UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING AGENDA

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
September 12, 2018 – 12:00 p.m. to 2:00 p.m.

12:00	Welcome and Approval of Minutes	Action	Tab 1	Judge Blanch
12:05	Assault Instructions: - *76-5-102 & 76-5-103* - *77-36-1 & 77-36-1.1* - *78B-7-102* - *Keene v. Bonser* - *State v. Salt*	Discussion / Action	Tab 2	Sandi Johnson
1:00	HB 102 – Use of Force Amendments - *Review new instruction prior to publication: Defense of Self or Others*	Discussion / Action	Tab 3	Committee
1:15	Object Rape / Definition of Penetration - *CR1607. Object Rape* - *CR1608. Object Rape of a Child* - *State v. Patterson*	Discussion / Action	Tab 4	Judge Blanch
1:25	Imperfect Self-Defense Instruction - *State v. Lee* - *State v. Ramos*	Discussion	Tab 5	Judge Blanch
1:55	Review 2019 Meeting Dates	Discussion		Michael Drechsel
2:00	Adjourn	Action		Judge Blanch

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/muji-criminal/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Wednesday of each month from 12:00 noon to 2:00 p.m., unless otherwise specifically noted.

Oct 3, 2018	**Jan 2, 2019**	Apr 3, 2019	**Jul 3, 2019**	Oct 2, 2019
Nov 7, 2018	Feb 6, 2019	May 1, 2019	Aug 7, 2019	Nov 7, 2019
Dec 5, 2018	Mar 6, 2019	Jun 5, 2019	Sept 4, 2019	Dec 4, 2019

UPCOMING ASSIGNMENTS:
1. Sandi Johnson = Assault; Burglary; Robbery
2. Judge McCullagh = DUI; Traffic
3. Karen Klucznik & Mark Fields = Murder
4. Stephen Nelson = Use of Force; Prisoner Offenses
5. Judge Jones = Wildlife Offenses

TAB 1

Minutes from June 6, 2018 Meeting

NOTES: The minutes were prepared by a person who was not present at the meeting. The minutes were prepared by listening to an audio recording of the meeting. The individual who prepared the minutes was not familiar with the voices associated with each speaker. As a result, the minutes refer to "the committee" discussing matters, without any specific attribution to any particular person. Please review the minutes carefully in light of this information.

MINUTES

STANDING COMMITTEE ON
THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

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

Wednesday, June 6, 2018
12:00 p.m. to 1:30 p.m.
Judicial Council Room

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

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

Judge Blanch welcomed everyone to the meeting. The committee considered the minutes from the May 2018 meeting.

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

2. Assault Instructions **Committee**

Consideration of this agenda item was carried over for discussion / action at the committee's next meeting.

3. Accomplice Liability Instructions **Committee**

The committee addressed the party and accomplice liability instructions (CR403, CR309A, and CR309B). The committee discussed the differences between party liability / accomplice liability and principle liability and how the model instructions should reflect those differences. The committee discussed State v. Grunwald, 2018 UT App 46 and whether / how that case can

inform potential amendments to these model rules. The committee discussed some of the various circumstances that would require the use of the model rules at issue. The committee discussed whether CR403 and CR309A/B are elements instructions or definition instructions. The committee discussed a specific change to CR309A/B(2)(c) to state: "recognized that his/her conduct could result in [the principle actor] committing the crime of _____(CRIME) but the defendant chose to act anyway."

The committee discussed what these model rules should be titled: party liability OR accomplice liability. While the legislature has disfavored the use of "accomplice," "party" liability invokes "the parties to the case" considerations (in other words, "party" to the crime vs. "party" to the case). The committee discussed practical applications of how to instruct the jury through the use of a definitions instruction and an elements instruction. The committee agreed that there should not be two elements instructions for any single charge in a case. One solution is to reference the relevant element instruction in an accomplice liability definition instruction. This would allow the use of the stock element instructions already outlined in MUJI.

The committee then cooperated on the preparation of a draft elements instruction of CR403A regarding "party liability," which read:

CR403A. Party Liability – Elements. Approved 6-6-18.

(DEFENDANT'S NAME) is charged as a party to the offense [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), as a party to the offense;
2. [Insert element two of (CRIME)];
3. [Insert element three of (CRIME)];
4. Etc.

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.

References
State v. Grunwald, 2018 UT App 45
State v. Jeffs, 2010 UT 49
Utah Code § 76-2-202

Committee Note
This instruction must be used with CR403B.

The committee then cooperated on the preparation of a draft definition instruction of CR403B regarding "party liability," which read:

CR 403B. Party Liability – Definition. Approved 6-6-18.

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

1. The person had the mental state required to commit the charged offense;

AND

2. The person
   a. directly committed the charged offense; or
   b. intentionally, knowingly, or recklessly solicited, requested, commanded or encouraged another person to commit the charged offense; or
   c. intentionally aided another person to commit the charged offense;

AND

3. The charged offense was committed either by that person or another person.

References
State v. Grunwald, 2018 UT App 45
State v. Jeffs, 2010 UT 49
Utah Code § 76-2-202

Mr. Phelps moved to approve the instructions as amended. Ms. Klucznik seconded. The instruction was unanimously approved.

4. HB 102 – Use of Force Amendments **Committee**

This matter was not considered by the committee during the meeting.

5. Adjourn **Committee**

The meeting was adjourned at approximately 1:30 p.m. The next meeting is Wednesday, September 12, 2018.

TAB 2

Assault Instructions

NOTES: Proposed instructions directly follow this tab, with reference materials included after that, as follows:

TAB 2 – draft model assault instructions

Utah Criminal Code:
TAB 2A - Utah Code § 76-5-102 “Assault – Penalties”
TAB 2B - Utah Code § 76-5-103 “Aggravated Assault – Penalties”

Cohabitant Abuse Procedures Act:
TAB 2C - Utah Code § 77-36-1 “Definitions”
TAB 2D - Utah Code § 77-36-1.1 "Enhancement of offense and penalty for subsequent domestic violence offenses”

Protective Orders – Cohabitant Abuse Act:
TAB 2E - Utah Code § 78B-7-102 “Definitions”

Caselaw:
TAB 2F - Keene v. Bonser, 2005 UT App 37
TAB 2G - State v. Salt, 2015 UT App 72

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)

TAB 2A:

Utah Code § 76-5-102

“Assault – Penalties”

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

TAB 2B:

Utah Code § 76-5-103

“Aggravated Assault – Penalties”

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

TAB 2C:

Utah Code § 77-36-1
Cohabitant Abuse Procedures Act
“Definitions”

Effective 5/8/2018

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 criminal intent, 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), except that a 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 federal Firearms Act, 18 U.S.C. Sec. 921 et seq.;

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

(q) threatening use of a dangerous weapon, as described in Section 76-10-506;

(r) threatening violence, as described in Section 76-5-107;

(s) tampering with a witness, as described in Section 76-8-508;

(t) retaliation against a witness or victim, as described in Section 76-8-508.3;

(u) unlawful distribution of an intimate image, as described in Section 76-5b-203;

(v) sexual battery, as described in Section 76-9-702.1;

(w) voyeurism, as described in Section 76-9-702.7;

(x) damage to or interruption of a communication device, as described in Section 76-6-108; or

(y) an offense described in Section 77-20-3.5.

(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 couple 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 couple 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 255, 2018 General Session

TAB 2D:

Utah Code § 77-36-1.1
"Enhancement of offense and penalty for subsequent domestic violence offenses”

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

TAB 2E:

Utah Code § 78B-7-102
Protective Orders – Cohabitant Abuse Act “Definitions”

Effective 5/8/2018

78B-7-102 Definitions.

