry of detailed findings.

Outcome
The court remanded for further findings.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Standards of Review, Reversible Errors**

Generally, an appellate court reviews a trial court's legal conclusions for correctness, according the trial court no particular deference. Moreover, it has long been the law in the State of Utah that conclusions of law must be predicated upon and find support in the findings of fact. Otherwise, the failure to enter adequate findings of fact on material issues may be reversible error.

Criminal Law & Procedure > ... > Illegal Consensual Relations > Bigamy > General Overview

Family Law > Cohabitation > General Overview

HN2[] Illegal Consensual Relations, Bigamy

The Utah Supreme Court has noted that the term "cohabitation" does not lend itself to a universal definition that is applicable in all settings. Thus, the meaning of cohabitation depends upon the context in which it is used.

Family Law > Cohabitation > General Overview

HN3[] Family Law, Cohabitation

See Utah Code Ann. § 30-6-1(2)(a)-(f).

Governments > Legislation > Interpretation

HN4[] Legislation, Interpretation

In interpreting statutory provisions, including definitions, courts look first to the plain language of the statute to discern the legislative intent. Only when the court finds ambiguity in the statute's plain language need it seek guidance from the legislative history and relevant policy considerations. In construing the plain language of a statute, words which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage. As a result, courts often refer to the dictionary to define statutory terms.

Family Law > Cohabitation > General Overview

HN5[] Family Law, Cohabitation

"Residence" is defined for the purposes of the Cohabitation Abuse Act, Utah Code Ann. § 30-6-1 to -15 (1998 & Supp. 2004) in a manner fully consistent with courts' view of the meaning of "reside," as a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit.

Family Law > Cohabitation > General Overview

HN6[] Family Law, Cohabitation

It is important to distinguish "residence" from "domicile" since residence usually just means bodily presence as an inhabitant in a given place, while domicile usually requires bodily presence plus an intention to make the place one's home. It is wholly possible that, for purposes of the Cohabitation Abuse Act, Utah Code Ann. § 30-6-1 to -15 (1998 & Supp. 2004) a person thus may have more than one residence at a time but only one domicile.

Criminal Law & Procedure > ... > Domestic Offenses > Domestic Assault > Elements

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

Family Law > Cohabitation > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Spousal Support > Modification & Termination > Cohabitation

HN7[] Domestic Assault, Elements

Under the Cohabitation Abuse Act's, Utah Code Ann. § 30-6-1 to -15 (1998 & Supp. 2004) definition of "cohabitant," a court must make a factual determination, on a case-by-case basis, whether a perpetrator or victim of domestic violence or abuse "resides or has resided in the same residence as the other party involved. Utah Code Ann. § 30-6-1(2)(f) (Supp. 2004). This factually driven analysis must look into the relationship the person has not so much with the other person as with the purported residence. A court must make findings on the extent to which the person has settled himself or herself in that place or how temporarily or permanently or, at least, how continuously they dwell there. A court must also make findings that show that the parties treated the place as a temporary or permanent dwelling place, abode, or habitation, focusing on evidence that shows one intends to return to the place versus treating it as a place of temporary sojourn or transient visit.

Family Law > Cohabitation > General Overview

HN8[] Family Law, Cohabitation

When determining whether a person is a "cohabitant" under the Cohabitation Abuse Act's, *Utah Code Ann. § 30-6-1 to -15* (1998 & Supp. 2004) and whether that person resides or has resided in the same residence, the court must make detailed findings of fact. When making the findings of fact, the court should take into account the definitions of the words "reside" and "residence" outlined above, it should consider a variety of factors that bear on cohabitation, and at the same time it should consider the evidence in light of the purpose behind the Act.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN9[] **Trials, Bench Trials**

It has long been the law in the State of Utah that conclusions of law must be predicated upon and find support in the findings of fact. Thus, *Utah R. Civ. P. 52(a)* requires the judge in a bench trial to find the facts specially and state separately its conclusions of law thereon. These findings must be articulated with sufficient detail so that the basis of the ultimate conclusion can be understood. Otherwise, the failure to enter adequate findings of fact on material issues may be reversible error.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > General Overview

HN10[] **Trials, Bench Trials**

Unless the record clearly and uncontrovertedly supports the trial court's decision, the absence of adequate findings of fact ordinarily requires remand for more detailed findings by the trial court. However, remand is not necessary if the evidence in the record is undisputed and the appellate court can fairly and properly resolve the case on the record before it. Thus, an appellate court can appropriately apply governing legal standards to undisputed facts to dispose of a matter rather than remanding for a trial court to do so. When credibility is not an issue as to underlying facts or a trial judge has already made necessary credibility assessments, the material facts are not disputed, and there is no additional evidence relevant to the dispositive issues that can or should be adduced.

Counsel: James A. McIntyre, Salt Lake City, for Appellant.

Randall T. Gaither, Salt Lake City, for Appellee.

Judges: Before Judges Greenwood, Jackson, and Orme. WE CONCUR: Pamela T. Greenwood, Judge, Norman H. Jackson, Judge.

Opinion by: ORME

Opinion

[694]** ORME, Judge:

[*P1] Ashley J. Bonser appeals from the issuance of a protective order under Utah's Cohabitant Abuse Act, which is codified at *Utah Code Ann. §§ 30-6-1 to -15* (1998 & Supp. 2004). Specifically, Bonser appeals the district court's conclusion that he was a "cohabitant" under the Act and therefore subject to its provisions. We reverse and remand.

BACKGROUND

[*P2] Appellant Bonser claims legal residence in Mountain View, Wyoming, a fifty-minute drive from Manila, Utah, where he would often launch his boat in order to fish on Flaming Gorge Reservoir. Bonser met Appellee Andrea N. Keene in February 2003 in Manila, where Keene lived. In March of 2003, the parties began an intimate relationship, with Bonser staying at Keene's trailer home when he **[***2]** was in Manila. Although the parties dispute just how often and how long **[**695]** Bonser would stay with Keene at her trailer, [1] it is evident that the parties maintained a relationship of sorts from March through May of 2003.

[*P3] On June 4, 2003, Keene filed a verified petition for a protective order in district court, alleging domestic violence or abuse under Utah's Cohabitant Abuse Act. *See Utah Code Ann. §§ 30-6-1 to -15* (1998 & Supp. 2004). The district court issued an ex parte protective

[1] The district court made no findings of fact about when, how long, and how often Bonser would stay with Keene.

order pursuant to Utah Code section 30-6-4.2 to be served on Bonser. Bonser voluntarily presented himself in Utah to be served with the order. The matter came before the district court on September 5, 2003, for an evidentiary hearing, following which the court announced its ruling from the bench. The court found that Bonser "had resided in the same residence" as Keene in Manila, **[***3]** Utah, making him a "cohabitant" under the Act, and that domestic violence or abuse had occurred. The court then issued a protective order under the Act. Bonser appeals the issuance of the protective order. [2]

ISSUES AND STANDARDS OF REVIEW

[*P4] Bonser raises three arguments against the district court's conclusion that he was a "cohabitant" under Utah's Cohabitant Abuse Act. Bonser challenges the court's legal conclusion that he "resided in the same residence" as Keene and was thus a "cohabitant" under the Act. *See* Utah Code Ann. § 30-6-1(2)(f) (Supp. 2004). Bonser also argues that the district court failed to make the necessary factual findings to sufficiently support its legal **[***4]** conclusion that he "had resided in the same residence" as Keene. Finally, anticipating the possibility of remand for entry of adequate findings, Bonser contends the evidence presented to the district court could not adequately support any factual findings that would lead the court to the legal conclusion that he was a "cohabitant" as defined in the Act, entitling him to judgment in his favor as a matter of law.

[*P5] ***HN1***[⬆] "Generally, we review a trial court's legal conclusions for correctness, according the trial court no particular deference." Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998). Moreover, "it has long been the law in this state that conclusions of law must be predicated upon and find support in the findings of fact." Gillmor v. Wright, 850 P.2d 431, 436 (Utah 1993). Otherwise, "the failure to enter adequate findings of fact on material issues may be reversible error." Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989).

THE MEANING OF "COHABITANT" UNDER UTAH'S COHABITANT ABUSE ACT

[*P6] Bonser challenges the court's legal conclusion that he "had resided in the same residence" as Keene and **[***5]** was thus a "cohabitant" subject to the Cohabitant Abuse Act's provisions. *See* Utah Code Ann. § 30-6-1(2)(f) (Supp. 2004). He specifically attacks the district court's broad interpretation of the Act's language in concluding he was a "cohabitant." [3] As a result, we examine the meaning of "cohabitant" as it is defined under the Act.

[*P7]

HN2[⬆] The Utah Supreme Court has noted that "the term 'cohabitation' does not lend itself to a universal definition that is applicable in all settings." Haddow v. Haddow, 707 P.2d 669, 671 (Utah 1985). Thus, "the meaning of [cohabitation] depends upon the context in which it is used." **[***6]** *Id.* Utah case law has discussed the meaning of cohabitation in a variety of factual contexts. *See* State v. ***[**696]***, 2004 UT 76, P48, 99 P.3d 820 (explaining that, in the context of a criminal bigamy prosecution, the dictionary definitions of to "'live together in a sexual relationship, especially when not legally married'" and to "'dwell together as, or as if, husband or wife'" were both acceptable definitions of the word "cohabit") (citations omitted); Haddow, 707 P.2d at 671-72 (defining "cohabitation" in an alimony termination proceeding as "'to live together as husband and wife'" with the key elements being "common residency and sexual contact evidencing a conjugal association") (citations omitted).

[*P8] In the context of Utah's Cohabitant Abuse Act, the Legislature has given the term specific meaning by expressly defining what a cohabitant is for purposes of the Act. The Act defines a "cohabitant" as

> ***HN3***[⬆] an emancipated person . . . or a person who is 16 years of age or older who: (a) is or was a spouse of the other party; (b) is or was living as if a spouse of the other party; (c) is related by blood or marriage to the other party; **[***7]** (d) has one or more children in common with the other party; (e) is the biological parent of the other party's unborn

[2] Bonser does not question on appeal the district court's conclusion that domestic violence or abuse occurred. Therefore, so long as Bonser qualifies as a "cohabitant" under its provisions, the court had adequate grounds upon which to issue a protective order under Utah's Cohabitant Abuse Act.

[3] The court summarily stated that it "would interpret [the definition] as a broad definition to cover folks who are entitled to protective orders that have resided or are residing in the same residence. . . . Mr. Bonser and Ms. Keene were residing or had resided in the same residence . . . . That's pretty clear I think under the statute."

child; or (f) resides or has resided in the same residence as the other party.

Utah Code Ann. § 30-6-1(2)(a)-(f). We have previously determined that the application of this definition is confined to the context of cohabitant abuse. [4] *See* Hill v. Hill, 968 P.2d 866, 868 (Utah Ct. App. 1998) (concluding the Act's definition of "cohabitant" is inapplicable to alimony termination because "the definitions in [the Act] are to be used solely for purposes of the Cohabitant Abuse Act," and seeing "no legislative intent to abrogate the [Utah] case law defining cohabitation" in other contexts). We have also previously suggested that the Utah Legislature has adopted a broader view of cohabitation in the cohabitant abuse context than Utah case law has in other contexts. *See id. at 868-69* (refusing to apply broader cohabitant abuse definition to terminate alimony where former spouse had a child with another man). However, no appellate court in Utah has specifically addressed just how broadly the Act's definition **[***8]** of "cohabitant" is to be construed in the context of "resides or has resided in the same residence." [5] Utah Code Ann. § 30-6-1(2)(f).

[*P9] [*9]** Bonser argues for a narrow construction of "cohabitant" under the Act, asserting that the Legislature carefully chose to define "cohabitant," using the terms "resides," "resided," and "residence" because they all have well-established meanings. He suggests that the Act's plain language, therefore, defines a cohabitant in terms of one's legal residency or domicile, as emphasized by the redundancy in the phrase "resides or has resided in the same residence." In other words, Bonser believes he would not be a cohabitant under the residency prong of the statute if he would not qualify for a Utah resident fishing license, *see Utah Code Ann. § 23-13-2(37)(a)* (2003) (defining a "resident" for purposes of hunting and fishing licenses); would not qualify for a Utah driver license, *see Utah Code Ann. § 53-3-205(9)(a)* (Supp. 2004) (requiring an applicant for a Utah driver license to "have a Utah residence address" and to provide it upon application); could not be sued in Utah under a venue provision permitting suit in the county where defendant resides, *see* Utah Code Ann. § 78-13-7 (2002) **[***10]** (providing for venue to be proper in the county in which "any defendant resides"); and could not register to vote in Utah. *See* Utah Code Ann. § 20A-2-101(1)(b) **[**697]** (2003) (requiring a person to "have been a resident of Utah for at least the 30 days immediately before the election" in order to register to vote). *See also id.* § 20A-2-105 (defining a "resident" for purposes of Utah election law). We do not agree that "cohabitant," as defined in the Act, is confined to such a narrow, legalistic interpretation.

[*P10] ***HN4***[↑] In interpreting statutory provisions, including definitions, "we look first to the plain language of the statute to discern the legislative intent. . . . 'Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations.'" *Gohler v. Wood, 919 P.2d 561, 562-63 (Utah 1996)* (citations omitted). In construing the plain language of a statute, words "'which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage.'" *Mesa Dev. Co. v. Sandy City Corp., 948 P.2d 366, 369 (Utah Ct. App. 1997)* **[***11]** (quoting *Government Employees Ins. Co. v. Dennis, 645 P.2d 672, 675 (Utah 1982)*). As a result, courts often refer to the dictionary to ***define*** statutory terms. We follow this approach today and adopt common, nontechnical, dictionary-definition meanings of the words used to ***define*** "***cohabitant***" under the Act.

[*P11] The Utah Supreme Court has previously used the dictionary to ***define*** the word "***reside***" as "['t]o dwell permanently or for a length of time; to have a settled abode for a time.'" *Knuteson v. Knuteson, 619 P.2d 1387, 1389 (Utah 1980)* (emphasis and citation omitted). We have also used the dictionary to ***define*** "***reside***" as "'to dwell permanently or continuously.'" *Travelers/Aetna Ins. Co. v. Wilson, 2002 UT App 221,P13, 51 P.3d 1288* (quoting Webster's Third New International Dictionary 1931 (1986)), *cert. denied, 59 P.3d 603 (Utah 2002)*. We find these nontechnical

[4] The same or a substantially similar definition appears in a number of closely related contexts. It appears in Utah's Insurance Code. *See* Utah Code Ann. § 31A-21-501(2)(a)-(e) (2003) (contained in provision entitled "Domestic Violence or Child Abuse--Insurance Practices"). The definition is also expressly adopted by Utah's Cohabitant Abuse Procedures Act, *see* Utah Code Ann. § 77-36-1(1) (2003), and Utah's criminal code provision dealing with "Offenses Against the Person." *See* Utah Code Ann. § 76-5-109.1(1)(a) (2003).

[5] The majority of cases that have treated the Cohabitant Abuse Act have presented factual scenarios where the parties are obviously "cohabitants" under the definition because they were spouses of many years or because there was no dispute that they were "cohabitants." *See, e.g.*, Bailey v. Bayles, 2002 UT 58, P22, 52 P.3d 1158; Strollo v. Strollo, 828 P.2d 532, 534 (Utah Ct. App. 1992).

definitions of "***reside***" pertinent for purposes of the Act. "Residence," on the other hand, has been used and defined differently in a variety of Utah statutes and cases. Therefore, ***HN5***[] we define "residence" anew for purposes of the Act, but in **[***12]** a manner fully consistent with our view of the meaning of "reside," as "a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit." Webster's Third New International Dictionary 1931 (1993). Under our definition, ***HN6***[] it is important to distinguish "residence" from "domicile" since residence usually "just means bodily presence as an inhabitant in a given place," while domicile usually "requires bodily presence plus an intention to make the place one's home." Black's Law Dictionary 1310 (7th ed. 1999). It is wholly possible that, for purposes of the Act, "a person thus may have more than one residence at a time but only one domicile." *Id.*

[*P12] ***HN7***[] Under the view we take of subpart (f) of the Act's definition of "cohabitant," a court must make a factual determination, on a case-by-case basis, whether a perpetrator or victim of domestic violence or abuse "resides or has resided in the same residence as the other party" involved. *Utah Code Ann. § 30-6-1(2)(f)* (Supp. 2004). This factually driven analysis must look into the relationship the person has not **[***13]** so much with the other person as with the purported "residence." A court must make findings on the extent to which the person has "settled" himself or herself in that place or how "temporarily or permanently" or, at least, how "continuously" they "dwell" there. A court must also make findings that show that the parties treated the place as a "temporary or permanent dwelling place, abode, or habitation," focusing on evidence that shows "one intends to return" to the place versus treating it as "a place of temporary sojourn or transient visit."