As used in this chapter:

(1) "Abuse" means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.

(2) "Cohabitant" means an emancipated person pursuant to Section 15-2-1 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 as the person's parent, grandparent, sibling, or any other person related to the person by consanguinity or affinity to the second degree;

(d) has or had one or more children in common with the other party;

(e) is the biological parent of the other party's unborn child;

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

(g) is or was in a consensual sexual relationship with the other party.

(3) Notwithstanding Subsection (2), "cohabitant" does not include:

(a) the relationship of natural parent, adoptive parent, or step-parent to a minor; or

(b) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(4) "Court clerk" means a district court clerk.

(5) "Domestic violence" means the same as that term is defined in Section 77-36-1.

(6) "Ex parte protective order" means an order issued without notice to the respondent in accordance with this chapter.

(7) "Foreign protection order" means the same as that term is defined in Section 78B-7-302.

(8) "Law enforcement unit" or "law enforcement agency" means any public agency having general police power and charged with making arrests in connection with enforcement of the criminal statutes and ordinances of this state or any political subdivision.

(9) "Peace officer" means those persons specified in Title 53, Chapter 13, Peace Officer Classifications.

(10) "Protective order" means:

(a) an order issued pursuant to this chapter subsequent to a hearing on the petition, of which the petitioner and respondent have been given notice in accordance with this chapter; or

(b) an order issued under Subsection 77-36-5.1(6).

Amended by Chapter 255, 2018 General Session

TAB 2F:

Keene v. Bonser, 2005 UT App 37

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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TAB 2G:

State v. Salt, 2015 UT App 72

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

Document (1)

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

HB 102 – Use of Force Amendments

NOTES:

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)

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.

TAB 4

Object Rape / Definition of Penetration

NOTES: The materials under in this tab include the current versions of MUJI Criminal Instruction 1607 ("Object Rape") and 1608 ("Object Rape of a Child"). These two instructions should be reviewed in light of the Utah Court of Appeals' decision in State v. Patterson, 2017 UT App 194, which is also attached under this tab.

CR1607 Object Rape.
(DEFENDANT'S NAME) is charged [in Count ___] with committing Object Rape [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 caused the penetration, however slight, of ([VICTIM'S NAME][MINOR'S INITIALS])'s genital or anal opening, by any object or substance other than the mouth or genitals;
3. The act was without ([VICTIM'S NAME] [MINOR'S INITIALS])'s consent;
4. (DEFENDANT'S NAME) acted with intent, knowledge or recklessness that ([VICTIM'S NAME] [MINOR'S INITIALS]) did not consent; and
5. (DEFENDANT'S NAME) did the act with the intent to:
    a. cause substantial emotional or bodily pain to ([VICTIM'S NAME] [MINOR'S INITIALS]); or
    b. arouse or gratify the sexual desire of any person.

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 § 76-5-402.2
State v. Barela, 2015 UT 22

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

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. *See* SVF 1617, Sexual Offense Prior Conviction or SVF 1618, Serious Bodily Injury.

Amended Dates:
September 2015

CR1608 Object Rape of a Child.
DEFENDANT'S NAME) is charged [in Count ___] with committing Object Rape of a Child [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 caused the penetration or touched the skin, however slight, of (MINOR'S INITIALS)'s genital or anal opening with any object or substance that is not a part of the human body;
3. With the intent to:

a. cause substantial emotional or bodily pain to (MINOR'S INITIALS); or
b. arouse or gratify the sexual desire of any person; and

4. (MINOR'S INITIALS) was under the age of 14 at the time of the conduct.

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 § 76-5-402.3
Utah Code § 76-5-407
State v. Martinez, 2002 UT 60
State v. Martinez, 2000 UT App 320

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

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. *See* SVF 1617, Sexual Offense Prior Conviction or SVF 1618, Serious Bodily Injury.

Amended Dates:
September 2015

407 P.3d 1002
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Cory R. PATTERSON, Appellant.

No. 20150791-CA
|
Filed October 19, 2017

Synopsis
Background: Defendant was convicted in the Fourth District Court, Provo Department, No. 141403037, Derek P. Pullan, J., of object rape. Defendant appealed.

[Holding:] The Court of Appeals, Michele M. Christiansen, J., held that jury reasonably inferred that defendant **penetrated** victim's vagina with his fingers to support defendant's conviction.

Affirmed.

West Headnotes (11)

[1] **Criminal Law**
Construction of Evidence
Criminal Law
Inferences or deductions from evidence

When the Court of Appeals reviews a challenge to the sufficiency of the evidence, it reviews the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury's verdict.

Cases that cite this headnote

[2] **Criminal Law**
Weight and sufficiency
Criminal Law
Construction of Evidence
Criminal Law
Reasonable doubt

The Court of Appeals will vacate a conviction on sufficiency grounds only when the evidence, viewed in the light most favorable to the verdict, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime; to conduct this analysis, the Court of Appeals first reviews the elements of the relevant statute and then considers the evidence presented to the jury to determine whether evidence of every element of the crime was adduced at trial.

Cases that cite this headnote

[3] **Sex Offenses**
Bodily contact; **penetration**

Jury reasonably inferred that defendant **penetrated** victim's vagina with his fingers to support defendant's conviction for object rape, although victim's testimony was susceptible to two interpretations, including one in which defendant did not **penetrate** victim's vagina; victim's testimony was not equally consistent with both interpretations as she testified that defendant's actions when he tried to put his fingers up victim's vagina "really hurt" and that she "had never felt anything like that before," and defendant confessed that he had been attempting to **penetrate** victim's vagina. Utah Code Ann. § 76-5-402.2(1).

Cases that cite this headnote

[4] **Sex Offenses**
Object, weapon, or device

"**Penetration**" under the statute governing object rape means entry between the outer folds of the labia. Utah Code Ann. § 76-5-402.2(1).

Cases that cite this headnote

[5] **Criminal Law**
Weight and sufficiency

To determine whether sufficient evidence was presented at trial, the Court of Appeals must scrutinize the testimony elicited at trial.

Cases that cite this headnote

[6] **Criminal Law**
Innocence
Criminal Law
Weight of Evidence in General

Notwithstanding the presumptions in favor of the jury's decision, the Court of Appeals still has the right to review the sufficiency of the evidence to support the verdict; the fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt.

Cases that cite this headnote

[7] **Criminal Law**
Construction of Evidence
Criminal Law
Inferences or deductions from evidence

In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, a reviewing court will stretch the evidentiary fabric as far as it will go, but this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict.

Cases that cite this headnote

[8] **Sex Offenses**
Sex Offenses
Sex Offenses
Weight and Sufficiency

Sex crimes are defined with great specificity and require concomitant specificity of proof.

Cases that cite this headnote

[9] **Criminal Law**
Elements of offense in general

The state has the burden of proving by evidence every essential element of the charged crime.

Cases that cite this headnote

[10] **Criminal Law**
Presumptions
Criminal Law
Inferences from evidence

The difference between a permissible inference and impermissible speculation by a jury in a criminal trial is a difficult distinction for which a bright-line methodology is elusive; an "inference" is a conclusion reached by considering other facts and deducing a logical consequence from them whereas "speculation" is the act or practice of theorizing about matters over which there is no certain knowledge.

Cases that cite this headnote

[11] **Criminal Law**
Inferences from evidence

A jury's inference is reasonable if there is an evidentiary foundation to draw and support the conclusion but is impermissible speculation when there is no underlying evidence to support

the conclusion; put another way, an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof.

Cases that cite this headnote

***1003** Fourth District Court, Provo Department, The Honorable Derek P. Pullan, No. 141403037

Attorneys and Law Firms

Dustin M. Parmley, Attorney for Appellant

Sean D. Reyes and Tera J. Peterson, Attorneys for Appellee

Judge Michele M. Christiansen authored this Opinion, in which Judges Gregory K. Orme and Jill M. Pohlman concurred.

Opinion

CHRISTIANSEN, Judge:

¶1 Defendant Cory R. Patterson challenges his conviction on one count of object rape, arguing that the evidence was insufficient to support the jury's verdict. He does not challenge his convictions on two counts of forcible sexual abuse, stemming from the same incident. We conclude that the evidence adduced at trial was sufficient for the jury to find every element of object rape, and we therefore affirm.

[1] [2]¶2 When we review a challenge to the sufficiency of the evidence, we review the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury's verdict. *State v. Pullman*, 2013 UT App 168, ¶ 4, 306 P.3d 827. We will vacate the conviction only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime. *Id.*; *see also State v. Hamilton*, 827 P.2d 232, 236 (Utah 1992). To conduct this analysis, we first review the elements of the relevant statute. We then consider the evidence presented to the jury to determine ***1004** whether evidence of every element of the crime was adduced at trial.

[3] [4]¶3 Defendant was charged with object rape. A person is guilty of object rape when the person, "without the victim's consent, causes the **penetration**, however slight, of the genital or anal opening of another person who is 14 years of age or older,[1] by any foreign object, substance, instrument, or device, including a part of the human body other than the mouth or genitals, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person." Utah Code Ann. § 76-5-402.2(1) (LexisNexis Supp. 2016). "**Penetration**" in this context means "entry between the outer folds of the labia." *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988). On appeal, Defendant's sole claim is that the State did not present evidence that he caused such **penetration**.

[5]¶4 To determine whether sufficient evidence was presented, we must scrutinize the testimony elicited at trial. And because we review evidence in the light most favorable to the jury's verdict, *State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346, we rely primarily on Victim's account of what happened to her, which the jury apparently credited.

¶5 Victim met Defendant at their workplace; Defendant was 23 and Victim was 17. While working together, Defendant regaled her with stories of his military training and his plans to get a concealed carry permit. Victim testified that, after their shifts, Defendant asked Victim if he could walk her to her car. When they got to her car, Defendant told Victim that he wanted to kiss her. He then kissed her for "about a couple minutes" before pushing her into the back seat of her car. Once inside the car, Defendant continued to talk to Victim, who was "start[ing] to get scared, frightened, and ... was still unsure of what to do or how to act." Victim testified that she did not think about running away at that point, explaining, "[I]n the moment when it's so traumatic, you don't know what to do. You're not really in control of your body." She also testified that she was concerned about "what he said about the military [training] before and about his conceal[ed] carry permit." Defendant then resumed kissing Victim.

¶6 Victim testified that, after about five minutes, "[t]he kissing got more intimate, and then he undid my pants, and he put his hand down my pants and started touching my vagina and moving his hand around that area." Victim further testified, "[W]hen he started trying to put his fingers up my vagina I told him to stop, and he kept

saying, 'No, no, it's okay. It's okay.' " Victim repeated her plea for Defendant to stop, and "he kind of moved his fingers back and just started touching around the area instead of putting his fingers up, instead of **penetrating**."

¶7 Defendant then opened his pants and "used [his] hand to grab my hand, and caress his penis and move it up and down." Victim testified that whenever she tried to let go, Defendant would "put[ ] my hand back onto his penis. After a while he noticed that I didn't want to do that; and after I told him to stop, he just noticed that. So he finished himself off. Then he had lifted up my shirt and moved my bra up and touched my breast."

¶8 At this point in Victim's testimony, the prosecutor asked Victim to provide more detail about the earlier touching. Specifically, the prosecutor asked Victim to "describe where on your vagina he touched." Victim testified, "He touched the general area. Then when he was trying to put his fingers up he separated the labia" using "[j]ust one hand, his two fingers." Victim further testified, "It really hurt. I had never felt anything like that before."

[6] [7] [8]¶9 The question before us is whether a reasonable jury, after hearing this testimony, could find beyond a reasonable doubt that Defendant caused "**penetration**, however slight, of [Victim's] genital ... opening." *See* Utah Code Ann. § 76-5-402.2(1) (LexisNexis Supp. 2016). We therefore review the evidence ***1005** in detail, bearing in mind that the evidence presented to the jury must speak to every element of the offenses charged to ensure that the jury's verdict does not rest on speculation:

> [N]otwithstanding the presumptions in favor of the jury's decision[,] this Court still has the right to review the sufficiency of the evidence to support the verdict. The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict.

State v. Shumway, 2002 UT 124, ¶ 15, 63 P.3d 94 (first alteration in original) (citation and internal quotation marks omitted). "Sex crimes are defined with great specificity and require concomitant specificity of proof." *State v. Pullman*, 2013 UT App 168, ¶ 14, 306 P.3d 827; *accord People v. Paz*, 10 Cal.App.5th 1023, 1030–31, 217 Cal.Rptr.3d 212 (2017) (certified for partial publication at 217 Cal.Rptr.3d 212) ("In all sex-crime cases requiring **penetration**, prosecutors must elicit precise and specific testimony to prove the required **penetration** beyond a reasonable doubt." (citing *Pullman*, 2013 UT App 168, ¶ 14, 306 P.3d 827)).

¶10 The Utah Supreme Court's decision in *State v. Simmons* is instructive to our analysis. *See generally* 759 P.2d 1152 (Utah 1988). There, the supreme court considered the crime of unlawful sexual intercourse which, like object rape, has "**penetration**" as an element. *Id.* at 1154. The supreme court held that a victim's testimony that the defendant "put the tip of his penis 'on' her labia" was insufficient to support conviction when the victim failed to "testify that [the defendant] put his penis between the outer folds of her labia." *Id.* (noting that the jury may have been confused by testimony regarding prior incidents where the defendant *did* "place his penis between [the victim's] outer labial folds" and "**penetrated** the vaginal canal").

¶11 Similarly, in *State v. Pullman*, this court vacated a defendant's conviction for sodomy on a child because the victim's testimony "describ[ing] a sexual act involving Pullman's penis and her buttocks" did not satisfy the statutory element of "touching the anus." 2013 UT App 168, ¶ 16, 306 P.3d 827 (emphasis, citation, and internal quotation marks omitted). This court explained that the victim's testimony that "Pullman 'tried to take [her] panties off and stick his dick into [her] butt' and that 'it hurt' " was " 'sufficiently inconclusive ... that reasonable minds must have entertained a reasonable doubt' as to whether Pullman's act involved the touching of her anus." *Id.* (alterations in original) (citation omitted).

[9]¶12 Here, the testimony does not explicitly describe the challenged element of the offense—"**penetration**, however slight." *See* Utah Code Ann. § 76-5-402.2(1). Victim testified that Defendant was "trying to put his fingers up" her vagina until she repeated her plea for him to stop. Victim further testified that, at that point, Defendant "started touching around the area instead of putting his fingers up, instead of **penetrating**." And when asked by the prosecutor to "describe where on your vagina he touched," Victim responded that Defendant had touched "the general area" and that he "separated the labia" using "[j]ust one hand, his two fingers." But the State did not elicit Victim's testimony as to whether

Defendant's fingers actually **penetrated** between her labia, however slightly.[2]

***1006** ¶13 Because Victim's testimony did not explicitly establish that Defendant **penetrated** Victim, we consider next whether the jury could have reasonably inferred that Defendant **penetrated** Victim. The State asserts that the jury could have inferred from her testimony that "Defendant's fingers entered, however slight[ly], between the outer folds of [Victim's] labia." (First alteration in original) (citation and internal quotation marks omitted). Defendant argues that such a finding amounted to speculation and was therefore not a reasonable inference.