[*P13] A court's analysis of whether someone is a "cohabitant" can be informed by looking at a variety of nonexclusive factors that reflect some general indicia of cohabitation. For example, in the alimony termination context, the Utah Supreme Court has examined the amount of time one spends at a purportedly shared abode and the amount of effort expended in its upkeep. *See Knuteson, 619 P.2d at 1389* (finding woman was not a resident at boyfriend's **[**698]** abode because "she expended much of her efforts in the daytime at her own home doing chores and yard work"). In the same context, the Court has also found persuasive an indication **[***14]** of whether a person is free to come and go as he pleases, treating the place as if it were his own home. *See Haddow v. Haddow, 707 P.2d 669, 673 (Utah 1985)* ("A resident will come and go as he pleases in his own home, while a visitor, however regular and frequent, will schedule his visits to coincide with the presence of the person he is visiting."). Likewise, the Court has also considered whether there has been a sharing of living expenses or sharing of financial obligations for the maintenance of a household, *see id. at 673-74*; whether there has been "sexual contact evidencing a conjugal association," *id. at 672*; and whether furniture or personal items have been moved into a purported residence. *See id. at 673*.

[*P14] Although a more technical and narrow inquiry, in the context of divorce jurisdiction the determination of whether a person was an "actual or bona fide resident,"[6] *Utah Code Ann. § 30-3-1* (1998), has been informed by such factors as "voting, owning property, paying taxes, having family in the area, maintaining a mailing address, being born or raised in the area, **[***15]** working or operating a business, and having children attend school in the forum." *Bustamante v. Bustamante, 645 P.2d 40, 41 (Utah 1982)*. *See also Travelers/Aetna Ins. v. Wilson, 2002 UT App 221,P14, 51 P.3d 1288* (adopting same factors in insurance coverage context). With the aid of evidence illuminating such factors, a court may make appropriately detailed findings of fact that will logically lead to a conclusion of whether or not a person is a "cohabitant" under the Cohabitant Abuse Act's definition, insofar as it is tied to residing at a residence.

[*P15]

While the above factors help to provide reliable indicia of whether a victim **[***16]** or perpetrator of domestic violence or abuse "resides or has resided in the same residence" for purposes of the Act, the court must also consider the evidence in light of the purpose behind the Act. Other states have recognized the expansive reach intended by legislatures in enacting domestic violence and abuse statutes. *See, e.g.*, *State v. Kellogg, 542*

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[6] In this context an "'actual or bona fide resident'" means "something more than a mere 'legal residence.'" *Kidman v. Kidman, 109 Utah 81, 164 P.2d 201, 202 (1945)*. *See also Munsee v. Munsee, 12 Utah 2d 83, 363 P.2d 71, 72 (1961)* (defining "'actual residence'" as "something more than that 'home feeling'").

N.W.2d 514, 517 (Iowa 1996) (recognizing the broadening of its domestic abuse statutes "to protect others[, beyond spouses,] from abuse occurring between persons in a variety of significant relationships"); State v. Williams, 79 Ohio St. 3d 459, 1997 Ohio 79, 683 N.E.2d 1126, 1129 (Ohio 1997). The courts of other states have broadly construed what it means to reside or have resided with a person. For example, the Hawaii Court of Appeals held in State v. Archuletta, 85 Haw. 512, 946 P.2d 620 (Haw. Ct. App. 1997), that its domestic abuse statute that defines cohabitants as "'persons jointly residing or formerly residing in the same dwelling unit,'" was broad enough to encompass a man who stayed three to four nights a week at his girlfriend's residence while also maintaining his own residence. **[***17]** Id. at 620 (quoting *Haw. Rev. Stat. § 709-906(1)*(1993)). The court specifically held that "substantial evidence in the record that, at the time of the abuse, Archuletta had two residences is not a defense." Id. at 622. In a similar vein, the California Court of Appeal, in People v. Moore, 44 Cal. App. 4th 1323, 52 Cal.Rptr.2d 256 (Cal. Ct. App. 1996), held that the perpetrator of domestic abuse "cannot immunize himself from criminal liability merely by living part-time elsewhere with one or more persons while continuing to reside the rest of the time with [another] partner and maintaining a substantial relationship with that person." Id. at 264. The court found it possible for the defendant to be cohabiting simultaneously with two or more people at different locations. [7] *See id.*

[*P16] [*18] [**699]** In sum, HN8[↑] when determining whether a person is a "cohabitant" under the Act, and whether that person "resides or has resided in the same residence," the court must make detailed findings of fact. When making the findings of fact, the court should take into account the definitions of the words "reside" and "residence" outlined above, it should consider a variety of factors that bear on cohabitation, and at the same time it should consider the evidence in light of the purpose behind the Act.

LACK OF FACTUAL FINDINGS BY THE DISTRICT COURT

[*P17] We now consider whether Bonser qualified as Keene's "cohabitant" under Utah's Cohabitant Abuse Act. Bonser argues that the district court failed to make the necessary factual findings to support its legal conclusion that he "resided in the same residence" as Keene. He also contends that even if the court had made the necessary factual findings, the evidence presented to the district court would not adequately support factual findings that would lead the court to conclude that he was a "cohabitant" as defined in the Act.

[*P18] HN9[↑] "It has long been the law in this state that conclusions of law must be predicated **[***19]** upon and find support in the findings of fact." Gillmor v. Wright, 850 P.2d 431, 436 (Utah 1993). Thus, "rule 52(a) of the Utah Rules of Civil Procedure requires the judge in a bench trial to 'find the facts specially and state separately its conclusions of law thereon.'" Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989) (quoting Utah R. Civ. P. 52(a)). These "findings must be articulated with sufficient detail so that the basis of the ultimate conclusion can be understood." *Id.* Otherwise, "the failure to enter adequate findings of fact on material issues may be reversible error." *Id.*

[*P19] The district court failed to set forth any specific findings of fact in support of its conclusion that Bonser was a "cohabitant" under the Act. After hearing testimony and receiving evidence, the court merely concluded from the bench that Bonser was a cohabitant, stating that the court would interpret the definition

> as a broad definition to cover folks who are entitled to protective orders that have resided or are residing in the same residence. I interpret that as meaning not that Mr. Bonser chose to make Utah his [legal] **[***20]** residence. . . . Mr. Bonser and Ms. Keene were residing or had resided in the same residence, residence being her house trailer with a bedroom and a bed. That's pretty clear I think under the statute.

HN10[↑] "Unless the record 'clearly and uncontrovertedly supports' the trial court's decision, the absence of adequate findings of fact ordinarily requires remand for more detailed findings by the trial court." Woodward v. Fazzio, 823 P.2d 474, 478 (Utah Ct. App. 1991) (quoting Acton v. Deliran, 737 P.2d 996, 999

[7] It would also be possible under our construction of the Utah Act for a person to be a "cohabitant" under the Act with multiple people simultaneously. Thus, the woman from Moscow, Idaho, who has two boyfriends in Utah, may be a cohabitant with the one in Kaysville while she is at the same time a cohabitant with the one in Provo. If her conduct manifests a great enough degree of residential continuity with both, she can be a "cohabitant" and "reside" with each for purposes of the Act.

(Utah 1987)). However, "remand is not necessary if the evidence in the record is undisputed and the appellate court can fairly and properly resolve the case on the record before it." *Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 622 (Utah 1989)*. [8]

[*P20]

[*21]** "We have canvassed the record in the instant case and find disputed evidence, making affirmance as a matter of law impossible." *Woodward, 823 P.2d at 478*. The record reflects that there are disputes between the parties as concerns the facts that would show whether they "reside[] or had resided" together to a degree that would warrant the conclusion that they were "cohabitants" under the Act. Moreover, the majority of the evidence presented below was testimonial, implicating credibility assessments of each witness's testimony, especially **[**700]** since the testimony is contradictory on several key points. We therefore remand to the district court for the entry of detailed findings on the criteria outlined above, and for the making of legal conclusions and a judgment in conformity therewith. We emphasize, however, that we do not intend our remand to be "merely an exercise in bolstering and supporting the conclusion already reached." *Allred v. Allred, 797 P.2d 1108, 1112 (Utah Ct. App. 1990)*.

[*P21] Our consideration of the evidence, using the nonexclusive factors set forth above, further demonstrates why we must remand to the district **[***22]** court to weigh the evidence and sort out the key facts. In examining, for instance, the evidence that indicates what amount of time Bonser may have spent at the purported residence, we see significant differences in the testimony. While it was undisputed that Bonser spent the night at Keene's trailer on multiple occasions during at least the months of April and May of 2003, the record reflects a dispute about the exact number of days Bonser stayed continuously with Keene and just how frequently he visited--or how permanently he had settled in with her. Bonser admitted to only once spending a stretch of at least four days in a row at the trailer--on an occasion when he was ill--and strenuously disputed Keene's assertion that he had been staying with her six to seven days a week throughout the month of April. As a result, the evidence concerning the amount of time Bonser was at Keene's trailer home is in dispute.

[*P22] Likewise, the evidence that would show whether Bonser moved items of furniture or personal property into the purported residence does not clearly point us in one direction. Keene testified that Bonser kept several items of personal property at Keene's trailer, **[***23]** namely, a television, a DVD player, a clothes dryer, a vacuum cleaner, a Skil saw, his boat, and some articles of clothing, as well as a toothbrush, deodorant, his own special shampoo and conditioner, and a bathrobe. Yet, on cross-examination Keene contradictorily indicated that Bonser had given the dryer and vacuum cleaner to her as gifts and that the television also remained in her possession at the time of trial, leaving some questions about what was his and what was hers. Bonser testified that the only items of his personal property he brought into the trailer consisted of a bag carrying his clothes and his tackle box, although he did also admit to keeping his father's Skil saw at the trailer and to parking his boat there. He characterized the boat storage as temporary--just until he could get the boat to a local repair shop. Nevertheless, Bonser denied keeping his clothes and other personal items at the trailer, even testifying that Keene had cleaned out a drawer in the trailer for him to put his clothes in, but he declined to use it. Whether the evidence shows that Bonser had moved significant amounts of personal property in with Keene greatly depends on which party's testimony **[***24]** is to be believed. Our review of the trial transcript suggests this factual call could easily go either way.

[*P23] The same problem exists with the evidence that would show whether Bonser treated the trailer as if it were his own home, or whether he was free to come and go as he pleased. Bonser's testimony seems to indicate that he only stayed at the trailer when Keene was present, but that fact is less than clear. Even more unclear, however, is the testimony about whether Bonser had his own key to the trailer, which would be

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[8] Thus, an appellate court can appropriately apply governing legal standards to undisputed facts to dispose of a matter rather than remanding for a trial court to do so. When credibility is not an issue as to underlying facts or a trial judge has already made necessary credibility assessments, the material facts are not disputed, and there is no additional evidence relevant to the dispositive issues that can or should be adduced.

State v. Mirquet, 914 P.2d 1144, 1148-49 (Utah Ct. App. 1996) (citation omitted). In such circumstances, "an appellate court is in as good a position as the trial court to apply the governing rules of law to the facts." *Id. at 1149*.

good evidence of his connection to Keene's trailer as at least a temporary residence. Bonser only admitted in testimony to having possession of a key to the trailer when he would stop at Keene's work to get one from her, if there was a chance he was going to stay at the trailer that night. Keene testified, however, that Bonser had his own key to the trailer. In fact, she went so far as to say that she had never actually given Bonser a key, but that he took the initiative in having a copy made of her key, with her permission. Whether Bonser actually possessed a key to the trailer is further obscured by the parties' differing descriptions of their attempts **[***25]** to return or retrieve keys during the fight that led to the protective order. It is less than clear from the parties' testimony if there was a key to the trailer on Bonser's sister's car keys and how it got there, or whether Bonser actually had a key on his own key ring that he was trying to return to Keene during their final **[**701]** fight, or whether he was simply trying to get his sister's car keys back from Keene.

[*P24] We do note that some of the evidence is undisputed, which will simplify the district court's work on remand, but it is not determinative on the issue of whether Bonser is a "cohabitant" under the Act. Such evidence includes: the fact that Bonser contributed a minuscule amount of money to groceries for the two, in what Keene's attorney agreed was a "one-time deal"; Bonser's testimony that he helped care for Keene's minor child, changing her and getting her ready for the day; Bonser's testimony that he never had any intention of living with Keene; the fact that Bonser never received any mail at Keene's trailer and maintained his legal residence at his parents' home in Wyoming; the fact that Bonser never stayed at the trailer during a several-day stretch where Keene **[***26]** was visiting relatives out of state; and the nature of the parties' relationship, which undisputedly had the quality of intimacy that could qualify it as what courts refer to as a conjugal association.

CONCLUSION

[*P25] Although the district court was correct in concluding that "resides or had resided in the same residence" under the definition of "cohabitant" has a broader meaning in Utah's Cohabitant Abuse Act than in other contexts, it is not as open-ended as the court apparently envisioned. We have therefore clarified what it means to "reside" in the same "residence" for purposes of the definition under the Act. The inquiry into whether a person is a "cohabitant" under the Act is a fact-sensitive determination that requires a court to make detailed findings of fact, on a case-by-case basis, in reaching its conclusion. Because the district court failed to make findings of fact in support of its conclusion that Bonser was a "cohabitant" for purposes of the Act, and because, in our view, the evidence does not clearly and uncontrovertedly indicate to us that the district court's conclusion was correct, we reverse and remand to the district court for entry of detailed findings **[***27]** on the criteria outlined above, and for the making of legal conclusions and a judgment in conformity therewith.

Gregory K. Orme, Judge

[*P26] WE CONCUR:

Pamela T. Greenwood, Judge

Norman H. Jackson, Judge

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User Name: Sandi Johnson
Date and Time: Wednesday, May 30, 2018 8:01:00 PM EDT
Job Number: 67567111

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1. *State v. Salt, 2015 UT App 72*
   Client/Matter: -None-

State v. Salt

Court of Appeals of Utah

March 26, 2015, Filed

No. 20130071-CA

Reporter
2015 UT App 72 *; 347 P.3d 414 **; 2015 Utah App. LEXIS 73 ***

STATE OF UTAH, Plaintiff and Appellee, v. JEFFREY CHARLES SALT, Defendant and Appellant.

Subsequent History: Writ of certiorari denied *State v. Salt, 2015 Utah LEXIS 244 (Utah, July 20, 2015)*

Prior History: Third District Court, Salt Lake Department. The Honorable William W. Barrett, The Honorable Elizabeth A. Hruby-Mills[1] **[***1]** . No. 081904756.

Core Terms

internal quotation marks, aggravated assault, argues, cohabitant, violence, assault, felony, third degree, serious bodily injury, jury instructions, bodily injury, statutes, trial court, self-defense, convicted, hit, ineffective, unconstitutionally vague, new trial, contends, likely to produce, inflicted, requires, jury's, second degree felony, ambiguity, violent, child abuse, overbreadth, acquitted

Case Summary

Overview

HOLDINGS: [1]-A trial court did not err when it denied defendant's motions to arrest judgment or grant a new trial on the grounds that the jury instruction on aggravated assault was erroneous and prejudicial where the instruction correctly stated the law; [2]-The trial court did not err when it refused to reduce the degree of conviction where the Shondel doctrine did not apply because *Utah Code Ann. §§ 76-5-102* and *76-5-103(1)(b)* and *(3)* did not address exactly the same conduct, and even if the rule of lenity applied in Utah, there was no ambiguity in the statute; [3]-The trial court did not abuse its discretion when it refused to grant a new trial on conflicting verdicts where the evidence was sufficient to support the aggravated assault conviction; [4]-Defendant's argument that the Cohabitant Abuse Act was unconstitutional was rejected; [5]-Defendant's counsel was no ineffective.