[10] [11]¶14 The resolution of this issue turns on the difference between a permissible inference and impermissible speculation. "This is a difficult distinction for which a bright-line methodology is elusive." *Salt Lake City v. Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067. "An inference is a conclusion reached by considering other facts and deducing a logical consequence from them" whereas "speculation is the act or practice of theorizing about matters over which there is no certain knowledge." *Id.* (citation and internal quotation marks omitted). Thus, a jury's inference is reasonable "if there is an evidentiary foundation to draw and support the conclusion" but is impermissible speculation when "there is no underlying evidence to support the conclusion." *Id.* Put another way, "an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof." *See United States v. Finnerty*, 470 F.2d 78, 81 (3d Cir. 1972) (emphasis, citation, and internal quotation marks omitted).

¶15 There is no question that **penetration** is an essential element of the crime of object rape; indeed, it is the critical element distinguishing object rape from forcible sexual abuse. *Compare* Utah Code Ann. § 76-5-402.2(1) (LexisNexis Supp. 2016), *with id.* § 76-5-404(1) (LexisNexis 2012). Therefore, we must consider whether the two scenarios Victim's testimony might have described—**penetration** or non-**penetration**—"may be drawn with equal consistency" from that testimony. *See Finnerty*, 470 F.2d at 81 (emphasis, citation, and internal quotation marks omitted).

¶16 Victim testified that Defendant attempted to **penetrate** her using two fingers to "separate[ ]" her labia. This might describe separation by insertion (**penetration**) or separation by stretching the skin adjacent to the labia (not **penetration**). Victim also testified that, after she repeatedly asked him to stop, Defendant "kind of moved his fingers back and just started touching around the area." Again, this might describe Defendant removing his fingers from Victim after **penetrating** her or Defendant pulling his hand away from her vagina and labia without having **penetrated** Victim. And Victim testified that, "[i]t really hurt. I had never felt anything like that before." Arguably, this testimony might describe physical pain from **penetration** or emotional trauma from Defendant's forcible sexual abuse of Victim. Thus, each of these pieces of testimony may plausibly be interpreted as describing either a **penetrative** scenario or a non-**penetrative** scenario.

¶17 However, while Victim's testimony was susceptible to two interpretations, it was not *equally consistent* with both. *See Finnerty*, 470 F.2d at 81. When viewed as a whole, rather than examining each statement in artificial isolation, Victim's testimony more consistently described actual **penetration** than it did mere attempted **penetration**. For example, given their context, Victim's statements that "[i]t really hurt" and that she "had never felt anything like that before" seem more likely to relate to bodily pain than emotional injury. And such a description of pain suggests that Defendant's separation of Victim's labia was accomplished by digital **penetration**. This is especially true given Victim's testimony that it was when Defendant was "trying to put his fingers up," that he "separated the labia." Indeed, Defendant himself described **penetration** as a goal he was unable to accomplish rather than testifying that he had been trying to merely separate ***1007** Victim's labia, as an objective in its own right:

> Q: Did you ever **penetrate** her vagina?
>
> A: I did not.
>
> Q: Was that because of the—what you've described as the tight quarters, or was there another reason?
>
> A: It was the tight quarters.

Thus Defendant's concession that he had been attempting to **penetrate** Victim casts doubt on the possible inference that he spread Victim's labia by stretching the skin around it rather than by **penetrating** it with his fingers. In other words, Defendant's admission as to his intent largely dispels the alternative possibility that he was, for some reason, merely trying to separate Victim's labia, one from the other, by stretching the skin and without **penetrating** between them.

¶18 Victim's testimony that, after putting his hand into her pants and trying to **penetrate** her vagina, Defendant "kind of moved his fingers back and just started touching around the area" could mean that his fingers had been on

Victim's labia or that his fingers had been between Victim's labia. But these interpretations are not equally consistent with the evidence adduced. Specifically, because Victim testified about the pain she suffered, the total evidentiary picture is more consistent with the interpretation that Defendant had **penetrated** Victim before "mov[ing] his fingers back."

¶19 Considering these pieces of testimony together, we cannot conclude that an inference of non-**penetration** "may be drawn with equal consistency" as an inference of **penetration** from the evidence adduced at trial. *See Finnerty*, 470 F.2d at 81 (emphasis, citation, and internal quotation marks omitted). Therefore, there was an evidentiary basis for the jury's adoption of one inference over the other. *See Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067. And because the jury's adoption rested on an evidentiary basis, we conclude that the jury made a reasonable inference rather than an impermissible speculation.

¶20 Affirmed.

All Citations

407 P.3d 1002, 850 Utah Adv. Rep. 24, 2017 UT App 194

Footnotes

1 A separate statute criminalizes object rape of a person younger than 14. *See* Utah Code Ann. § 76-5-402.3 (LexisNexis Supp. 2016).

2 We recognize that testifying about a sexual assault is traumatic for the victim. But the State has the burden of "proving by evidence every essential element" of the charged crime. *See Carella v. California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (per curiam); *see also In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). We urge prosecutors to adduce specific testimony regarding each and every element of such crimes to ensure that a jury's guilty verdict rests not on speculation but on clear evidence sufficient to find beyond a reasonable doubt that the defendant committed the crime charged. *Cf. People v. Paz*, 10 Cal.App.5th 1023, 1030–31, 217 Cal.Rptr.3d 212 (2017) (certified for partial publication at 217 Cal.Rptr.3d 212) ("We caution prosecutors not to use vague, euphemistic language and to ask follow-up questions where necessary.").

TAB 5

Imperfect Self-Defense Instruction

NOTES: Two cases are included to inform the committee's discussion regarding an Imperfect Self-Defense instruction. The cases are:

State v. Lee, 2014 UT App 4 (focusing on ¶¶ 19-45); and
State v. Ramos, 2018 UT App 161.

318 P.3d 1164
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Joseph Logan LEE, Defendant and Appellant.

No. 20110707–CA.
|
Jan. 9, 2014.

Synopsis

Background: Defendant was convicted in the Second District Court, Ogden Department, Michael D. Lyon, J., of murder, unlawful possession of a firearm, and failure to stop at command of a police officer. Defendant appealed.

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

[1] remand was not required for development of record on ineffective assistance claims;

[2] any deficiency in counsel's failure to timely file motion in limine did not prejudice defendant and thus was not ineffective assistance;

[3] trial counsel's introduction of evidence of defendant's prior incarceration and past crimes was reasonable trial strategy and thus not ineffective assistance; and

[4] counsel's deficiency in failing to object to jury instruction which improperly placed burden on defendant to prove affirmative defense of imperfect self-defense manslaughter beyond a reasonable doubt did not prejudice defendant and thus was not ineffective assistance.

Affirmed.

J. Frederic Voros, Jr., J., concurred and filed opinion.

West Headnotes (16)

[1] **Criminal Law**
Remission to lower court for correction of defects

A remand for development of the record for an ineffective assistance claim is not necessary if the facts underlying the ineffectiveness claim are contained in the existing record. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

4 Cases that cite this headnote

[2] **Criminal Law**
Remission to lower court for correction of defects

Remand was not required for development of record as to defendant's claims of ineffective assistance based on trial counsel's failure to object to jury instructions on murder and self-defense, where all jury instructions at issue appeared in record, and trial transcript contained all relevant discussions between court and counsel regarding instructions. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

Cases that cite this headnote

[3] **Criminal Law**
Remission to lower court for correction of defects

Remand was not required for development of record as to defendant's claims of ineffective assistance based on trial counsel's failure to timely file a motion in limine, where record included transcripts of hearings in which the untimely motion in limine was discussed, the motion itself, all supporting and responsive briefing, and the trial court's ruling on the motion. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

Cases that cite this headnote

[4] **Criminal Law**

Remission to lower court for correction of defects

Remand was not required for development of record as to defendant's claims of ineffective assistance based on trial counsel's opening statement, where opening statement was part of trial transcript in record. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

Cases that cite this headnote

[5] **Criminal Law**

Remission to lower court for correction of defects

To obtain a remand for development of the record on an ineffective assistance claim, a defendant must not only submit affidavits specifying who the uncalled witnesses are and that they are available to testify at an evidentiary hearing, he must ordinarily submit affidavits from the witnesses detailing their testimony. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

1 Cases that cite this headnote

[6] **Criminal Law**

Remission to lower court for correction of defects

To show that counsel's failure to investigate resulted in prejudice as a demonstrable reality and not a speculative matter, a defendant who moves for remand to develop the record on an ineffective assistance claim must identify exculpatory testimony or evidence that his attorney failed to uncover. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

1 Cases that cite this headnote

[7] **Criminal Law**

Remission to lower court for correction of defects

Remand was not required for development of record as to defendant's claim of ineffective assistance based on failure to investigate case and failure to call a witness, where defendant did not support his motion for remand with an affidavit from the witness, and defendant did not identify any particular evidence that counsel did not uncover. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

2 Cases that cite this headnote

[8] **Criminal Law**

Presentation of witnesses

Reviewing court would assume that trial counsel's failure to call particular witness to testify at murder trial was not deficient and thus not ineffective assistance, where defendant did not provide an affidavit from witness detailing her testimony. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[9] **Criminal Law**

Suppression of evidence

Any deficiency in counsel's failure to timely file motion in limine did not prejudice murder defendant, and thus was not ineffective assistance, where trial court nevertheless considered the motion on the merits and partially granted it. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[10] **Criminal Law**

Other offenses and prior misconduct

Trial counsel's introduction of evidence of murder defendant's prior incarceration and past crimes was reasonable trial strategy, and thus not ineffective assistance; defendant testified at trial, and because State was generally permitted to impeach defendant with such evidence, introduction of evidence up front could be sound strategic decision, and defendant's testimony that he had been incarcerated with victim lent support to defendant's self-defense theory.

1 Cases that cite this headnote

[11] **Criminal Law**

Instructions

Defendant's affirmative waiver of any objection to jury instructions precluded plain error review of such instructions on appeal.

2 Cases that cite this headnote

[12] **Criminal Law**

Construction and Effect of Charge as a Whole

Criminal Law

Instructions

On appeal, reviewing court looks at the jury instructions in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case.

3 Cases that cite this headnote

[13] **Criminal Law**

Objecting to instructions

Even if one or more of the jury instructions, standing alone, are not as full or accurate as they might have been, counsel is not deficient in approving the instructions as long as the trial court's instructions constituted a correct statement of the law.

1 Cases that cite this headnote

[14] **Homicide**

Requisites and sufficiency in general

Trial court's giving of separate jury instructions on murder and self-defense was not error, despite argument that instructions could have led jury to determine that defendant was guilty of murder without realizing that proof of lack of self-defense beyond reasonable doubt was essential element, after defendant raised some evidence of self-defense; jury was instructed not to single out one instruction alone but to consider the instructions as a whole, and self-defense was central theme of defense at trial, making it unlikely that jury would have convicted defendant of murder without considering his self-defense claim.

4 Cases that cite this headnote

[15] **Criminal Law**

Objecting to instructions

Homicide

Apprehension of danger

Instruction providing that in order to convict defendant of imperfect self-defense manslaughter rather than murder, jury needed to find that it was proven beyond a reasonable doubt that defendant acted under a reasonable belief that his actions were legally justifiable, was incorrect statement of law, and thus counsel's failure to object to instruction was deficient, as would support ineffective assistance claim; instruction improperly placed burden upon defendant to prove affirmative defense beyond a reasonable doubt.

5 Cases that cite this headnote

[16] **Criminal Law**

Objecting to instructions

Counsel's deficiency in failing to object to jury instruction which improperly placed burden on defendant to prove affirmative defense of imperfect self-defense manslaughter beyond a reasonable doubt did not prejudice defendant and thus was not ineffective assistance, in murder prosecution in which defendant alleged that he shot victim after victim threatened defendant with gun; while there was evidence of perfect self-defense, there was no evidence to suggest that defendant used excessive force in reasonably responding to a threat from victim, and thus jury could not have concluded that defendant caused victim's death under circumstances constituting imperfect self-defense. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

Attorneys and Law Firms

***1166** Randall W. Richards, for Appellant.

Sean D. Reyes, Karen A. Klucznik, and John J. Nielsen, for Appellee.

Judge MICHELE M. CHRISTIANSEN authored this Opinion, in which Judge GREGORY K. ORME concurred. Judge J. FREDERIC VOROS JR. concurred, with opinion.

Opinion

***1167** CHRISTIANSEN, Judge:

¶ 1 Joseph Logan Lee appeals from his conviction for murder, a first degree felony, and for unlawful possession of a firearm and for failure to stop at the command of a police officer, both third degree felonies. We affirm.

BACKGROUND

¶ 2 Lee met with the victim, T.H., on June 1, 2006, to settle a drug debt owed to T.H. by a friend of Lee's.[1] At some point during the exchange, T.H. was leaning through the open driver's window of Lee's car when Lee pulled out a handgun. While the parties dispute what happened next, Lee ultimately fired two shots, one of which struck T.H. and killed him almost instantly. Lee fled the scene but later that day was identified and pursued by police, who apprehended Lee after his vehicle struck a median and was disabled. Subsequent to Lee's arrest, police found two speed-loaders for a .357 magnum revolver on Lee's person and a .357 magnum revolver on the driver's floorboard of Lee's car. Lee was charged by information based on the shooting and his flight from police.

1 "On appeal, we recite the facts from the record in the light most favorable to the jury's verdict." *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 3, 82 P.3d 1064 (citation and internal quotation marks omitted).

¶ 3 Lee retained private counsel (Trial Counsel) to represent him. Trial Counsel entered his appearance at a May 10, 2007 hearing and notified the trial court that he would be filing a motion in limine seeking to admit the testimony of a proposed defense witness. Trial Counsel had difficulty timely filing the motion and requested additional time on at least three occasions. Trial Counsel ultimately filed the motion approximately ten days after the final deadline given by the trial court, but the trial court allowed briefing and oral argument on the motion to proceed and ruled on the merits of the motion, granting it in part.