Outcome

Conviction and sentence affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

HN1[] **Trials, Jury Instructions**

The Court of Appeals of Utah reviews jury instructions in their entirety to determine whether the instructions, taken as a whole, fairly instruct the jury on the applicable law. Whether a jury instruction correctly states the law presents a question of law which the Court of Appeals reviews for correctness.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

HN2[] **Standards of Review, Abuse of Discretion**

The Court of Appeals of Utah reviews a trial court's

[1] Judge William W. Barrett presided over the trial and denied the defendant's motion to arrest judgment as well as his alternative motion to reduce his conviction. Judge Elizabeth A. Hruby-Mills denied the motion for a new trial.

denial of a motion to reduce the degree of a conviction for abuse of discretion.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > New Trial

HN3 **Abuse of Discretion, New Trial**

The Court of Appeals of Utah reviews the decision to grant or deny a motion for a new trial only for an abuse of discretion. When considering a defendant's argument that the verdicts are inconsistent, the Court of Appeals will not overturn a jury's verdict of criminal conviction unless reasonable minds could not rationally have arrived at the verdict of guilty beyond a reasonable doubt based on the law and on the evidence presented.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

HN4 **De Novo Review, Conclusions of Law**

Constitutional challenges are matters of law reviewed for correctness.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

HN5 **De Novo Review, Conclusions of Law**

The Court of Appeals of Utah considers claims of ineffective assistance of counsel raised for the first time on appeal as questions of law.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

HN6 **Aggravated Offenses, Elements**

The crime of third degree felony aggravated assault does not require that a person act with the intent to cause a specific level of harm.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > General Overview

HN7 **Commencement of Criminal Proceedings, Double Jeopardy**

The Shondel doctrine establishes that where two statutes define exactly the same penal offense, a defendant can be sentenced only under the statute requiring the lesser penalty.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > General Overview

HN8 **Commencement of Criminal Proceedings, Double Jeopardy**

The Shondel doctrine applies only if the two crimes have identical elements and prohibit exactly the same conduct.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > General Overview

HN9 **Aggravated Offenses, Elements**

While the severity of injury required by the misdemeanor assault statute and the injury actually inflicted in connection with a third degree felony may sometimes be the same, the culpable conduct required for each is different. Class A misdemeanor assault requires only an act committed with unlawful force or violence, Utah Code Ann. § 76-5-102 (2012), while third degree felony aggravated assault requires the use of a dangerous weapon or other means or force likely to produce more grave consequences, i.e., serious bodily injury or even death, Utah Code Ann. § 76-5-103(1)(b), (3) (2008). Thus, each of these crimes describes conduct that is significantly different in both conduct and potential for harm, differences that are reflected in the elements each crime requires for conviction. Because the two

statutes fail to address exactly the same conduct, the Shondel doctrine does not apply.

Governments > Legislation > Interpretation > Rule of Lenity

HN10 **Interpretation, Rule of Lenity**

Lenity is an ancient rule of statutory construction that penal statutes should be strictly construed against the government and in favor of the persons on whom such penalties are sought to be imposed. In other words, lenity serves as an aid for resolving an ambiguity in a statute. The Court of Appeals of Utah notes that the Utah Legislature appears to have rejected the rule of lenity as a permissible canon of statutory construction.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements

HN11 **Aggravated Offenses, Elements**

Assault and aggravated assault, the statutory crimes that Salt claims are ambiguous and unconstitutionally vague, employ varying levels of bodily injury to differentiate degrees of criminal assault. For example, class B misdemeanor assault proscribes the infliction or creation of a substantial risk of bodily injury, or an attempt or a threat to inflict it. Utah Code Ann. § 76-5-102(1), (2) (2012). And bodily injury is defined as physical pain, illness, or any impairment of physical condition. Utah Code Ann. § 76-1-601(3). But class A misdemeanor assault requires that the assault result in substantial bodily injury. Utah Code Ann. § 76-5-102(3). Substantial bodily injury is defined as bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ. Utah Code Ann. § 76-1-601(12). And Utah law defines serious bodily injury 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. Utah Code Ann. § 76-1-601(11).

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

HN12 **Aggravated Offenses, Elements**

Third degree felony aggravated assault requires the assault to involve either a dangerous weapon or other means or force likely to produce death or serious bodily injury. Utah Code Ann. § 76-5-103(1)(b), (3) (2008). And an aggravated assault becomes a second degree felony only if it causes serious bodily injury. Utah Code Ann. § 76-5-103(1)(a), (2).

Governments > Legislation > Interpretation

HN13 **Legislation, Interpretation**

Ambiguity is defined as an uncertainty of meaning or intention. Black's Law Dictionary 93 (9th ed. 2009).

Governments > Legislation > Vagueness

HN14 **Legislation, Vagueness**

As long as a statute is sufficiently explicit to inform the ordinary reader what conduct is prohibited, the Court of Appeals of Utah will not find it unconstitutionally vague. Further, if the meaning of a statute is readily ascertainable, it does not encourage or facilitate arbitrary and discriminatory enforcement.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > Sentencing > Ranges

HN15 **Imposition of Sentence, Factors**

Under Utah Code Ann. § 76-3-402, a court may reduce the degree of a conviction by one level if, having considered the nature and circumstances of the offense and the history and character of the defendant, the court concludes that it would be unduly harsh to record the conviction as being for that degree of offense established by statute. Utah Code Ann. § 76-3-402 (2012). By its nature, such a decision is one of judgment and discretion.

Criminal Law & Procedure > Trials > Verdicts > Inconsistent Verdicts

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Verdicts

HN16 **Verdicts, Inconsistent Verdicts**

Appellate courts are under no duty to reconcile seemingly inconsistent acquittals and convictions because the jury is free to determine that the evidence only supported one conviction. Therefore, a claim of inconsistency alone is not sufficient to overturn the conviction; rather, there must be additional error beyond a showing of inconsistency because appellate courts have always resisted inquiring into the jury's thought processes and deliberations.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Verdicts

HN17 **Substantial Evidence, Sufficiency of Evidence**

So long as sufficient evidence supports each of the guilty verdicts, state courts generally have upheld the convictions. In determining whether the evidence is sufficient, appellate courts review the evidence in the light most favorable to the verdict and will not overturn a jury's verdict of criminal conviction unless reasonable minds could not rationally have arrived at the verdict of guilty beyond a reasonable doubt based on the law and on the evidence presented.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Vulnerable Victims

HN18 **Adjustments & Enhancements, Vulnerable Victims**

The Cohabitant Abuse Act provides that a second or subsequent conviction for certain domestic violence offenses is subject to enhanced penalties. Utah Code Ann. § 77-36-1.1(2) (2012). Domestic violence is defined as any criminal offense involving violence or physical harm when committed by one cohabitant against another. Utah Code Ann. § 77-36-1(4).

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Vagueness

HN19 **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

Statutory language is overbroad if its language proscribes both harmful and innocuous behavior. The Court of Appeals of Utah determined that a statute is not unconstitutionally overbroad unless it renders unlawful a substantial amount of constitutionally protected conduct. The Court noted, however, that the overbreadth doctrine has not been recognized outside the limits of the First Amendment.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

HN20 **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If the statute does not reach a substantial amount of such conduct, the overbreadth claim fails. The United States Supreme Court has recognized that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme, Further, the Supreme Court has recognized that implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends. However, to warrant First Amendment

protection, those engaging in their right of free association must engage in some form of expression, whether it be public or private.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Criminal Law & Procedure > ... > Domestic Offenses > Domestic Assault > General Overview

HN21[] **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

The Cohabitant Abuse Act does not penalize a person for choosing to reside with another person nor does it inhibit any protected form of expression. Instead, the act only prohibits criminal conduct against a cohabitant that involves violence or physical harm or threat of violence or physical harm. *Utah Code Ann. §§ 77-36-1(4)*, *77-36-1.1* (2012). Violence and threats of violence against cohabitants are not the sort of form of expression that the First Amendment right of association is meant to protect from government intrusion; indeed, such conduct is universally criminalized. Rather, the Cohabitant Abuse Act is designed to promote the value of the relationships the act encompasses by discouraging physical violence in such relationships. Because the Act does not constrain any speech or conduct protected by the First Amendment, the fact that its broad definition of cohabitant may theoretically bring within its reach such attenuated relationships as, for example, former roommates, may raise questions of policy without necessarily implicating constitutional overbreadth. This is especially true in a case where two people have lived together for a substantial time and the violence stemmed from their prior intimate relationship.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Vagueness

HN22[] **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

A statute is unconstitutionally vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or if it authorizes or even encourages arbitrary and discriminatory enforcement. The burden of showing that a statute is unconstitutionally vague is a heavy one because a defendant has the burden of proving that the statute is impermissibly vague in all of its applications. Thus, a defendant who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

Governments > Legislation > Interpretation

HN23[] **Legislation, Interpretation**

The court's primary objective when interpreting statutory language is to give effect to the legislature's intent as expressed in the text of the statute. In doing so, the court will consider the plain language and also the purpose of the statute.

Criminal Law & Procedure > ... > Domestic Offenses > Domestic Assault > Elements

HN24[] **Domestic Assault, Elements**

The Court of Appeals of Utah considered the "resides or has resided" definition of cohabitant in the context of a statute that sets forth the procedure for domestic violence victims to obtain a protective order. In that case, the Court of Appeals determined that the plain meaning of reside was to dwell permanently or for a length of time; to have a settled abode for a time. The Court also defined residence according to its plain meaning, i.e., a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit. And the Court further noted that one of the purposes other states have recognized for implementing statutes such as the Cohabitant Abuse Act is to protect others, beyond spouses, from abuse occurring between persons in a variety of significant relationships. Such a purpose is supported by the plain language of Utah's own statute, which increases the penalty for criminal offenses involving violence or physical harm when committed by one cohabitant against another. *Utah Code Ann. §§ 77-36-1(4)*, *77-36-1.1(2)*.

Criminal Law & Procedure > Defenses > Self-Defense

HN25[] **Defenses, Self-Defense**

Under Utah law, a person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force is necessary to defend the person against another person's imminent use of unlawful force. *Utah Code Ann. § 76-2-402(1)(a)* (2012). The self-defense statute also states that in determining the imminence or reasonableness of an attack or response, the trier of fact may consider, but is not limited to, any of 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) the other's prior violent acts or violent propensities; and (5) any patterns of abuse or violence in the parties' relationship. *Utah Code Ann. § 76-2-402(5)*.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN26[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To establish ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. Because both prongs are required, an appellate court may skip to the second prong and determine that the ineffectiveness, if any, did not prejudice the trial's outcome. To satisfy the prejudice prong, it is not enough to show that the alleged errors had some conceivable effect on the outcome of the trial but, rather, defendant must show that a reasonable probability exists that, but for counsel's error, the result would have been different.

Counsel: Herschel Bullen, Attorney for Appellant.

Sean D. Reyes and Karen A. Klucznik, Attorneys for Appellee.

Judges: JUDGE STEPHEN L. ROTH authored this Opinion, in which JUDGES. J. FREDERIC VOROS JR. and MICHELE M. CHRISTIANSEN concurred.

Opinion by: STEPHEN L. ROTH

Opinion

[417]** ROTH, Judge:

[*P1] Jeffrey Charles Salt appeals from his conviction for aggravated assault, a third degree felony. We affirm.

BACKGROUND

[*P2] Shortly after Salt began dating his girlfriend (J.G.), she bought a home in Salt Lake City.[2] Salt suggested that she hire him to complete some renovations, and she agreed. J.G. moved in with Salt in April 2006 when her house became unlivable during the remodeling. Over the next couple of years, the renovations became the source of frequent conflict between the two. J.G. moved out of Salt's residence in February 2008 and hired another contractor to finish the work on her home. **[***2]** At that point, Salt ended their relationship. But between February and April 2008, the two continued to see each other and came to a sort of reconciliation. At the end of April, however, J.G. told Salt "this isn't going to work out" and attempted to end their relationship permanently.

[*P3] Salt continued to contact J.G., eventually convincing her to meet him at his home in early June to talk things through and help him move past their breakup. When J.G. arrived at the scheduled meeting, Salt told her he wanted to "set some ground rules." He asked J.G. to agree not to leave even if "the questioning got tough." For nearly an hour, Salt asked her questions about their relationship and her decision to end it. When J.G. eventually told Salt she wanted to leave, he responded with misogynistic verbal abuse and then grabbed J.G. and twisted her head. The two ended up on the ground, and Salt grabbed a piece of pottery from a shelf and hit J.G. on the head with it multiple times. J.G. grabbed **[***3]** a phone from the floor and attempted to call 911, but she misdialed, **[**418]** and Salt knocked the phone away before she could reach anyone.

[*P4] Salt then grabbed what J.G. thought was a metal

[2] "On appeal from a jury verdict, we view the evidence and all reasonable inferences in a light most favorable to that verdict and recite the facts accordingly." *State v. Winfield, 2006 UT 4, ¶ 2, 128 P.3d 1171* (citation and internal quotation marks omitted).

pipe and hit her above her eye, drawing blood, before pinning her to the ground. When the two eventually stopped struggling, Salt allowed J.G. to get up. At that point, she saw blood all over the floor and could feel that her head was covered with blood as well. J.G. attempted to leave, but Salt blocked the exit. J.G. said, "[N]o, no, no, just let me out," and then either she pushed her way past him or he stepped aside. Feeling faint, J.G. lay down on the cement walkway in front of Salt's residence where a passerby stopped to give her aid and called 911. At the hospital, J.G. received sixty-five staples in her scalp to close lacerations that totaled roughly eleven inches in length. She continued to suffer back pain for years and, at the time of trial, still had a "lump on the side of [her] head" that felt as if there was "a little piece of the clay in [it]." Salt was charged with aggravated kidnapping, aggravated assault, and damage to a communication device.

[*P5] The case was tried to a jury. Salt claimed he acted **[***4]** in self-defense. He admitted using derogatory names to describe J.G. but testified that in response to the name-calling she landed the first blow, hitting him in the left eye. He testified he then put her in a headlock to keep her from further attacking him, and they fell to the ground wrestling. According to Salt, J.G. tried "to gouge [his] face" and then bit his finger and would not let go. In response, he repeatedly struck her head against a bookshelf until she released his finger. He testified that he never hit her with pottery or a metal pipe and that any action he took against J.G. was to protect himself from her attempts to gouge his face, her blows with a phone receiver, and her biting. He said that he was "in fear for [his] safety and [his] life" after J.G. hit him in the face and bit him. Salt also testified that a few months before the incident, J.G. had come to his house to collect some of her belongings. Then, as she was leaving, she "drove her car in reverse and hit [his] car." He then testified, "And I was in the path of that vehicle and I had to move out of the way to avoid being assaulted by the vehicle."

[*P6] The defense called a physician friend of Salt's who practiced **[***5]** emergency medicine as an expert witness. Based on his review of J.G.'s medical records, the physician testified that the nature of her injuries did not support a claim that she had suffered direct blows from a metal pipe or a ceramic object. Rather, in his opinion, J.G.'s injuries were most likely caused by a "glancing blow[]" rather than a "direct blow" from an object he did not attempt to describe. The defense also cross-examined law enforcement officers who had responded to the scene. They observed blood all over the apartment, but they neither found a metal pipe nor recovered any pieces of pottery.

[*P7] The jury convicted Salt of aggravated assault involving domestic violence but acquitted him of two other charges involving domestic violence—aggravated kidnapping and damage to a communication device. Salt moved to arrest judgment and filed an alternative motion to have his conviction reduced to a class A misdemeanor. The trial court denied his motions. After sentencing, Salt moved for a new trial. The court also denied that motion. Salt appeals.

ISSUES AND STANDARDS OF REVIEW

[*P8] First, Salt argues that the aggravated assault jury instruction was incomplete. ***HN1***[↑] "[W]e review jury instructions in **[***6]** their entirety to determine whether the instructions, taken as a whole, fairly instruct the jury on the applicable law." *State v. Malaga, 2006 UT App 103, ¶ 18, 132 P.3d 703* (alteration in original) (citation and internal quotation marks omitted). "Whether a jury instruction correctly states the law presents a question of law which we review for correctness." *State v. Houskeeper, 2002 UT 118, ¶ 11, 62 P.3d 444*.

[*P9] Second, Salt argues that the trial court erred when it denied his motion to reduce his sentence to a class A misdemeanor. ***HN2***[↑] We review a trial court's denial of a motion to reduce the degree of a conviction for abuse of discretion. *State v. Boyd, 2001 UT 30, ¶ 31, 25 P.3d 985*.