¶ 4 The case proceeded to trial, and Lee argued that he had shot T.H. in self-defense. In support of this theory, Lee introduced testimony that he had met T.H. while the two men were incarcerated at the Utah State Prison, that T.H. often carried a gun, and that Lee was paying off the drug debt because T.H. had threatened a friend of Lee's. Lee testified that just before the shooting he handed the gun to T.H. as a showing of good faith, that T.H. turned the gun on Lee, and that Lee wrestled the gun away from him. Lee testified that he then shot T.H. because he believed T.H. was reaching behind his back for another gun. T.H.'s girlfriend, the only other eyewitness to the shooting, testified for the State that T.H. was unarmed and was not threatening Lee at the time of the shooting. At the close of trial, the court instructed the jury as to both self-defense and imperfect self-defense at Lee's request. The jury found Lee guilty of murder, and he appeals.

ISSUES AND STANDARDS OF REVIEW

¶ 5 As an initial matter, Lee requests a remand for an evidentiary hearing under rule 23B for the development of the record and the entry of factual findings necessary for this court's review of his ineffective assistance of counsel claim. *See* Utah R.App. P. 23B. A remand under rule 23B will only be granted "upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective." *See id.*

¶ 6 Lee claims that he was denied effective assistance of counsel due to multiple alleged deficiencies on the part of Trial Counsel. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Ott*, 2010 UT 1, ¶ 22, 247 P.3d 344 (citation and internal quotation marks omitted).

¶ 7 Lee also argues that the trial court erroneously instructed the jury as to the elements of murder and manslaughter in light of Lee's claim of self-defense. "Claims of erroneous jury instructions present questions

of law that we review for correctness." *State v. Jeffs,* 2010 UT 49, ¶ 16, 243 P.3d 1250.

***1168** ANALYSIS

I. Lee's Rule 23B Motion Is Not Adequately Supported to Warrant Remand for an Evidentiary Hearing.

¶ 8 Lee asserts that a remand for an evidentiary hearing is appropriate to address all of the claims of Trial Counsel's alleged deficiencies that Lee raises on appeal. However, remand under rule 23B is available only upon a motion that alleges nonspeculative facts that do not appear in the record and is accompanied by affidavits setting forth those facts. *See* Utah R.App. P. 23B(a), (b). To succeed on the motion, Lee must "allege facts that if true would show (1) 'that counsel's performance was so deficient as to fall below an objective standard of reasonableness' and (2) 'that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.' " *State v. King,* 2012 UT App 203, ¶ 18, 283 P.3d 980 (quoting *State v. Hales,* 2007 UT 14, ¶ 68, 152 P.3d 321).

A. Claims Based on Record Evidence

[1] **[2]** **[3]** **[4]** ¶ 9 Lee argues that Trial Counsel performed deficiently because he did not object to the jury instructions on murder and self-defense, did not comply with the trial court's orders to timely file a motion in limine, and introduced the fact of Lee's prior incarceration during his opening statement and examination of witnesses. However, Lee does not identify any evidence that is not already in the record on appeal to support these claims of ineffective assistance. "A [rule 23B] remand is not necessary if the facts underlying the ineffectiveness claim are contained in the existing record." *State v. Johnston,* 2000 UT App 290, ¶ 9, 13 P.3d 175 (per curiam).

¶ 10 Here, all of the jury instructions at issue appear in the record. The trial transcript contains all of the relevant discussions between the court and counsel regarding the jury instructions and Trial Counsel's waiver of objections to the final jury instructions. The record also includes transcripts of the hearings in which the untimely motion in limine were discussed, the motion itself, all supporting and responsive briefing, and the trial court's ruling on the motion. Finally, Trial Counsel's opening statement in which he referred to Lee's prior incarceration is part of the trial transcript in the record. As a result, Lee has not demonstrated that any additional non-record evidence is available to support these claims on appeal, and remand is therefore inappropriate. *See id.*

B. Claims Based on Non–Record Evidence

[5] **[6]** **[7]** ¶ 11 Lee also argues that Trial Counsel performed deficiently because he failed to adequately investigate the case and to call a witness who Lee claims would have supported his self-defense claim (the Witness). However, a rule 23B motion must include "affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney" and show "the claimed prejudice suffered by the appellant as a result of the claimed deficient performance." Utah R.App. P. 23B(b). "[T]o obtain a Rule 23B remand, a defendant must not only submit affidavits specifying who the uncalled witnesses are and that they are available to testify at an evidentiary hearing, he must ordinarily submit affidavits from the witnesses detailing their testimony." *Johnston,* 2000 UT App 290, ¶ 11, 13 P.3d 175. To show that counsel's failure to investigate resulted in prejudice "as a demonstrable reality and not a speculative matter," a rule 23B movant must identify exculpatory testimony or evidence that his attorney failed to uncover. *See State v. Bryant,* 2012 UT App 264, ¶ 23, 290 P.3d 33 (citation and internal quotation marks omitted) (concluding that no prejudice resulted from trial counsel's failure to investigate because defendant did not identify any evidence that his trial counsel allegedly failed to discover).

¶ 12 Here, Lee did not support his rule 23B motion with an affidavit from the Witness. Lee also has not identified any particular evidence, other than his proffer of the Witness's potential testimony, that Trial Counsel failed to uncover. Lee offered affidavits only from his mother and a member of his appellate counsel's staff averring that Trial Counsel did not hire a private investigator and may not have adequately reviewed ***1169** the Witness's statement. However, Lee cannot meet his burden by merely pointing out what counsel did not do; he must bring forth the evidence that would have been available in the absence of counsel's deficient performance. *See id.; Johnston,* 2000 UT App 290, ¶ 7, 13 P.3d 175 ("The purpose of Rule 23B is for appellate counsel to put on evidence he or she now has, not to amass evidence that might

help prove an ineffectiveness of counsel claim."). Absent affidavits demonstrating a likelihood that further review of the Witness's testimony or inquiry by an investigator would have uncovered evidence sufficient to support Lee's claims, remand for an evidentiary hearing is not appropriate. We therefore deny Lee's motion for a remand under rule 23B.[2]

[2] Lee's motion also states that Trial Counsel "was in the middle of his disbarment proceedings at the time leading up to and during the trial," and an exhibit to the motion includes excerpts from the *Utah Bar Journal* detailing disciplinary sanctions entered against Trial Counsel for his failure to comply with the Utah Rules of Professional Conduct in other cases. However, Lee fails to explain how this evidence would support any of his claims in this case if remand were granted to enter this exhibit into the record.

II. Lee Has Not Demonstrated That Trial Counsel Was Ineffective.

¶ 13 Lee argues that Trial Counsel was ineffective by failing to adequately investigate the case, failing to call the Witness at trial, failing to comply with the trial court's deadlines for filing a motion in limine, and introducing the fact of Lee's prior incarceration in opening statements and witness examination. To succeed on a claim of ineffective assistance of counsel, a defendant must show both "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish that counsel's performance was deficient, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. This showing requires the defendant to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. 2052 (citation and internal quotation marks omitted; *see also* *State v. Larrabee*, 2013 UT 70, ¶ 19, 321 P.3d 1136, 2013 WL 6164424). To establish the prejudice prong of an ineffective assistance of counsel claim, the "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; *accord* *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "In the event it is 'easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,' we will do so without analyzing whether counsel's performance was professionally unreasonable." *Archuleta v. Galetka*, 2011 UT 73, ¶ 42, 267 P.3d 232 (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052).

A. Failure To Investigate and Call the Witness

[8] ¶ 14 Lee argues that Trial Counsel's performance was deficient for failure to investigate the case prior to trial. The only evidence Lee identifies that Trial Counsel allegedly failed to uncover in his investigation is the testimony of the Witness. Accordingly, we consider this claim together with Lee's claim that Trial Counsel's performance was deficient for failing to call the Witness.

¶ 15 Lee asserts that the Witness was present at the time of the shooting and that if Trial Counsel had investigated and called the Witness, she would have offered testimony that contradicted the testimony of T.H.'s girlfriend. However, because we are unable to grant a rule 23B remand due to Lee's failure to include an affidavit from the Witness detailing her testimony, *see supra* ¶ 12, there is nothing in the record before this court upon which we can evaluate the merits of Trial Counsel's decision not to call the Witness. "Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92. We therefore must assume that Trial Counsel's decision regarding this witness was not deficient performance. ***1170** Because Lee has not demonstrated that Trial Counsel performed deficiently, we conclude that Trial Counsel was not ineffective on this basis.

B. Failure To Comply with Deadlines for Filing a Motion in Limine

[9] ¶ 16 Lee next argues that Trial Counsel performed deficiently in failing to file a motion in limine in compliance with the trial court's deadlines for filing of the motion. While the record shows that Trial Counsel repeatedly failed to submit the motion within the time allowed by the trial court, the record also shows that the trial court nevertheless considered the motion on the merits and partially granted it. Though we agree that Trial Counsel's repeated failure to timely file the motion in limine was likely deficient performance, Lee has not demonstrated that he was prejudiced by Trial Counsel's late filing of the motion. Rather, Lee frankly concedes that "the effect on the outcome of the trial is admittedly somewhat speculative." However, "proof of ineffective

assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *State v. Munguia,* 2011 UT 5, ¶ 31, 253 P.3d 1082 (citation and internal quotation marks omitted). Specifically, Lee has not demonstrated how a more timely filing would have led to a different result in either the trial court's ruling on the motion or the jury's ultimate verdict. Absent a showing that Lee was prejudiced by Trial Counsel's alleged error, we conclude that Lee is not entitled to relief on this basis.

C. Introduction of Lee's Prior Incarceration

[10] ¶ 17 Lee also argues that Trial Counsel performed deficiently in raising the issue of Lee's prior conviction and incarceration during his opening statement and examination of witnesses. Lee argues that by introducing the evidence of Lee's prior crimes and incarceration, Trial Counsel inappropriately called the jury's attention to Lee's criminal background and damaged his credibility as a witness. In evaluating whether counsel was deficient, we will not "second-guess trial counsel's legitimate strategic choices," *State v. Franco,* 2012 UT App 200, ¶ 7, 283 P.3d 1004 (citations and internal quotation marks omitted). Rather, if there is a "conceivable tactical basis for counsel's actions," *id.* (citation and internal quotation marks omitted), the defendant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy," *Strickland v. Washington,* 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (citation and internal quotation marks omitted). *Accord State v. Larrabee,* 2013 UT 70, ¶ 19, 321 P.3d 1136.

¶ 18 Lee has not overcome the presumption that Trial Counsel had a legitimate strategic basis for his decision to introduce to the jury information regarding Lee's prior convictions and incarceration. Indeed, "many experienced counsel always tell the jury of the convictions their client has suffered. This tends to take the wind out of the sails of the prosecutor." *United States v. Larsen,* 525 F.2d 444, 449 (10th Cir.1975). Because the State is generally permitted to impeach a testifying defendant with evidence of his prior convictions, *see* Utah R. Evid. 609(a), introduction of such prior convictions up front is often a sound strategic decision to build credibility for the defendant and minimize the prejudicial impact of the convictions, *see Larsen,* 525 F.2d at 449; *Swington v. State,* 97–KA–00591–SCT, ¶ 25, 742 So.2d 1106 (Miss.1999). Further, Lee's testimony that he had been incarcerated with T.H. lent support to Lee's self-defense theory by informing the jury that T.H. himself was a felon. While Lee argues that there were "alternative methods of establishing that Lee was afraid of [T.H.] and that he had some dealings with [T.H.] in the past to bolster this fear," this argument itself suggests that Trial Counsel in fact had a conceivable tactical basis for introducing evidence of Lee's incarceration, even if Lee would now prefer some alternative approach. *See Franco,* 2012 UT App 200, ¶ 7, 283 P.3d 1004. Accordingly, we conclude that Trial Counsel did not perform deficiently and therefore did not render ineffective assistance of counsel on this basis.

III. Trial Counsel Was Not Ineffective for Failing To Object to the Challenged Jury Instructions.

¶ 19 Finally, Lee argues that the jury instructions for the charges of murder (Instruction ***1171** 15) and manslaughter (Instruction 16) did not correctly instruct the jury on the State's burden to prove that Lee did not act in self-defense. Because Lee did not preserve this claim for appeal by objecting to the jury instructions at trial, he asks this court to review the jury instructions on the basis of plain error or ineffective assistance of counsel. "When a party fails to preserve an issue for appeal, we will address the issue only if (1) the appellant establishes that the district court committed plain error, (2) exceptional circumstances exist, or (3) in some situations, if the appellant raises a claim of ineffective assistance of counsel in failing to preserve the issue." *State v. Low,* 2008 UT 58, ¶ 19, 192 P.3d 867 (citations and internal quotations marks omitted).

A. Plain Error

[11] ¶ 20 Lee argues that the trial court's instructions to the jury constituted plain error and that this court should reverse to avoid a manifest injustice. To obtain appellate relief under this standard, Lee must show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome." *State v. Casey,* 2003 UT 55, ¶ 41, 82 P.3d 1106 (citation and internal quotation marks omitted). However, invited error precludes appellate review of an issue under the plain error standard. *State v. McNeil,* 2013 UT App 134, ¶ 24, 302 P.3d 844.

¶ 21 Here, the trial court asked Trial Counsel, "Does the defense waive any objections to the instructions?" and Trial Counsel responded, "Yes." This affirmative

representation to the court that there was no objection to the jury instructions forecloses Lee from "tak[ing] advantage of an error committed at trial" because Trial Counsel "led the trial court into committing the error." *State v. Hamilton,* 2003 UT 22, ¶ 54, 70 P.3d 111 (alteration in original) (citation and internal quotation marks omitted). Thus, Trial Counsel's waiver of any objection to the finalized jury instructions precludes our review of those instructions for plain error.

B. Ineffective Assistance of Counsel

¶ 22 Lee also contends that Trial Counsel was ineffective due to his failure to object to the self-defense and imperfect self-defense instructions given by the trial court. To prevail, Lee must show that Trial Counsel's performance was deficient and that Lee was prejudiced by the deficient performance. *Gregg v. State,* 2012 UT 32, ¶ 19, 279 P.3d 396. Failure to object to jury instructions that correctly state the law is not deficient performance. *See State v. Chavez–Espinoza,* 2008 UT App 191, ¶ 15, 186 P.3d 1023.

[12] **[13]** ¶ 23 Lee argues that the jury instructions were erroneous because the murder and manslaughter instructions did not include as an element of the offense that the prosecution had the burden to prove that Lee did not act in self-defense. He claims that Trial Counsel's failure to object and propose "adequate" instructions was deficient performance. On appeal, "we look at the jury instructions in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case." *See State v. Maestas,* 2012 UT 46, ¶ 148, 299 P.3d 892 (citation and internal quotation marks omitted). Thus, even if "one or more of the instructions, standing alone, are not as full or accurate as they might have been," counsel is not deficient in approving the instructions "as long as the trial court's instructions constituted a correct statement of the law." *See State v. Garcia,* 2001 UT App 19, ¶ 13, 18 P.3d 1123 (citations and internal quotation marks omitted).