[*P10] **[**419]** Third, Salt argues that the trial court should have granted his motion for a new trial because the jury's not-guilty verdict on the charge of aggravated kidnapping conflicted with its guilty verdict on aggravated assault. ***HN3***[↑] "[W]e review the decision to grant or deny a motion for a new trial only for an abuse of discretion." *State v. Loose, 2000 UT 11, ¶ 8, 994 P.2d 1237*. "When considering a defendant's argument that the verdicts are inconsistent, we . . . will not overturn a jury's verdict of criminal conviction unless reasonable minds could not rationally have arrived at the verdict of guilty beyond a reasonable doubt based on the law and on the evidence presented." *State v. LoPrinzi, 2014 UT App 256, ¶ 30, 338 P.3d 253* (citation and internal quotation **[***7]** marks omitted), *petition for cert. filed*, Dec. 24, 2014 (No. 20141168).

[*P11] Fourth, Salt contends that the definition of "cohabitant" as used in the Cohabitant Abuse Act is unconstitutionally overbroad and vague. ***HN4***[↑] Constitutional challenges are matters of law reviewed

for correctness. State v. Pullman, 2013 UT App 168, ¶ 6, 306 P.3d 827.

[*P12] Finally, Salt argues that his counsel was constitutionally ineffective for failing to request an additional element in the jury instruction related to self-defense. HN5[] We consider claims of ineffective assistance of counsel raised for the first time on appeal as questions of law. State v. Clark, 2004 UT 25, ¶ 6, 89 P.3d 162.

ANALYSIS

I. The Aggravated Assault Jury Instruction

[*P13] At trial, the jury was instructed that to find Salt guilty of aggravated assault, it must find beyond a reasonable doubt that he used a dangerous weapon or "other means or force likely to produce death or serious bodily injury" in the course of acting "with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another." Salt contends that this instruction was erroneous because it failed to "require the jury to find that he acted with intent, or knowledge, or recklessness with respect to the result of his conduct." Instead, **[***8]** Salt argues, the instruction required the jury to find only that he used means likely to produce death or serious bodily injury. In other words, Salt argues that the instruction was missing a "vital" mens rea element, i.e., that he must have specifically *intended to cause* death or serious bodily injury, not simply that he *used means* likely to do so.

[*P14] In support of his argument, Salt relies on State v. O'Bannon, 2012 UT App 71, 274 P.3d 992. We held in *O'Bannon* that the State was required to prove that the defendant acted with intent to cause the victim serious physical injury before a jury could convict him of second degree felony child abuse. Id. ¶ 31. We determined that it was not enough "to prove only that [the defendant] intended to be, or knew that he was, engaged in certain conduct without the requisite intent or knowledge that a serious physical injury would likely result." *Id.* Salt argues that we should come to the same conclusion in this case because the aggravated assault instruction did not require jurors to determine that he intended to cause serious bodily injury, but to determine only that his actions were "likely to produce death or serious bodily injury" without ever taking his specific intent into account as he **[***9]** claims *O'Bannon* requires. We conclude that O'Bannon does not apply here because our holding in that case was based on a different crime requiring a different mens rea.

[*P15] *O'Bannon* involved a charge of second degree felony child abuse, not third degree felony aggravated assault. Id. ¶¶ 1, 24. Under the child abuse statute, a person is guilty of second degree felony child abuse if that person inflicts "serious physical injury" and does so "intentionally or knowingly." Utah Code Ann. § 76-5-109(2) (LexisNexis 2012). But the *O'Bannon* jury had been given an "eggshell victim" instruction, stating that "[w]hen injury ensues from deliberate wrongdoing, *even if it is not an intended consequence*, the injurer is responsible at law without the law concerning itself with the precise amount of harm inflicted." O'Bannon, 2012 UT App 71, ¶ 12, 274 P.3d 992 (emphasis added) (internal quotation marks omitted). **[**420]** We determined that this instruction "inaccurately stated the law with regard to the mental state required for the jury to find [the defendant] guilty of second degree felony child abuse." Id. ¶ 17. We reached this decision because even though the defendant had seriously injured the child victim, the instruction contradicted the statutory requirement that the defendant must **[***10]** also have *intended* serious physical injury or have known that it would result from his conduct. Id. ¶¶ 17, 31.

[*P16] In contrast, HN6[] the crime of third degree felony aggravated assault does not require that a person act with the intent to cause a specific level of harm. *Compare* Utah Code Ann. § 76-5-103(1)(b) (LexisNexis 2008) (defining third degree felony aggravated assault), *and id.* § 76-5-102 (2012)[3] (defining assault), *with id.* § 76-5-109(2) (defining second degree felony child abuse). Instead, the version of the statute that Salt was charged under defines third degree felony aggravated assault as an act causing or creating a substantial risk of bodily injury, committed "with unlawful force or violence," *id.* § 76-5-102, while using a dangerous weapon or "other means or force likely to produce death or serious bodily injury," *id.* § 76-5-103(1)(b), (3) (2008). The specific intent to cause "serious bodily injury" was an element of second degree felony aggravated assault, not the third degree felony with which Salt was charged. *See id.* § 76-5-103. And our precedent recognizes that specific intent to inflict serious bodily injury—or knowledge that such injury is likely to occur—is not required for a third degree felony aggravated assault conviction under the version of the statute that **[***11]** is applicable here. *See id.* (current

[3] Where amendments made to the relevant statutes since the time of the incident are not substantive, we cite to the current version of the Utah Code for the convenience for the reader.

version at *id.* § 76-5-103(1), (2)(a) (2012)). For example, in State v. Mangum, 2013 UT App 292, 318 P.3d 250 (per curiam), we noted that because the defendant "was charged and convicted under subsection (1)(b)" of the 2008 version of the statute, and not with a second degree felony under subsection (1)(a), "there was no requirement to show specific intent in order to support [the defendant's] conviction." *Id.* ¶¶ 6—7; *see also* State v. Potter, 627 P.2d 75, 78 (Utah 1981) (holding that an instruction stating that "specific intent" is not required to "violate the law but merely an intent to engage in acts or conduct that constitute the elements of a crime" was appropriate for an aggravated assault charge (internal quotation marks omitted)); State v. McElhaney, 579 P.2d 328, 328 & n.2 (Utah 1978) (holding that when aggravated assault is committed by use of a deadly weapon "or such means or force likely to produce death or serious bodily injury," "no culpable mental state is specified" (internal quotation marks omitted)); State v. Howell, 554 P.2d 1326, 1328 (Utah 1976) (agreeing with the parties that third degree felony aggravated assault requires only general intent).

[*P17] We therefore conclude that the trial court **[***12]** did not err when it determined that the third degree felony aggravated assault instruction correctly stated the law and for that reason refused to arrest judgment or grant a new trial.

II. Motion to Reduce Degree of Conviction

[*P18] Prior to sentencing, Salt moved to have his conviction reduced from third degree felony aggravated assault to class A misdemeanor assault under section 76-3-402 of the Utah Code (a section 402 reduction), because a felony conviction "would be unduly harsh" and because "[h]e ha[d] no significant prior criminal record." Salt also argued that he would be unable to continue in his position with a nonprofit organization if convicted of a felony. The trial court denied the motion. Salt argues that the court abused its discretion in failing to grant him a section 402 reduction. He also contends that the trial court's decision violated the *Shondel* doctrine and failed to comply with the rule of lenity.

[*P19] Salt argues on appeal that a reduction of his sentence is required under the *Shondel* doctrine. ***HN7***[↑] The *Shondel* doctrine establishes that "where two statutes define exactly the same penal offense, a defendant can be sentenced only under the statute requiring the lesser penalty." State v. Bluff, ***[**421]*** 2002 UT 66, ¶ 33, 52 P.3d 1210 (citing State v. Shondel, 22 Utah 2d 343, 453 P.2d 146, 147—48 (Utah 1969)). Salt argues that "[t]here is no meaningful distinction" **[***13]** between the acts required to commit the two crimes because in either case the actual result could be the same—substantial bodily injury, the kind of injury that Salt inflicted here.

[*P20] But ***HN8***[↑] the *Shondel* doctrine applies only if the two crimes "have identical elements and prohibit exactly the same conduct." *Id.* The elements of the lesser offense Salt argues for—a class A misdemeanor simple assault—are not the same as the third degree felony aggravated assault of which he was convicted. *Compare* Utah Code Ann. § 76-5-102 (defining simple assault), *with id.* § 76-5-103(1)(b), (3) (2008) (defining third degree felony aggravated assault). And the fact that an act committed under either statute may actually result in the same injury does not mean the crimes are wholly duplicative. ***HN9***[↑] While the severity of injury required by the misdemeanor assault statute and the injury actually inflicted in connection with a third degree felony may sometimes be the same, the culpable conduct required for each is different. Class A misdemeanor assault requires only an act "committed with unlawful force or violence," *see id.* § 76-5-102 (2012), while third degree felony aggravated assault requires the use of a dangerous weapon or "other means or force *likely to produce* ***[***14]*** " more grave consequences—"serious bodily injury" or even death, *id.* § 76-5-103(1)(b), (3) (2008) (emphasis added). Thus, each of these crimes describes conduct that is significantly different in both conduct and *potential* for harm, differences that are reflected in the elements each crime requires for conviction. Because the two statutes fail to "address exactly the same conduct," the *Shondel* doctrine does not apply. *See* Bluff, 2002 UT 66, ¶ 33, 52 P.3d 1210 (citation and internal quotation marks omitted).

[*P21] Salt also argues that the rule of lenity requires that his conviction be reduced. He contends that the statutory scheme surrounding the varying degrees of assault is ambiguous because "there are no standards assisting a trial court in distinguishing" between the types of bodily injury that determine whether the assault will result in a misdemeanor or felony conviction for the defendant. He argues that "the determination is [thus] left to the arbitrary conclusions of the prosecution" and renders the statutes unconstitutionally vague.

[*P22] ***HN10***[↑] "[L]enity is an ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom such penalties are sought to be imposed." State v. Rasabout, 2013 UT App 71, ¶ 31,

299 P.3d 625 (omission **[***15]** in original) (citation and internal quotation marks omitted), *cert. granted*, *308 P.3d 536 (Utah 2013)*. In other words, lenity serves "as an aid for resolving an ambiguity" in a statute. *Albernaz v. United States, 450 U.S. 333, 342, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)*. We noted in *State v. Rasabout, 2013 UT App 71, 299 P.3d 625*, that "our Legislature appears to have rejected the rule of lenity as a permissible canon of statutory construction." *Id. ¶ 31*. But in *Rasabout* we determined that even if the rule of lenity were applicable, there was no ambiguity in the pertinent statute. *Id. ¶ 32*. We come to the same conclusion here.

[*P23] ***HN11***[↑] Assault and aggravated assault, the statutory crimes that Salt claims are ambiguous and unconstitutionally vague, employ varying levels of bodily injury to differentiate degrees of criminal assault. For example, class B misdemeanor assault proscribes the infliction or creation of a substantial risk of "bodily injury"—or an attempt or a threat to inflict it. *See* *Utah Code Ann. § 76-5-102(1)*, *(2)* (LexisNexis 2012). And "[b]odily injury" is defined as "physical pain, illness, or any impairment of physical condition." *Id.* *§ 76-1-601(3)*. But class A misdemeanor assault requires that the assault result in "substantial bodily injury." *Id.* *§ 76-5-102(3)*. "Substantial bodily injury" is defined as "bodily injury, not amounting to serious bodily injury, that creates or causes protracted **[***16]** physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ." *Id.* *§ 76-1-601(12)*. And Utah law defines "[s]erious bodily injury" as "bodily injury that creates or causes serious permanent disfigurement, **[**422]** protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." *Id.* *§ 76-1-601(11)*. ***HN12***[↑] Third degree felony aggravated assault requires the assault to involve either a dangerous weapon or "other means or force likely to produce death or serious bodily injury." *Id.* *§ 76-5-103(1)(b)*, *(3)* (2008). And an aggravated assault becomes a second degree felony only if it "causes serious bodily injury." *Id.* *§ 76-5-103(1)(a)*, *(2)*.

[*P24] Salt provides no analysis or explanation as to how the statutory definitions of the pertinent degrees of bodily injury are so indistinguishable from one another as to be ambiguous. ***HN13***[↑] Ambiguity is defined as "[a]n uncertainty of meaning or intention." *Black's Law Dictionary* 93 (9th ed. 2009). Here, there is no uncertainty as to the meaning or definitions of the terms with which Salt finds fault, as the legislature has specifically defined each term. As a result, the "rule of lenity," even if available as a canon of statutory construction, is not **[***17]** applicable here.

[*P25] For the same reason, Salt's related claim that the statutes are unconstitutionally vague is unavailing. ***HN14***[↑] As long as a statute "is sufficiently explicit to inform the ordinary reader what conduct is prohibited" we will not find it unconstitutionally vague. *State v. MacGuire, 2004 UT 4, ¶ 14, 84 P.3d 1171* (citation and internal quotation marks omitted). Further, if the meaning of a statute is "readily ascertainable," it "does not encourage or facilitate arbitrary and discriminatory enforcement." *Id. ¶ 32*. Having already found that the ambiguity Salt urges does not exist, we conclude that the statutes at issue here are "sufficiently explicit." *See id. ¶ 14* (citation and internal quotation marks omitted). As discussed, the statutes provide specific definitions for each of the degrees of bodily injury that accompany the various degrees of assault. We therefore conclude that the meaning of the statutes is "readily ascertainable." *See id. ¶ 32*.

[*P26] Finally, Salt's contention that the trial court's refusal to reduce his conviction to a class A misdemeanor was "unduly harsh" is unpersuasive. ***HN15***[↑] Under *section 76-3-402 of the Utah Code*, a court may reduce the degree of a conviction by one level if, having considered "the nature and circumstances of the offense" and **[***18]** "the history and character of the defendant," the court "concludes [that] it would be unduly harsh to record the conviction as being for that degree of offense established by statute." *Utah Code Ann. § 76-3-402* (LexisNexis 2012). By its nature, such a decision is one of judgment and discretion. The court did not exceed its discretion when it determined that Salt's clean criminal history and potential job problems did not warrant such a reduction given the circumstances of this case, including the injuries inflicted on J.G. In addition, the trial court expressly stated that it would consider a renewed motion under *section 402* in the event Salt successfully completed his probation.

III. Conflicting Verdicts

[*P27] Salt contends that he was entitled to a new trial because "the verdict acquitting him of aggravated kidnapping necessarily conflicted with his conviction of aggravated assault and therefore he should have been acquitted of the aggravated assault as well."

[*P28] We considered a similar argument in *State v. LoPrinzi, 2014 UT App 256, 338 P.3d 253*, *petition for cert. filed*, Dec. 24, 2014 (No. 20141168), where the

defendant was convicted of two counts of unlawful sexual activity with a minor and acquitted of a third count. *Id. ¶ 29*. There, the defendant argued that all three **[***19]** counts "involved the same witnesses, same parties, same allegations, and same evidence." *Id.* (internal quotation marks omitted). Accordingly, she argued that "the jury would have [to] either convict on all Counts, or acquit on all Counts." *Id.* (alteration in original) (internal quotation marks omitted). We concluded, however, that "***HN16***[↑] [w]e are under no duty" to reconcile seemingly inconsistent acquittals and convictions because the jury is free to determine "that the evidence only supported one conviction." *Id. ¶ 31* (citation and internal quotation marks omitted). Therefore, a "claim of inconsistency alone is not sufficient to overturn [the] conviction; rather, [t]here must be additional error beyond a showing of **[**423]** inconsistency because appellate courts have always resisted inquiring into the jury's thought processes and deliberations." *Id. ¶ 30* (citation and internal quotation marks omitted).

[*P29] Salt argues that such additional error exists here because the aggravating factor the prosecution alleged for the aggravated kidnapping charge was essentially the assault for which he was convicted and thus the jury must have decided he did not commit the assault when it acquitted him of the aggravated kidnapping **[***20]** charge. As we noted in *LoPrinzi*, ***HN17***[↑] "so long as sufficient evidence supports each of the guilty verdicts, state courts generally have upheld the convictions." *Id.* (citation and internal quotation marks omitted). In determining whether the evidence is sufficient, "we review the evidence in the light most favorable to the verdict and will not overturn a jury's verdict of criminal conviction unless reasonable minds could not rationally have arrived at the verdict of guilty beyond a reasonable doubt based on the law and on the evidence presented." *Id.* (citation and internal quotation marks omitted). Here, the version of the evidence most favorable to the jury's verdict was that Salt assaulted J.G. and hit her with a metal pipe, a piece of pottery, or both, causing her significant head injuries and lingering residual pain in her back. Based on this evidence, the jury could reasonably have determined that Salt assaulted J.G. with a dangerous weapon or "other means or force likely to produce death or serious bodily injury." *See Utah Code Ann. § 76-5-103(1)(b)* (LexisNexis 2008).

[*P30] We therefore conclude that the evidence was sufficient to support the aggravated assault conviction and that the trial court did not err when it refused **[***21]** to grant a new trial on the basis of inconsistent verdicts.

IV. Constitutionality of the Cohabitant Abuse Act

[*P31] Salt contends that the term "cohabitant," as used in the Cohabitant Abuse Act, is both unconstitutionally overbroad and unconstitutionally vague. As a result, he argues the domestic violence designations attached to his charges were inappropriate and that "the jury should not have been instructed with regard to finding such a status." ***HN18***[↑] The Cohabitant Abuse Act provides that a second or subsequent conviction for certain domestic violence offenses is subject to enhanced penalties. *Utah Code Ann. § 77-36-1.1(2)* (LexisNexis 2012). "[D]omestic violence" is defined as "any criminal offense involving violence or physical harm . . . when committed by one cohabitant against another." *Id. § 77-36-1(4)*. Defendant argues that the term "cohabitant," as used in this act—and specifically the act's last alternative definition, "a person who . . . resides or has resided in the same residence as the other party"—is unconstitutionally overbroad because it unduly inhibits "First Amendment freedom of association rights." *See id. §§ 77-36-1*, *78B-7-102*. In other words, he argues that the act criminalizes "entirely innocent behavior, the mere act of residing with another." And he argues **[***22]** that the phrase "has resided" is unconstitutionally vague because it is unqualified and does not provide sufficient notice as to what behavior is being proscribed.

A. Unconstitutional Overbreadth

[*P32] Salt refers us to *Salt Lake City v. Lopez, 935 P.2d 1259 (Utah Ct. App. 1997)*, where we determined that ***HN19***[↑] "[s]tatutory language is overbroad if its language proscribes both harmful and innocuous behavior." *Id. at 1263* (citation and internal quotation marks omitted), *superseded by statute on other grounds as recognized by Baird v. Baird, 2014 UT 8, 322 P.3d 728*. In *Lopez*, we determined that a "statute is not unconstitutionally overbroad unless it renders unlawful a substantial amount of constitutionally protected conduct." *Id.* We noted, however, that "[t]he overbreadth doctrine has not been recognized outside the limits of the *First Amendment*." *Id.* Salt contends that the definition of "cohabitant" restricts a person's right to freedom of association under the *First Amendment* by "criminalizing entirely innocent behavior, the mere act of residing with one another."

[*P33] ***HN20***[↑] "In a facial challenge to the overbreadth and vagueness of a law, a court's **[**424]**

first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." State v. Norris, 2007 UT 6, ¶ 13, 152 P.3d 293 (emphasis omitted) (citation and internal quotation marks omitted). If the statute does not **[***23]** reach a substantial amount of such conduct, the overbreadth claim fails. *Id.* As Salt notes, the United States Supreme Court has recognized that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Roberts v. United States Jaycees, 468 U.S. 609, 617—18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Further, the Supreme Court has recognized that "implicit in the right to engage in activities protected by the *First Amendment* is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." Boy Scouts of Am. v. Dale, 530 U.S. 640, 647, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) (citation and internal quotation marks omitted). However, to warrant First Amendment protection, those engaging in their right of free association must "engage in some form of expression, whether it be public or private." Id. at 648.

[*P34] HN21[↑] The Cohabitant Abuse Act does not penalize a person for choosing to reside with another person, as Salt claims, nor does it inhibit any protected form of expression. Instead, the act only prohibits criminal conduct against a cohabitant that "involv[es] violence or physical harm or threat of violence or physical harm." *See* Utah Code Ann. §§ 77-36-1(4), -1.1 (LexisNexis **[***24]** 2012). Violence and threats of violence against cohabitants are not the sort of "form of expression" that the First Amendment right of association is meant to protect from government intrusion; indeed, such conduct is universally criminalized. Rather, the Cohabitant Abuse Act is designed to promote the value of the relationships the act encompasses by discouraging physical violence in such relationships. Because the act does not constrain any speech or conduct protected by the *First Amendment*, the fact that its broad definition of "cohabitant" may theoretically bring within its reach such attenuated relationships as, for example, former roommates, may raise questions of policy without necessarily implicating constitutional overbreadth. This is especially true in a case such as this one, where Salt and J.G. had lived together for a substantial time and the violence stemmed from their prior intimate relationship. We therefore conclude that Salt's claim of overbreadth fails.

B. Unconstitutional Vagueness

[*P35] Salt also claims that the definition of "cohabitant" is unconstitutionally vague. He argues that "[n]o evidence exists that he was put on notice or was otherwise aware that he had somehow permanently attained the status **[***25]** of 'cohabitant' simply because he once resided with" J.G. HN22[↑] A statute is unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or if it "authorizes or even encourages arbitrary and discriminatory enforcement." State v. Ansari, 2004 UT App 326, ¶ 42, 100 P.3d 231 (citation and internal quotation marks omitted). The burden of showing that a statute is unconstitutionally vague is a heavy one because "a defendant has the burden of proving that the statute is impermissibly vague in *all* of its applications." Id. ¶ 44 (emphasis added) (citation and internal quotation marks omitted). "Thus, a defendant who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* (citation and internal quotation marks omitted).

[*P36] HN23[↑] Our "primary objective" when interpreting statutory language "is to give effect to the legislature's intent" as expressed in the text of the statute. State v. Maestas, 2012 UT 46, ¶ 195, 299 P.3d 892 (citation and internal quotation marks omitted). In doing so, we will consider the plain language and also the purpose of the statute. Anderson v. Bell, 2010 UT 47, ¶ 9, 234 P.3d 1147. Our decision in **Keene v. Bonser, 2005 UT App 37, 107 P.3d 693**, is instructive here. In *Keene*, HN24[↑] we considered the "resides or has **[***26]** **[**425]** resided" definition of "cohabitant" in the context of a statute that sets forth the procedure for domestic violence victims to obtain a protective order. **Id. ¶¶ 2, 8**. In that case, we determined that the plain meaning of "reside" was "[t]o dwell permanently or for a length of time; to have a settled abode for a time." **Id. ¶ 11** (alteration in original) (citation and internal quotation marks omitted). We also defined "residence" according to its plain meaning—"a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit." *Id.* (citation and internal quotation marks omitted). And we further noted that one of the purposes other states have recognized for implementing statutes such as the Cohabitant Abuse Act is "'to protect others[, beyond spouses,] from abuse occurring between persons in a variety of significant relationships.'" **Id. ¶ 15** (alteration in original) (quoting

State v. Kellogg, 542 N.W.2d 514, 517 (Iowa 1996)). Such a purpose is supported by the plain language of our own statute, which increases the penalty for criminal offenses "involving violence or physical harm . . . when committed by one cohabitant against another." *See* Utah Code Ann. §§ 77-36-1(4), **[***27]** -1.1(2).

[*P37] Salt's conduct in the context of his relationship with J.G. falls well within the scope of the statute's definition and purpose. *See* Ansari, 2004 UT App 326, ¶ 44, 100 P.3d 231. Here, Salt and J.G. lived together in an intimate relationship in Salt's permanent home for nearly two years. And it was only about two months after J.G. moved out that Salt violently assaulted her during a discussion directly related to their prior romantic relationship. Salt's behavior is exactly the type contemplated by statutes like the act which are aimed at protecting those in "a variety of significant relationships" from the increased vulnerability to abuse that those relationships may create, even after they end. *See* ***Keene, 2005 UT App 37, ¶ 15, 107 P.3d 693*** (citation and internal quotation marks omitted). Because we conclude that the kind of relationship Salt had with J.G. fell well within the central focus of the act's definition of "cohabitant," and because that definition "provide[s] people of ordinary intelligence" fair notice, Salt's unconstitutional vagueness claim fails. *See* Ansari, 2004 UT App 326, ¶ 42, 100 P.3d 231 (citation and internal quotation marks omitted).

V. Ineffective Assistance of Counsel

[*P38] Salt's final claim is that his trial counsel was ineffective for failing to request that the court include an additional factor **[***28]** for the jury's consideration in one of the self-defense jury instructions. ***HN25***[↑] Under Utah law, "[a] person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force . . . is necessary to defend the person . . . against another person's imminent use of unlawful force." Utah Code Ann. § 76-2-402(1)(a) (LexisNexis 2012). The self-defense statute also states that in determining the "imminence or reasonableness" of an attack or response,

> 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.

Id. § 76-2-402(5) (emphasis added). Salt argues that Jury Instruction No. 20, which purported to address these factors, failed to include the fourth factor listed in the statute—"the other's prior violent acts or violent propensities."[4] *See id.* He argues that his counsel was ineffective for failing to ensure that this factor was included because it was implicated by **[***29]** evidence presented at trial that J.G. had previously attempted to hit him with her car.

[*P39] ***HN26***[↑] To establish ineffective assistance of counsel, a defendant must demonstrate (1) "that counsel's performance was deficient" and (2) "that the deficient performance prejudiced **[**426]** the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because both prongs are required, "an appellate court may skip to the second prong . . . and determine that the ineffectiveness, if any, did not prejudice the trial's outcome." State v. Perry, 2009 UT App 51, ¶ 11, 204 P.3d 880 (citation and internal quotation marks omitted). "To satisfy the prejudice prong, it is not enough to show that the alleged errors had some conceivable effect on the outcome of the trial but, rather, defendant must show that a reasonable probability exists that, but for counsel's error, the result would have been different." State v. Millard, 2010 UT App 355, ¶ 18, 246 P.3d 151 (citation and internal quotation marks omitted). Salt first argues that "[b]y failing to request a very crucial element of self-defense," counsel prevented the jury from being given the "opportunity to consider in its deliberations the effect of the prior assault by [J.G.]." He argues **[***30]** that "the result may very well have been different" had the jury been permitted to consider this evidence.

[*P40] We conclude that Salt has not shown that counsel's failure to object to the jury instruction prejudiced his case. Even if the "prior violent acts or prior violent propensities" factor had been included, Salt has failed to show a reasonable probability exists that the outcome would have been different. Salt argues he was prejudiced because the missing factor deprived him of the opportunity to argue his theory of self-defense and the jury of the ability to consider it. Put another way, Salt contends counsel was prevented from arguing that Salt reacted to J.G. both reasonably and in self-defense in light of the parties' history and that had counsel been

[4] The jury instruction also failed to list the fifth factor described in the statute, but Salt does not appeal the omission of that factor.

able to do so, Salt would not have been convicted. We disagree.

[*P41] First, Jury Instruction No. 20 clearly stated that the jury was "not limited" only to the factors listed in the instruction. The jury was therefore free to consider Salt's testimony that his actions were a justified response to J.G. hitting him in the eye because J.G. had previously tried to hit him with a car. And just as the missing factor did not prevent the jury from **[***31]** considering any evidence presented to it related to self-defense, neither did it prevent counsel from arguing a theory of self-defense to the jury during closing arguments. Indeed, while counsel did not specifically mention the alleged prior incident of attempted vehicular assault, he did focus several of his closing remarks on the allegation that J.G. struck Salt first. And counsel also characterized J.G. as a person who initiates violence, refuting Salt's claim that the missing factor precluded him from making an argument about J.G.'s alleged propensity. Counsel argued to the jury, "She started this by hitting him the eye, she was the aggressor," and, "[H]e's got the bruise on his eye to prove [it]." Counsel also told the jury, "If someone comes up to you and punches you in the eye, . . . in Utah, you don't have to run away, you can stand your ground and defend yourself and especially when you're in your own home." And counsel further told the jury that Salt was reasonable in his response because "he's entitled to defend himself however he needs to make sure that [the attack] doesn't get worse."

[*P42] It is worth noting that Salt does not argue trial counsel was somehow deficient in his arguments **[***32]** because he did not call the jury's attention to the incident involving J.G.'s car during closing arguments. Salt only argues that he was prejudiced by the missing factor in the jury instruction because its absence prevented counsel from arguing it and the jury from considering it. So the question of whether counsel was ineffective for failing to include the incident in his jury arguments related to Salt's theory of self-defense is not before us. Instead, we need only determine whether, as Salt contends, counsel was actually prohibited from making such an argument had he chosen to. We are not persuaded that the missing jury instruction prevented counsel from presenting for the jury's consideration any legitimate arguments related to Salt's theory of self-defense or that it influenced the trial's outcome in the way that Salt claims. Accordingly, Salt's ineffective assistance of counsel claim fails.

CONCLUSION

[*P43] We conclude that the trial court did not err when it denied Salt's motions to **[**427]** arrest judgment or grant a new trial on the grounds that the jury instruction on aggravated assault was erroneous and prejudicial. We further determine the trial court did not err when it refused to reduce **[***33]** his conviction. We also conclude that the trial court did not abuse its discretion when it refused to grant a new trial on conflicting verdicts. We also do not find the Cohabitant Abuse Act to be unconstitutional. Finally, we conclude that Salt did not receive ineffective assistance of counsel. Accordingly, the trial court's denial of Salt's motions for a new trial or to arrest judgment and his conviction are affirmed.

End of Document

Tab 3

CR403. Party Liability.

A person can commit a crime as a "**party to the offense**." In other words, [Defendant]~~a person~~ can commit a criminal offense even though [she] [he] did not personally do all of the acts that make up the offense. Before [Defendant]~~a person~~ may be found guilty as a "party to the offense," you must find beyond a reasonable doubt that:

1. [Defendant]~~The person~~ had the mental state required to commit the charged offense,

AND

2. [Defendant]~~The person~~ [intentionally] [or] [knowingly] [or] [recklessly] solicited, requested, commanded, or encouraged another person to commit the charged offense OR [Defendant]~~the person~~ intentionally aided another person to commit the charged offense,

AND

3. The charged offense was committed [either by [Defendant]~~that person~~ or another person].

CR403. Party Liability.

A person can commit a crime as a "party." In other words, a person can commit a criminal offense even though that person did not personally do all of the acts that make up the offense. If you find beyond a reasonable doubt that:

(1) the defendant had the mental state required to commit the offense, AND

(2) the defendant solicited, requested, commanded, encouraged, or intentionally aided another to commit the offense, AND

(3) the offense was committed,

then you can find the defendant guilty of that offense.

References
Utah Code Ann. §76-2-202

CR309A Accomplice Liability.

The defendant _____(NAME) is charged as a party [in Count_____] with committing _____ (CRIME) on or about [DATE]. You cannot convict (him) (her) of this offense unless based on the evidence, you find beyond a reasonable doubt, each of the following elements:

1. That the defendant _____(NAME):

a. [intentionally][knowingly] or [recklessly] ~~solicitated~~solicited, requested, commanded, or encouraged [the principal actor] to

i. ELEMENT ONE

ii. -ELEMENT TWO

or

b. intentionally aided [the principal actor] to

i. -ELEMENT ONE

ii. ~~.~~ –ELEMENT TWO

2. And that the defendant _____(NAME),

[a. intended that [the principal actor] commit the crime of _____ (CRIME)];

[b. was aware that his conduct was reasonably certain to result in [the principal actor] committing the crime of _____ (CRIME)];

or

[c. recognized that his conduct could result in [the principal actor] committing the crime of _____ (CRIME) but chose to act anyway.]

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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

CR309B Accomplice Liability.

The defendant _____(NAME) is charged as a party [in Count_____] with committing _____ (CRIME) on or about [DATE]. You cannot convict (him) (her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant _____(NAME):

a. [intentionally][knowingly] or [recklessly] ~~solicitated~~solicited, requested, commanded, or encouraged [the principal actor] to commit the crime of (CRIME) as set forth in elements instruction [_____]

or

b. intentionally aided [the principal actor] to commit the crime of (CRIME) as set forth in elements instruction [_____]

2. And that (NAME),

[a. intended that [the principal actor] commit the crime of _____ (CRIME)];

[b. was aware that his conduct was reasonably certain to result in [the principal actor] committing the crime of _____ (CRIME)];

or

[c. recognized that his conduct could result in [the principal actor] committing the crime of _____ (CRIME) but chose to act anyway.]

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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

CR309A. Accomplice Liability. (DRAFT – May 2, 2018)

The defendant _____(NAME) is charged as a party [in Count _____] with being a party to _____ (CRIME) on or about [DATE]. You cannot convict (him) (her) of this offense unless based on the evidence, you find beyond a reasonable doubt, each of the following elements:

1. That the defendant _____(NAME):

a. [intentionally][knowingly] or [recklessly] solicited, requested, commanded, or encouraged [the principal actor] to

i. ELEMENT ONE

ii. ELEMENT TWO

or

b. intentionally aided [the principal actor] to
i. ELEMENT ONE
ii. ELEMENT TWO

2. And that the defendant _____ (NAME),
[a. intended that [the principal actor] commit the crime of _____ (CRIME)];
[b. was aware that his conduct was reasonably certain to result in [the principal actor] committing the crime of _____ (CRIME)];

or

[c. recognized that his conduct could result in [the principal actor] committing the crime of _____ (CRIME) but chose to act anyway.]

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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

2018 WL 1443867

Court of Appeals of Utah.

STATE of Utah, Appellee,

v.

Meagan **GRUNWALD**, Appellant.

No. 20160079-CA

|

Filed March 22, **2018**

Fourth District Court, Provo Department, The Honorable Darold J. McDade, No. 141400517

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Judge Diana Hagen authored this Opinion, in which Judges Gregory K. Orme and Kate A. Toomey concurred.

Opinion

HAGEN, Judge:

***1** ¶1 This appeal arises from a crime spree that left one police officer dead and another gravely injured. The deadly rampage ended when Jose Angel Garcia Juaregi (Garcia) was shot and killed by police. His teenaged girlfriend, Meagan **Grunwald**, was charged and convicted as an accomplice to the aggravated murder of Sergeant Cory Wride [1] (Count One); the attempted aggravated murder of Deputy Greg Sherwood and felony discharge of a firearm resulting in serious bodily injury (Counts Two and Three); felony discharge of a firearm for shooting at Trooper Jeff Blankenagel (Count Five); felony discharge of a firearm and criminal mischief for shooting and damaging a semi-trailer truck (Counts Six and Seven); and aggravated robbery for carjacking a vehicle from another motorist (Count Eleven). [2]

¶2 At trial, the jury was incorrectly instructed on the elements of accomplice liability. After carefully reviewing the evidence presented at trial, we hold that the error was harmless with respect to Counts One and Eleven and therefore affirm those convictions. With respect to Counts Two, Three, Five, Six, and Seven, however, there is a reasonable probability that the result would have been different if the jury had been correctly instructed on the law. As a result, we must vacate those convictions and remand for a new trial on those counts.

BACKGROUND

¶3 In June 2013, when **Grunwald** was sixteen years old, she was introduced to Garcia by a mutual friend. Garcia had been previously convicted of manslaughter and was on parole. Although Garcia was almost ten years older than **Grunwald**, they became romantically involved. By September, Garcia had moved into the **Grunwald** family home in Draper, Utah. Garcia's presence in the home and his intimate relationship with **Grunwald** resulted in friction between **Grunwald's** parents.

¶4 In January 2014, **Grunwald's** parents decided to separate, and **Grunwald** planned to move with her mother to St. George, Utah. Garcia told his parole officer that he wanted to transfer his supervision to St. George so that he could stay with **Grunwald**. His parole officer directed Garcia to stay with his brother in Provo, Utah and to report in on January 27. When Garcia failed to report, the parole officer applied for an arrest warrant.

***2** ¶5 On January 30, **Grunwald** and her mother were packing their belongings when Garcia asked **Grunwald** to "go on a ride" with him so they could talk. **Grunwald** agreed, and she and Garcia drove away in her truck, with **Grunwald** behind the wheel.

¶6 At some point during the drive, Garcia told **Grunwald** that there was a warrant out for his arrest. The circumstances surrounding this announcement were disputed at trial, but **Grunwald** became sufficiently upset to pull off to the side of Highway 73 and turn on her hazard lights.

¶7 Sergeant Cory Wride, with the Utah County Sheriff's Office, noticed the truck on the side of the road and

notified dispatch that he was conducting a "motorist assist." He approached the driver's window and asked Grunwald if she was okay. Although she was crying and her face was red, Grunwald told him she was fine. He asked for her identification and car registration and then went back to his vehicle to confirm her information with a police dispatcher. When Sergeant Wride returned to the truck, he gave the documents back to Grunwald and asked her again if she was sure she was okay. When she assured him that she was, he turned his attention to Garcia. Garcia provided a false name and birthdate, and Sergeant Wride again returned to his vehicle to verify the information.

¶8 According to Grunwald, Garcia told her to put her foot on the brake while he shifted the truck into drive. [3] With a gun in hand, Garcia announced to Grunwald that he was "going to buck [the officer] in the fucking head." Grunwald held her foot on the brake with the car in drive for more than three-and-a-half minutes. During this time, a passing motorist noticed that Grunwald was checking her driver's side mirror. When there was a significant lull in traffic, Garcia slid open the truck's back window and fired seven shots at Sergeant Wride as he sat in is patrol vehicle. Immediately after Garcia fired the shots, Grunwald accelerated back onto the road and drove away.

¶9 Two bullets struck Sergeant Wride, one piercing his forehead and the other puncturing his neck. When Sergeant Wride did not answer his radio or calls to his mobile phone, another officer drove to his last known location. The officer found Sergeant Wride dead. He notified the dispatch center, and other officers began searching for Grunwald's truck.

¶10 About an hour and a half after the shooting, police first spotted the truck travelling southbound on I-15 between the two Santaquin exits. When police gave chase, Grunwald pulled into an emergency turnaround and made a U-turn to head northbound on I-15.

¶11 Another officer, Utah County Sheriff's Deputy Greg Sherwood, spotted Grunwald's truck as she exited the interstate at the Santaquin Main Street exit and began to follow. When Deputy Sherwood activated his siren and overhead lights, Grunwald suddenly reduced her speed, which closed the gap between the two vehicles. In that instant, Garcia fired at Deputy Sherwood through the truck's back window. One bullet struck Deputy Sherwood in the head, causing serious injury. Fortunately, Deputy Sherwood survived the shooting.

***3** ¶12 Immediately after Garcia fired at Deputy Sherwood, Grunwald made another abrupt U-turn and headed back to the I-15 on-ramp. Utah Highway Patrol Trooper Jeff Blankenagel spotted Grunwald's truck once it was back on the interstate. As Trooper Blankenagel followed the truck, Garcia fired two shots in his direction from the truck's back window. Trooper Blankenagel reduced his speed to create a safe following distance between his vehicle and Grunwald's truck. Ahead on I-15, other officers had deployed a spike strip to stop the truck. Grunwald maneuvered around it, but the spike strip disabled Trooper Blankenagel's vehicle. As Grunwald continued driving, she crashed into another vehicle, resulting in damage to the front end of the truck that impaired her ability to steer and brake.

¶13 Undeterred, Grunwald continued driving and passed a semi-trailer truck traveling southbound on I-15. As they went by, the truck driver saw Garcia lean out of the truck's passenger window and fire shots at his semi-trailer. The truck driver pulled over to examine his vehicle and found that the gun shots had damaged parts of the truck.

¶14 Shortly after passing the semi-trailer truck, Grunwald took the Nephi Main Street exit off of I-15, and she and Garcia abandoned the disabled truck. Garcia ran down the middle of the road away from the truck, and Grunwald followed. Officers yelled at them to "stop" and "[g]et down." Ignoring these commands, Garcia fired at an officer while Grunwald ran directly toward a moving car waving her arms. The driver saw Grunwald flagging her down and stopped her vehicle. While Grunwald opened the passenger side door and climbed in, Garcia opened the driver's door, waved his gun at the driver, and ordered her to get out. The driver asked if she could get her daughter out of the back seat, to which Garcia replied, "[Y]ou better hurry." As soon as the driver retrieved her daughter, Garcia drove away with Grunwald in the passenger seat.

¶15 Garcia returned to I-15, but police successfully deployed tire spikes, slowing the vehicle and eventually causing a tire to become dislodged. When the disabled vehicle came to a stop, Garcia abandoned it, running toward another vehicle with Grunwald following him. Officers yelled at them to stop and get down. As Garcia

neared the other vehicle, gunfire erupted. Grunwald stopped and dropped to her knees.

¶16 Garcia continued to flee and aimed his gun at an approaching officer. The officer yelled, "Show me your hands." When Garcia failed to do so, the officer fired two shots. Grunwald saw one bullet strike Garcia in the head, and she began to scream. The officer who fired heard her yell, "You shot him in the fucking head." A bystander saw Grunwald pacing frantically, acting distraught and hysterical. She appeared angry at the police and screamed, "You fucking ass holes, you didn't have to shoot him. You fucking shot him. Oh, my God, you fucking shot him."

¶17 Garcia, on the ground but still conscious, continued to struggle as officers wrestled away his gun and placed him in handcuffs. Once he was subdued, officers attempted to administer first aid. Garcia asked them for water then said, "Why don't you let me kiss my girlfriend with my last dying breath?" Garcia died later that day.

¶18 After Grunwald was arrested and placed in a patrol vehicle, she claimed that Garcia had threatened to shoot her and her family if she refused to go with him and that she "tried to get him to stop."

¶19 The State charged Grunwald with twelve counts associated with these events. On Counts One through Seven and Count Eleven, the State charged Grunwald as an accomplice. She pled not guilty to all charges and the case proceeded to trial. Between April 28 and May 9, 2015, the district court held a nine-day trial, during which Grunwald raised the affirmative defense of compulsion. At the end of trial, the jury convicted Grunwald of eleven of the twelve counts, acquitting her of Count Four, attempted aggravated murder for Garcia's shooting at Trooper Blankenagel.

***4** ¶20 On July 8, 2015, the court sentenced Grunwald to various prison terms of zero-to-five years to twenty-five years to life. The court imposed a sentence of twenty-five years to life on Count One (aggravated murder) to run consecutively with a sentence of five years to life on Count Eleven (aggravated robbery). The court ordered the sentences on the remaining counts to run concurrently with all other counts.

¶21 Grunwald appealed. Pursuant to Utah Code section 78A-3-102(4), the Utah Supreme Court transferred the appeal to this court. Utah Code Ann. § 78A-3-102(4) (LexisNexis 2017).

ISSUE AND STANDARD OF REVIEW

¶22 Grunwald contends that she received ineffective assistance of counsel because her attorney failed to object to erroneous jury instructions on accomplice liability. "When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review and we must decide whether [the] defendant was deprived of the effective assistance of counsel as a matter of law." *Layton City v. Carr*, 2014 UT App 227, ¶ 6, 336 P.3d 587 (alteration in original).

ANALYSIS

¶23 An accused is guaranteed assistance of counsel for his or her defense under the Sixth Amendment to the United States Constitution and article 1, section 12 of the Utah Constitution. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (citation and internal quotation marks omitted). To establish a constitutional claim of ineffective assistance of counsel, a defendant must demonstrate both "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. 2052; *see also* *State* *v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (following *Strickland* 's two-prong test for ineffective assistance of counsel). To satisfy the first element, a defendant must show that "counsel's representation fell below an objective standard of reasonableness," which "overcome[s] the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland,* 466 U.S. at 688–89, 104 S.Ct. 2052 (citation and internal quotation marks omitted). The second element requires that the defendant establish that "a reasonable probability exists that, but for counsel's error, the result would have been different." *State* *v. Millard*, 2010 UT App 355, ¶ 18, 246 P.3d 151 (citation and internal quotation marks omitted).

¶24 In this case, counsel's performance was deficient because counsel failed to object to serious errors in the jury instructions relating to accomplice liability. As to prejudice, we conclude that there is a reasonable

probability that the result would have been different on some counts but not others.

I. Deficient Performance

¶25 To assess deficient performance in this case, we must evaluate whether the instructions provided to the jury correctly stated the law. Because the jury instructions at issue concerned accomplice liability, we begin with a review of Utah law on that subject.

¶26 Under section 76-2-202 of the Utah Code, "[e]very person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Code Ann. § 76-2-202 (LexisNexis 2017). Under this statute, "accomplice liability adheres only when the accused acts with the mens rea to commit the principal offense." *State v. Calliham*, 2002 UT 86, ¶ 64, 55 P.3d 573. To prove the requisite mens rea,[4] "the State must show that an individual acted with both the intent that the underlying offense be committed and the intent to aid the principal actor in the offense." *State v. Briggs*, 2008 UT 75, ¶ 13, 197 P.3d 628.

***5** ¶27 "[T]he first step in applying accomplice liability is to determine whether the individual charged as an accomplice had the intent that an underlying offense be committed." *Id.* ¶ 14. In this context, "intent" means "[t]he state of mind accompanying an act," and it is not to be confused with the mental state "intentionally." *State v. Jeffs*, 2010 UT 49, ¶ 43, 243 P.3d 1250 (alteration in original) (citations and internal quotation marks omitted). Regardless of the mental state required, the accomplice must possess that mental state with respect to the commission of the principal crime. *See id.* ¶ 44. Second, under the "intentionally aids" portion of accomplice liability, the "accomplice must intentionally aid in the commission of a crime to be held criminally liable." *Briggs*, 2008 UT 75, ¶¶ 13, 15, 197 P.3d 628. In other words, the accomplice must intentionally provide aid directed to accomplishing the crime. *See Jeffs*, 2010 UT 49, ¶ 44, 243 P.3d 1250.

¶28 The Utah Supreme Court's decision in *Jeffs*, illustrates these principles. Jeffs was charged as an accomplice to rape for his role in performing a coerced marriage between the principal and an underage girl. *See id.* ¶¶ 4–13. At trial, Jeffs unsuccessfully requested a jury instruction requiring the State to prove that he "intended that the result of his conduct would be that [the principal] rape [the victim]." *Id.* ¶ 40. The Utah Supreme Court held that he was entitled to this instruction for two reasons.

¶29 First, the provided instructions failed to connect the required mental state to the commission of the principal crime. Because the principal offense of rape could be committed "intentionally, knowingly or recklessly," the State had to prove that Jeffs acted "intentionally, knowingly, or recklessly" to convict him as an accomplice. *Id.* ¶ 44 "But," the court asked rhetorically, "intentionally, knowingly, or recklessly in regard to what?" *Id.* The instruction provided to the jury "only indicated that the reckless, knowing, or intentional mental state attached to the actions of 'solicited, requested, commanded, or encouraged,' not to the underlying criminal conduct of rape." *Id.* ¶ 42. This was error. The *Jeffs* court explained that in order for an accomplice to act "with the mental state required for the commission of [the] offense," the accomplice "must act intentionally, knowingly, or recklessly as to the results of his conduct. And in order for criminal liability to attach, the results of his conduct must be a criminal offense." *Id.* ¶ 44 (alteration in original) (citation and internal quotation marks omitted). An accomplice to rape would act intentionally if he "desires to cause rape," knowingly if he "knows that his conduct will most likely cause rape," and recklessly if he "recognizes that his conduct could result in rape but chooses to proceed anyway." *Id.* ¶ 45.

¶30 Second, the jury instructions in *Jeffs* failed to clarify the "intentionally aided" portion of the accomplice liability statute. Where "the defendant is charged with aiding another in the commission of the offense, the accomplice liability statute requires that the defendant's aiding be 'intentional,' " meaning that the accomplice must intend to aid the principal in committing the offense. *Id.* ¶¶ 50–51 (quoting Utah Code Ann. § 76-2-202 (2008)). "Without Jeffs' proposed instruction as to intent, the jury could have convicted Jeffs if it found that Jeffs 'intentionally' did some act, and such intentional act *unintentionally* 'aided' " the principal in raping the victim. *Id.* ¶ 52. As a result, the jury could have convicted Jeffs as an accomplice "simply because he intentionally performed the marriage ceremony and the existence of

the marriage aided [the principal] in raping [the victim]." *Id.* In short, the instructions failed to require the State to prove that Jeffs "acted with both the intent that the underlying offense be committed and the intent to aid the principal actor in the offense." *Id.* ¶ 51 (citation and internal quotation marks omitted).

***6** ¶31 With these principles in mind, we turn to the accomplice liability instructions in this case. Instructions 33, 38, 40, 44, 45, 46, and 50 each contain identical language, replacing only the name and elements of the principal crime. In relevant part, these instructions required the jury to find:

> 1. That the defendant, Meagan Dakota Grunwald,
>
> 2. "Intentionally," "knowingly," or "recklessly" solicited, requested, commanded, encouraged, or "intentionally" aided [Garcia] who:
>
> [elements of principal crime]
>
> 3. And that the defendant, Meagan Dakota Grunwald,
>
> a. Intended that [Garcia] commit the [principal crime], or
>
> b. Was aware that [Garcia's] conduct was reasonably certain to result in [Garcia] committing the [principal crime], or
>
> c. Recognized that her conduct could result in [Garcia] committing the [principal crime] but chose to act anyway;
>
> 4. And that the defense of Compulsion does not apply.

This instruction appears to be based on the Utah Model Jury Instruction on accomplice liability, which reverses the order in which the elements appear in the statute. The first statutory element—"acting with the mental state required for the principal offense"—is addressed in paragraph 3 of the instruction. The second element—"solicits, requests, commands, encourages, or intentionally aids another person to engage" in the principal offense—is addressed in paragraph 2.

¶32 Grunwald has identified three distinct errors in this jury instruction, which we address in the following order. First, by including paragraph 3(c), the instruction incorrectly permitted the jury to convict if it found that Grunwald acted recklessly, when each of the underlying offenses—unlike the offenses in *Jeffs*—require either an intentional or knowing mental state. Second, instead of tracking the statutory language that requires an accomplice to solicit, request, command, encourage, or intentionally aid another *to* commit a crime, paragraph 2 mistakenly replaced "to" with "who," effectively eliminating the requirement that the accomplice's conduct be directed to the accomplishment of the crime. Third, in defining the "knowing" mental state in paragraph 3(b), the instruction focuses on Garcia's conduct rather than Grunwald's. We agree with Grunwald that the instruction misstated the law on accomplice liability in all three respects.

A. The Accomplice Must Have the Mental State Required for the Commission of the Principal Offense.

¶33 The most obvious error in the accomplice liability instruction is that it permits a conviction based on a reckless mental state. Accomplice liability requires that the defendant act "with the mental state required for the commission of [the principal] offense." Utah Code Ann. § 76-2-202 (LexisNexis 2017). It is unnecessary for the accomplice to act "with the same intent, or mental state, as the principal." *State v. Jeffs*, 2010 UT 49, ¶ 49, 243 P.3d 1250. But an accomplice cannot be convicted based on a lesser mental state than that required to commit the underlying offense. *See State v. Calliham*, 2002 UT 86, ¶ 64, 55 P.3d 573 (noting that "accomplice liability adheres only when the accused acts with the mens rea to commit the principal offense").

¶34 This statutory element was addressed in paragraph 3 of the accomplice liability instruction. Paragraph 3 allowed the State to prove one of three alternative mental states.[5] Paragraph 3(a) and 3(b), respectively, instructed the jury that a finding of an intentional or knowing mental state would support a guilty verdict. Paragraph 3(c) allowed the jury to convict if Grunwald acted recklessly, that is, if Grunwald recognized that her conduct could result in Garcia committing the underlying crime but chose to act anyway.

***7** ¶35 In this case, none of the underlying crimes charged could be committed recklessly. *See* Utah Code Ann. § 76-5-202 (aggravated murder requires intentionally or knowingly causing death); *id.* § 76-10-508.1(1) (felony discharge of a firearm requires knowingly endangering a person or intent to intimidate or harass); *id.* §

76-6-106(2)(c) (criminal mischief requires intentional property damage); *id.* §§ 76-6-301–302 (aggravated robbery requires intentional taking by means of force or fear or intentionally or knowingly using force or fear during theft). As a result, the State properly concedes that "including the reckless mental state was erroneous because, as [Grunwald] correctly argues, all of the accomplice liability crimes required the jury to find either an intentional or knowing mental state."

¶36 It was error to instruct the jury in paragraph 3(c) that it could convict Grunwald as an accomplice if she "[r]ecognized that her conduct could result in [Garcia] committing the [principal crime] but chose to act anyway." Instead, Grunwald could not be held liable as an accomplice unless she either intended or knew that her conduct—i.e., intentionally, knowingly, or recklessly soliciting, requesting, commanding encouraging or intentionally aiding Garcia—would result in the commission of the principal crime. By allowing the jury to convict if it found Grunwald acted recklessly as to the results of her conduct, the instructions impermissibly reduced the State's burden with respect to the mental state element.

B. The Accomplice's Conduct Must Be Directed at Committing the Principal Offense.

¶37 The second error Grunwald identified relates to the requirement that an accomplice's conduct must be directed toward accomplishing the principal offense. Paragraph 2 of the accomplice liability instructions allowed the jury to find Grunwald guilty if she "intentionally, knowingly, or recklessly solicited, requested, commanded or intentionally aided [Garcia] *who*" committed the principal crime. The State concedes that the instruction misstates the statutory language, which imposes accomplice liability on one "who solicits, requests, commands, encourages, or intentionally aids another person *to* engage in conduct which constitutes an offense." Utah Code Ann. § 76-2-202 (LexisNexis 2017) (emphasis added). However, the State argues that the substitution of the word "who" for the word "to" does not render the jury instructions erroneous when read as a whole.

¶38 While the substitution of a single word might seem insignificant and might be so in other contexts, substituting "who" for "to" fundamentally changed what the State was required to prove to convict Grunwald as an accomplice. As explained in *Jeffs*, an accomplice must act with the requisite mental state "as to the results of his conduct" and "the results of his conduct must be a criminal offense." *State v. Jeffs*, 2010 UT 49, ¶ 44, 243 P.3d 1250. In other words, an accomplice's conduct must be directed at accomplishing the principal crime. Here, to convict Grunwald as an accomplice, she had to either intend for her conduct to result in Garcia's commission of the underlying crimes or know that her conduct was reasonably certain to cause that result. *See* Utah Code Ann. § 76-2-103(1)–(2) (defining "intentionally" and "knowingly" mens rea).

¶39 To adequately convey this requirement to the jury, the instruction should have required the State to prove that Grunwald solicited, requested, commanded, encouraged, or aided Garcia *to* commit the crime. By substituting the word "who," the instruction permitted the jury to find Grunwald guilty if she solicited, requested, commanded, encouraged, or aided Garcia in any way, so long as Garcia committed the principal crimes. The instructions thus failed to convey the statutory requirement that an accomplice must have the requisite mens rea to commit the principal offense. [6]

C. The Accomplice's Mental State Must Relate to the Results of the Accomplice's Conduct.

***8** ¶40 The third error identified by Grunwald relates to the requirement that an accomplice act with the requisite mental state as to the results of her own conduct. Paragraph 3(b) of the jury instruction, which addresses the "knowing" mental state, allowed the jury to convict her as an accomplice if she "[w]as aware that the principal actor's ... conduct was reasonably certain to result in the principal actor ... committing the [underlying crime]." Grunwald contends that "the instructions defined the knowing mental state with regard to Garcia's conduct, not her own." We agree.

¶41 A person acts "knowingly" if "he is aware that his conduct is reasonably certain to cause the result." Utah Code Ann. § 76-2-103(2) (LexisNexis 2017). Thus, an accomplice acts knowingly if "the accomplice knows that his conduct will most likely cause" the principal crime. *State v. Jeffs*, 2010 UT 49, ¶ 45, 243 P.3d 1250. The accomplice liability instructions misstated the law by permitting a conviction if Grunwald knew that Garcia's conduct—rather than her own—was reasonably certain to result in the commission of the principal crimes. The

jury should have been instructed to find Grunwald not guilty unless the State proved that she acted intentionally or knowingly as to the results of her own conduct in accomplishing the principal crime.

¶42 Through this combination of errors, the jury instructions improperly allowed the jury to convict Grunwald as an accomplice under three impermissible scenarios: (1) if she acted recklessly as to the results of her conduct, rather than intentionally or knowingly; (2) if she directed her actions to some purpose other than the commission of the principal crime; or (3) if she acted knowing that Garcia's actions, rather than her own, were reasonably certain to result in the commission of the principal crime. These errors had the effect of reducing the State's burden of proof at trial. While we recognize that Grunwald's primary defense was compulsion, no reasonable trial strategy would justify trial counsel's failure to object to instructions misstating the elements of accomplice liability in a way that reduced the State's burden of proof. *See* *State* *v. Barela*, 2015 UT 22, ¶ 27, 349 P.3d 676 (holding that "no reasonable lawyer would have found an advantage in understating the mens rea requirement" regardless of whether the error related to the defense theory). As a result, trial counsel was deficient for failing to object to the instructions on Counts One through Seven and Count Eleven.

II. Prejudice

¶43 Deficient performance does not require reversal unless the defendant establishes that "a reasonable probability exists that, but for counsel's error, the result would have been different." *State* *v. Millard*, 2010 UT App 355, ¶ 18, 246 P.3d 151 (citation and internal quotation marks omitted). Grunwald contends that "if the jury had been properly instructed on the law of accomplice liability and the mental states required to prove [that she] acted as an accomplice, ... there is a reasonable probability the jury would have had a reasonable doubt." The State asserts that the errors in this case were not prejudicial because (1) "none of the errors [Grunwald] identifies affected her primary defense—compulsion," and (2) "the objective evidence overwhelmingly demonstrated that [Grunwald] and [Garcia] worked in concert and that she was his loyal teammate."

¶44 To be clear, the burden is on the defendant to affirmatively prove prejudice. *See* *State* *v. Garcia*, 2017 UT 53, ¶ 36, —— P.3d ——. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland* *v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This is "a relatively high hurdle to overcome." *Garcia*, 2017 UT 53, ¶ 44, —— P.3d ——.

***9** ¶45 To determine whether a defendant has met this burden, a reviewing court "needs to focus on the evidence before the jury and whether the jury could reasonably have found" the facts in the defendant's favor "such that a failure to instruct the jury properly undermines confidence in the verdict." *Id.* ¶ 42. Here, because there were three errors in the jury instructions, we must assess whether there is a reasonable probability that the jury convicted due to any one of those errors and otherwise "would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052.

¶46 In assessing each conviction, we assume that the jury found beyond a reasonable doubt both that Garcia committed the principal crimes and that Grunwald "intentionally, knowingly, or recklessly solicited, requested, commanded, encouraged, or intentionally aided" Garcia. Grunwald does not challenge these aspects of the accomplice jury instructions or the sufficiency of the evidence to support these findings. We refer to the act of soliciting, requesting, commanding, encouraging, or intentionally aiding Garcia as Grunwald's "conduct," or as "intentionally aiding" because that variant is most applicable to the facts of this case. With those assumptions in mind, we ask the following questions to determine whether Grunwald suffered prejudice based on any one of the three errors in the jury instructions:

- Is there a reasonable probability that the jury found Grunwald acted recklessly, rather than knowingly or intentionally, as to whether her conduct would result in the commission of the principal crime?

- Is there a reasonable probability that the jury found that **Grunwald's** conduct was not directed to Garcia's commission of the crime?

- Is there a reasonable probability that the jury found that **Grunwald** knew that Garcia's conduct, but not necessarily her own, was reasonably certain to result in the crime?

¶47 We first address those convictions where there is no reasonable probability that the erroneous jury instructions affected the outcome of the trial. We then turn to those convictions where there is a reasonable probability that the jury might well have acquitted **Grunwald** if it had been properly instructed.

A. **Grunwald** Has Not Established Prejudice with Respect to Counts One and Eleven.

¶48 Based on our review of the evidence presented at trial, we conclude there is no reasonable probability that the jury would have acquitted **Grunwald** on Counts One and Eleven but for the erroneous instructions on accomplice liability.

1. Aggravated Murder of Sergeant Wride (Count One)

¶49 Count One charged **Grunwald** as an accomplice to the crime of aggravated murder arising from the shooting death of Sergeant Wride. To convict **Grunwald** of this charge, the **State** had to prove that **Grunwald** either intended that her conduct would result in Garcia committing the crime of aggravated murder or that she was aware that her conduct was reasonably certain to result in Garcia committing that crime. *See* Utah Code Ann. § 76-2-202 (LexisNexis 2017) (accomplice liability); *see also id.* § 76-5-202(1) (aggravated murder); *id.* § 76-2-103(1)-(2) (mens rea definitions). Based on the evidence presented at trial, we conclude that there is no reasonable probability that the jury would have acquitted **Grunwald** of this count if it had been correctly instructed on accomplice liability.

¶50 First, there is no reasonable probability that the jury based its verdict on a finding that **Grunwald** was merely reckless as to the results of her conduct. It was undisputed that Garcia was holding a gun and looking back at Sergeant Wride's patrol car when Garcia **stated** that he was "going to buck [the officer] in the fucking head." Although **Grunwald** claimed that she did not know the meaning of the term "buck" and assumed police cars had bulletproof windshields, no reasonable person could have misinterpreted Garcia's objective under the circumstances. If Garcia had not been holding the gun when he **stated** his intent to do something to Sergeant Wride "in the head," the situation might have been more ambiguous, creating a real possibility that the jury convicted **Grunwald** for recklessly disregarding the risk that her conduct would result in the murder. But under the circumstances, there is no reasonable probability that the jury convicted on this basis.

***10** ¶51 Second, there is no reasonable probability that the jury convicted **Grunwald** because she aided Garcia in some way other than to commit the crime of aggravated murder. The undisputed evidence showed that, after Garcia announced his intention, **Grunwald** applied the brake, enabling the truck to shift into drive. It is unclear whether **Grunwald** or Garcia shifted the truck into drive, *see supra* ¶ 8 n.3, but there is no dispute that she did not immediately attempt to drive away or to shift back into park. Instead, she held her foot on the brake for three-and-a-half minutes while Garcia shifted in his seat to get into position to fire. **Grunwald** was observed watching traffic behind the truck from her side view mirror, which allowed her to see around Sergeant Wride's vehicle and to monitor the traffic approaching from behind. Garcia waited to open fire until there was a significant lull in traffic, leading to a reasonable inference that **Grunwald** was helping Garcia time the shooting to avoid witnesses and to ensure a safe and speedy getaway. In addition, **Grunwald** did not accelerate until after several shots were fired, strongly suggesting that she waited to flee until after the murder had been accomplished. By remaining stationary, keeping a lookout, and acting as the getaway driver, **Grunwald** enabled Garcia to fire the shots that killed Sergeant Wride.

¶52 **Grunwald** argues that "this evidence, the brake lights, the gear shifting, watching the traffic and eventually driving away," was "not the only evidence the jury heard of [**Grunwald**] soliciting, requesting, commanding, or aiding Garcia," and thus the jury could have relied on a different factual basis in reaching its verdict. For example, **Grunwald** argues that the jury might have convicted her because she failed to tell Sergeant Wride that there was a warrant for Garcia's arrest, or that Garcia had just provided false information or even because she had aided

Garcia in various ways in the past. We consider it highly improbable that the jury convicted on such a theory. In closing argument, the State asked the jury to find that Grunwald "intentionally aided the principal actor" when she prepared for the shooting by "shift[ing] her car into drive, and [putting] the brakes on, holding on until they're ready"; watched her mirror for a break in traffic so that "others would not witness the murder" and so that there would be no cars around to "preclude their getaway"; and then drove away to safety, "protecting herself and her man from apprehension." Given that the State focused solely on these actions in arguing that Grunwald was guilty on Count One, it is highly improbable that the jury would have convicted Grunwald based on other conduct.

¶53 Third, there is no reasonable probability that the jury convicted Grunwald on the theory that she knew Garcia was going to shoot Sergeant Wride but did not know that her conduct would result in Garcia committing that crime. As detailed above, the State presented persuasive evidence that Grunwald's own actions were designed to help Garcia commit the crime. Consequently, Grunwald's defense at trial depended on the jury believing her claim that Garcia pointed his gun at her head, compelling her to assist him. In returning a guilty verdict, the jury necessarily rejected the compulsion defense. Once it did so, the only reasonable conclusion from the evidence was that Grunwald intended or knew that her conduct in keeping the truck in drive with her foot on the brake, watching for a lull in traffic, and preparing to flee, would result in Garcia committing the crime of aggravated murder.

¶54 Even if the jury had been correctly instructed on accomplice liability, there is no reasonable probability that it would have acquitted on Count One. Accordingly, we affirm Grunwald's aggravated murder conviction.

2. The Carjacking (Count Eleven)

¶55 Similarly, there is no reasonable probability that but for the erroneous instructions the jury would have reached a different result on Count Eleven, which charged Grunwald as an accomplice to aggravated robbery based on the carjacking. To convict Grunwald of this crime, the State had to prove that Grunwald either intended that her conduct would result in Garcia committing the crime of aggravated robbery or that she was aware that her conduct was reasonably certain to result in Garcia committing that crime. *See* Utah Code Ann. § 76-2-202 (LexisNexis 2017) (accomplice liability); *id.* § 76-6-301 (robbery); *id.* § 76-6-302 (aggravated robbery); *id.* §§ 76-2-103(1)-(2) (mens rea definitions).

***11** ¶56 The evidence at trial showed that Grunwald and Garcia abandoned her disabled truck after exiting I-15 at the Nephi Main Street exit. The videotape introduced at trial shows Garcia running away from the truck and Grunwald following. Grunwald testified that as soon as they left the truck, Garcia told her "to find a fucking car." Grunwald ran toward a passing motorist's vehicle, waving the motorist down. On cross-examination, Grunwald acknowledged that she stopped the driver, enabling Garcia to "point his gun at her and get her out." As soon as the vehicle came to a stop, Grunwald opened the passenger side door and climbed in as Garcia ordered the driver out of the driver's seat at gunpoint.

¶57 In her testimony, Grunwald claimed that Garcia threatened her, at one point turning the gun on her and telling her "to fucking hurry." She testified that she "was scared for dear life" and had "no choice" but to participate in the carjacking. But once the jury had rejected her compulsion defense, the evidence left no room for any other conclusion except that Grunwald intentionally aided Garcia to commit the carjacking.

¶58 Based on this evidence, there is no reasonable probability that the jury convicted Grunwald because she was merely reckless as to whether her conduct could result in a carjacking. Nor is there any question that she intentionally aided Garcia in committing the carjacking itself, as opposed to intentionally aiding him in some other manner. Finally, because Grunwald's mens rea with respect to the carjacking cannot be characterized as anything less than intentional, there is no reasonable probability that the jury convicted her based on the erroneous "knowingly" instruction. The evidence permitted no conclusion other than that Grunwald intended her own conduct in waving down a passing motorist to result in the carjacking. Accordingly, we affirm Grunwald's aggravated robbery conviction.

B. Grunwald Has Established Prejudice on the Remaining Counts.

¶59 On the remaining counts, we conclude that there is a reasonable probability that Grunwald may have received a more favorable outcome but for the erroneous jury instructions. We begin with those counts arising from the shots fired at Trooper Blankenagel and at the

semi-trailer truck, where the evidence suggesting that Grunwald intended or knew that her conduct would result in the principal crimes was weakest. We then turn to the convictions relating to the shooting of Deputy Sherwood. Although the State presented stronger evidence relating to those counts, our confidence in those convictions is ultimately undermined by the erroneous jury instructions.

1. Shooting at Trooper Blankenagel (Count Five)

¶60 Count Five charged Grunwald as an accomplice to felony unlawful discharge of a firearm based on the shots Garcia fired at Trooper Blankenagel. The evidence presented at trial showed that Trooper Blankenagel spotted Grunwald's truck on I-15 and gave chase. Grunwald saw Trooper Blankenagel following the truck with the patrol vehicle's overhead lights on, but she continued driving up to 110 miles per hour. After a few miles, Garcia fired at Trooper Blankenagel from the back window of the truck. The bullet did not strike the vehicle, but the pursuit ended when Trooper Blankenagel hit a spike strip that had been deployed to stop Grunwald.

¶61 At trial, the State argued that Grunwald intentionally aided Garcia "by driving and enabling him to shoot." The State argued that, by the time Garcia fired at Trooper Blankenagel, Grunwald was "more than aware of what [Garcia] could and would do," suggesting that she knew Garcia would fire at any officer who attempted to apprehend them but chose to continue driving anyway. On appeal, the State does not specifically address whether Grunwald suffered prejudice with respect to this count, other than to argue generally that the evidence overwhelmingly refuted Grunwald's compulsion defense and established that she was Garcia's willing partner throughout the crime spree.

***12** ¶62 In finding Grunwald guilty, the jury clearly rejected her attempt to distance herself from Garcia and found that she was a willing participant. But a willing participant as to what? As *Jeffs* makes clear, an accomplice must act with the requisite mental state "as to the results of [her] conduct" and "the results of [her] conduct must be a criminal offense." *State v. Jeffs*, 2010 UT 49, ¶ 44, 243 P.3d 1250.

¶63 Based on the evidence presented at trial, it is certainly possible the jury found that Grunwald intended or reasonably knew that her conduct—that is, continuing to drive, leaving Garcia free to aim and fire his gun—would result in Garcia shooting at Trooper Blankenagel. Garcia had demonstrated that he would open fire on law enforcement and the jury could have reasonably inferred that Grunwald intended or knew that her conduct was reasonably certain to result in Garcia shooting at other pursuing officers. However, it is at least equally likely that the jury convicted because Grunwald intentionally aided Garcia by continuing to drive, even though she did not have the mental state required for the commission of the underlying crime—unlawful discharge of a firearm. Unlike the evidence supporting Count One, there was no evidence that Garcia announced his intention to discharge the firearm at Trooper Blankenagel or that Grunwald undertook some action specifically designed to accomplish that crime, such as holding her foot on the brake, watching for traffic, and fleeing as soon as the crime was accomplished.

¶64 There is a reasonable probability that the jury convicted on Count Five based on one or more of the three errors in the jury instructions. First, the jury may have improperly convicted Grunwald based on a reckless mental state, finding that Grunwald recognized that her conduct could result in Garcia discharging the firearm but chose to continue driving anyway. Second, there is a reasonable probability that the jury convicted even though it found that Grunwald's conduct in continuing to drive was directed to helping Garcia evade law enforcement, a different and uncharged crime, not to the commission of unlawfully discharging his firearm. And, third, there is a reasonable probability that the jury may have convicted without finding that Grunwald knew that her own conduct in driving the truck was reasonably certain to result in the crime. Because of the likelihood of a more favorable outcome if the jury had been correctly instructed, we must vacate Grunwald's conviction on Count Five.

2. The Shooting at the Semi-Trailer Truck (Counts Six and Seven)

¶65 Counts Six and Seven charged Grunwald as an accomplice to the crimes of felony discharge of a firearm and criminal mischief, respectively, based on the shooting that damaged the semi-trailer truck. As in Count Five, the trial evidence relating to this event was sparse. Shortly after evading Trooper Blankenagel, as Grunwald continued to drive down I-15, Garcia fired three shots out the passenger side window at the semi-trailer truck.

¶66 Like Count Five, the State's theory of accomplice liability on Counts Six and Seven is based on Grunwald intentionally aiding Garcia by driving the truck. As a result, our analysis of Count Five applies equally here. There is a reasonable probability that the jury convicted Grunwald on Counts Six and Seven because she intentionally aided Garcia by continuing to drive, even though she did not intend or know that her conduct would result in Garcia firing at the semi-trailer truck. Given the lack of evidence showing that Grunwald acted with the requisite mental state to commit the underlying crimes, there is a reasonable probability that the jury would have had a reasonable doubt regarding Grunwald's guilt if it had been properly instructed. Therefore, we must vacate the convictions on Counts Six and Seven.

3. The Shooting of Deputy Sherwood (Counts Two and Three)

***13** ¶67 Counts Two and Three charged Grunwald as an accomplice to the crimes of attempted aggravated murder and felony unlawful discharge of a firearm causing serious bodily injury, respectively. Both counts related to the shooting of Deputy Sherwood.

¶68 The evidence at trial showed that, as Deputy Sherwood approached the truck on Main Street in Santaquin, Grunwald initially accelerated and maneuvered past cars in an apparent attempt to outrun him. But then Grunwald suddenly applied her brakes, reducing the distance between her truck and Deputy Sherwood. At that point, Garcia fired through the truck's back window, striking Deputy Sherwood in the head and causing serious bodily injury. Immediately after the shooting, Grunwald accelerated and then quickly made a U-turn to head back onto I-15.

¶69 In contrast to Counts Five through Seven, which relied solely on Grunwald's continued driving, the State presented evidence suggesting that she took additional action designed to enable the commission of these crimes. Specifically, the videotape from Deputy Sherwood's dash camera shows that Grunwald abruptly applied the brakes right before Garcia began firing. In closing argument, the State focused on Grunwald's conduct, arguing that "she hits her brakes, slows down, closes the gap between [her truck] and Deputy Sherwood" thereby "helping [Garcia] accomplish the attempted aggravated murder" and the felony discharge of a firearm resulting in serious bodily injury.

¶70 However, the evidence leaves significant doubt as to whether Grunwald intended that conduct to result in Garcia committing these crimes or knew it was reasonably certain to have such a result. At trial, Grunwald testified that she slowed down because of the traffic in front of her. This explanation was supported by the video from Deputy Sherwood's patrol car, showing slower vehicles ahead in Grunwald's lane. In addition, Deputy Sherwood testified that Grunwald would have had to slow down to avoid hitting the car in front of her.

¶71 On the other hand, there was also evidence to suggest that Grunwald did have the requisite intent to aid in the commission of these crimes. Grunwald knew that Garcia had previously fired at an officer, knew that they were being pursued by a police car, and knew that Garcia still had the gun. Grunwald admitted at trial that she could have used the left turn lane to swerve around the cars in her path. Immediately after Garcia fired at Deputy Sherwood, Grunwald sped up again. Based on this evidence, the jury reasonably might have inferred that she chose to suddenly brake at that moment, intending or knowing that her conduct would give Garcia the opportunity to shoot at the officer in pursuit. Even without the braking, the jury could have reasonably inferred that Grunwald continued to drive the truck for the purpose of ensuring that Garcia's hands would be free to shoot at any pursuing officers. Had the jury been correctly instructed, this evidence would be sufficient to support the convictions on Counts Two and Three.

¶72 However, we lack confidence that the jury would have reached the same result but for the errors in the accomplice liability instructions. Once the jury rejected the compulsion defense, there was no question that Grunwald had intentionally aided Garcia by driving the truck. But the instructions failed to explain how that intentional aid must relate to the commission of the underlying offenses.

***14** ¶73 As in Counts Five through Seven, there is a reasonable probability that the jury convicted Grunwald of Counts Two and Three based on one or more of the errors in the jury instructions. First, the jury may have improperly convicted Grunwald because she intentionally aided Garcia by driving the truck even though she was merely reckless as to whether her continued driving would result in Garcia shooting at Deputy Sherwood. Second, the instructions allowed the jury to convict if Grunwald's

purpose in driving the truck was to aid Garcia in avoiding apprehension or to achieve some objective other than the commission of the charged crimes. Third, the jury may have convicted Grunwald because she knew that Garcia's conduct, but not her own, was reasonably certain to result in Garcia firing at Deputy Sherwood.

¶74 In sum, given the evidence presented, there is a reasonable probability that the jury convicted on these counts without finding that Grunwald intentionally or knowingly directed her conduct to aid Garcia in committing the principal crimes. Accordingly, we vacate the convictions on these counts.

CONCLUSION

¶75 By failing to object to jury instructions that misstated the law regarding accomplice liability, Grunwald's trial counsel's performance fell below the level of representation guaranteed by the federal and state constitutions. Having carefully reviewed the evidence at trial, we conclude that there is no reasonable probability that the deficient performance affected the verdict on Counts One and Eleven, and therefore, we affirm those convictions. However, there is a reasonable probability that Grunwald may have secured an acquittal on the remaining counts had the jury been correctly instructed on the law. As a result, we vacate and remand for a new trial on Counts Two, Three, Five, Six, and Seven. [7]

All Citations

--- P.3d ----, 2018 WL 1443867, 2018 UT App 46

Footnotes

1 "This court typically does not include the names of crime victims, witnesses, or other innocent parties in its decisions. We make an exception in this case due to the considerable notoriety this criminal episode has attracted. The ... identity [of the officers involved in this case] is well known, and obscuring [their] identit[ies] in this decision would serve no purpose." *State v. Chavez-Reyes*, 2015 UT App 202, ¶ 2 n.2, 357 P.3d 1012.

2 On appeal, Grunwald does not challenge her convictions for fleeing an accident scene (Count Nine), failure to respond to an officer's signal to stop (Count Ten), and possession of a controlled substance (Count Twelve), in which she was charged as a principal. She was additionally charged as an accomplice to attempted aggravated murder for the shots fired at Trooper Blankenagel (Count Four), but she was acquitted of that charge.

3 While Grunwald testified that Garcia shifted the truck into drive, the State's theory at trial was that Grunwald herself shifted the truck into drive in preparation for the subsequent shooting. Our analysis does not turn on whether the jury believed that Garcia or Grunwald operated the gearshift.

4 "Mens rea" means "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." *Mens Rea*, Black's Law Dictionary (10th ed. 2014).

5 The inclusion of recklessness in paragraph 3 is not to be confused with the use of the term "recklessly" in paragraph 2. Paragraph 3 deals with the element that the accomplice must have the mental state required to commit the principal offense. On the other hand, paragraph 2 deals with the separate element that the accomplice must solicit, request, command, encourage, or intentionally aid the principal. As Grunwald acknowledges, "Because the statute does not designate what mental state is required for these acts [of soliciting, requesting, commanding, or encouraging] and because it is not a strict liability statute, any of the three recognized mental states apply." *See* Utah Code § 76-2-101 (LexisNexis 2017). As a result, paragraph 2 correctly required the jury to find that Grunwald " '[i]ntentionally,' 'knowingly,' or 'recklessly' solicited, requested, commanded, encouraged, or 'intentionally' aided" Garcia. The error was the inclusion of paragraph 3(c), which allowed the jury to convict Grunwald if she "[r]ecognized that her conduct could result in [Garcia] committing the [principal crime] but chose to act anyway."

6 The State argues that the accomplice liability instructions remedied any ambiguity created by the "who"/"to" error in paragraph 2 because paragraph 3 required the jury to find that Grunwald either intended that Garcia commit the charged crimes, knew that he would do so, or was reckless as to whether he would do so. The State contends that, when read as a whole, the instruction required the jury not only to find that Grunwald aided Garcia but to find that she intended, through her aid, to assist him in committing the crimes. However, as explained in this opinion, paragraph 3(b) incorrectly focused on the results of Garcia's actions, rather than the results of Grunwald's actions, and paragraph 3(c) erroneously allowed the jury to convict based on recklessness. Given these additional errors, we cannot say that the jury instructions, when read as a whole, adequately stated the law.

7 In so ruling, we recognize that **Grunwald** stands convicted of aggravated murder and aggravated robbery, for which she is serving consecutive sentences of twenty-five years to life and five years to life, respectively. Our remand for a new trial on the counts requiring reversal is the relief to which she is entitled for her partial success on appeal. Whether she will be retried on those counts is, of course, a judgment call for the **State**.

76-2-202 Criminal responsibility for direct commission of offense or for conduct of another.

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Enacted by Chapter 196, 1973 General Session

Tab 4

USE OF FORCE AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brian M. Greene

Senate Sponsor: Jacob L. Anderegg

LONG TITLE

General Description:

This bill modifies criminal provisions related to use of force.

Highlighted Provisions:

This bill:

- addresses when a person is not justified in using force.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

76-2-402, as last amended by Laws of Utah 2010, Chapters 324 and 361

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-2-402** is amended to read:

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

(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, unless the use of force is a reasonable response to factors unrelated to the commission, attempted commission, or fleeing after the commission of that 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.

CR____. Defense of Self or Other. Approved 3/7/18

You must decide whether the defense of Defense of Self or Other applies in this case. Under that defense, the defendant is justified in using force against another when and to the extent that the defendant reasonably believes that force is necessary to defend [himself] [herself], or a third party, against another person's imminent use of unlawful force.

The defendant is justified in using force intended or likely to cause death or serious bodily injury only if the defendant reasonably believes that:

1. Force is necessary to prevent death or serious bodily injury to the defendant or a third person as a result of another person's imminent use of unlawful force; or,
2. To prevent the commission of [Forcible Felony], the elements of which can be found under jury instruction [_____].

The defendant is not justified in using force if the defendant:

1. Initially provokes the use of force against another person with the intent to use force as an excuse to inflict bodily harm upon the assailant;
2. Is attempting to commit, committing, or fleeing after the commission or attempted commission of [Felony], the elements of which can be found under jury instruction [_____]; 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 the defendant's intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

The following do not, by themselves, constitute "combat by agreement":

1. Voluntarily entering into or remaining in an ongoing relationship; or
2. Entering or remaining in a place where one has a legal right to be.

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