1. Murder Instruction

[14] ¶ 24 Lee contends that the jury instructions on murder were erroneous because the trial court instructed the jury separately as to the State's burden to disprove his self-defense claim rather than incorporating that burden as an element of the murder instruction. Our review of the jury instructions confirms that Instruction 15 properly instructed the jury as to the elements of murder. *See* Utah Code Ann. § 76–5–203(2) (LexisNexis Supp.2006); *State v. Knoll,* 712 P.2d 211, 214 (Utah 1985) ("Absence of self-defense is not an element of a homicide offense."). In addition, the jury was separately ***1172** and accurately instructed that "if you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, then you must find him not guilty" of murder or manslaughter. Taken together, these instructions fairly instructed the jury on the burden of proof relative to Lee's claim of self-defense and are a "correct statement of the law" applicable to the case. *See Garcia,* 2001 UT App 19, ¶ 13, 18 P.3d 1123 (citation and internal quotation marks omitted).

¶ 25 Lee argues that because the jury was instructed on murder separately from and prior to the instruction on self-defense, it is "highly likely" that these instructions led the jury to determine that he was guilty of murder "without realizing that proof of the lack of self-defense beyond a reasonable doubt is an essential element of the charge of murder." However, the jury was instructed "not to single out one instruction alone as stating the law" but to "consider the instructions as a whole," giving the order of the instructions "no significance as to their relative importance." We "presume that a jury ... follow[ed] the instructions given it" unless the facts indicate otherwise. *See State v. Nelson,* 2011 UT App 107, ¶ 4, 253 P.3d 1094 (citation and internal quotation marks omitted). Particularly in this case, where self-defense was the central theme of Lee's defense at trial, and given the intuitive effect of a self-defense claim on a charge of murder, it is unlikely that the separate instruction on self-defense led the jury to convict Lee of murder on the basis of Instruction 15 without considering his self-defense claim. Because the jury was correctly instructed on the charge of murder, Trial Counsel did not perform deficiently in failing to object or propose an alternate murder instruction. *See Chavez–Espinoza,* 2008 UT App 191, ¶ 15, 186 P.3d 1023.

2. Manslaughter Instruction

[15] ¶ 26 Lee also challenges Instruction 16, which instructed the jury to find Lee guilty of manslaughter if it found that he caused T.H.'s death under circumstances constituting imperfect self-defense. *See* Utah Code Ann. § 76–5–203(4) (providing that a charge of murder is reduced to manslaughter if the defendant caused the death "under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the

existing circumstances"). Lee argues that the instruction failed to properly instruct the jury as to the State's burden to disprove an imperfect self-defense claim beyond a reasonable doubt. We agree.

¶ 27 Because the burden of proof for an affirmative defense is counterintuitive, instructions on affirmative defenses "must clearly communicate to the jury what the burden of proof is *and* who carries the burden." *State v. Campos,* 2013 UT App 213, ¶ 42, 309 P.3d 1160 (citations and internal quotation marks omitted). "[O]nce a defendant has produced some evidence of imperfect self-defense, the prosecution is required to disprove imperfect self-defense beyond a reasonable doubt." *Id.* ¶ 38. Instruction 16 provides, in relevant part,

> Before you can convict the defendant of the lesser included offense of manslaughter ... you must find from the evidence, *beyond a reasonable doubt,* all of the following elements of the crime:
>
> (1) That defendant, Joseph Logan Lee;
>
> (2) Committed a homicide which would be murder, but the offense is reduced because the defendant caused the death of [T.H.]:
>
> ...
>
> (ii) Under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.
>
> If you believe that the evidence established each and all of the essential elements of the offense *beyond a reasonable doubt,* it is your duty to convict the defendant. On the other hand, if the evidence failed to establish one or more of said elements, it is your duty to find the defendant not guilty.

(Emphases added.) *See* Utah Code Ann. § 76–5–203(4). Thus, the jury was instructed ***1173** that in order to convict Lee of imperfect self-defense manslaughter rather than murder, it needed to find that all of the listed elements were proven beyond a reasonable doubt, including that Lee acted under a reasonable belief that his actions were legally justifiable. This instruction improperly placed the burden upon Lee to prove his affirmative defense beyond a reasonable doubt rather than correctly placing the burden on the State to *disprove* the defense beyond a reasonable doubt. *See Campos,* 2013 UT App 213, ¶ 42, 309 P.3d 1160. Trial Counsel had a duty to object to such a fundamentally flawed instruction and to ensure that the jury was properly instructed on the correct burden of proof. *See id.* ¶ 45. We see no conceivable tactical basis for Trial Counsel's approval of such a flawed instruction and conclude that Trial Counsel performed deficiently in failing to object to Instruction 16.

[16] ¶ 28 However, our inquiry does not end with our determination that Trial Counsel performed deficiently in not objecting to the erroneous instruction. Lee must also demonstrate that "but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Smith,* 909 P.2d 236, 243 (Utah 1995). Lee argues that the facts of this case are analogous to *State v. Garcia,* 2001 UT App 19, 18 P.3d 1123, where this court concluded that the defendant was prejudiced by a jury instruction that did not clearly place the burden of proof for self-defense on the State. *Id.* ¶ 19. There, we noted that "some evidence was introduced by Garcia that he acted in self-defense," including corroboration of his testimony by another witness. *Id.* We observed that had the jury been correctly instructed as to the burden of proof, "it is reasonably likely that the jury could have entertained a reasonable doubt as to whether Garcia acted in self-defense, thus requiring acquittal." *Id.* Accordingly, we reversed Garcia's conviction and remanded for a new trial. *Id.* ¶¶ 20–21.

¶ 29 However, in this case, neither the State nor Lee introduced evidence that would support Lee's theory that he caused T.H.'s death under a reasonable, but legally mistaken, belief that his use of deadly force was justified. The testimony elicited by the State demonstrated that T.H. was unarmed and was not threatening Lee when Lee shot him. The jury could not have found that Lee acted reasonably or with legal justification in shooting T.H. under these circumstances. The State's evidence therefore supports Lee's conviction for murder. Conversely, the evidence put forth by Lee supports his acquittal on the basis of perfect self-defense. Lee testified that T.H. was the first aggressor when he pointed the gun at Lee and that after Lee regained possession of the gun, he fired only when he believed T.H. was reaching for another gun. If the jury believed Lee's version of events, then he would have been justified in using deadly force to defend himself and been entitled to an acquittal on the charge of

murder. However, there is no basis on this evidence for the jury to find that Lee acted reasonably but without legal justification.

¶ 30 This case is unlike our decision in *State v. Spillers,* 2005 UT App 283, 116 P.3d 985, *aff'd,* 2007 UT 13, 152 P.3d 315, where we determined that the trial court's failure to give an instruction on imperfect self-defense was in error. *Id.* ¶ 26. There, Spillers shot the victim after the victim had struck Spillers once in the head with the butt of a handgun and was attempting to strike him again. *Id.* ¶ 20. The state argued that the evidence gave rise to only two interpretations—that Spillers' actions rose to the level of perfect self-defense because he was about to suffer death or serious bodily injury from being struck with the butt of the gun or that Spillers had not acted in self-defense and was guilty of murder. *Id.* ¶ 25. However, we concluded that the evidence supported other interpretations, specifically "an interpretation that [Spillers] was entitled to defend himself against an attack by [the victim] but not entitled to use deadly force" because the jury could have concluded that the victim's strikes with the butt of the gun did not threaten Spillers with serious bodily injury or death. *Id.* We reversed and remanded for a new trial on the basis of the trial court's failure to give the requested imperfect self-defense instruction, *id.* ¶ 26, and the Utah Supreme Court affirmed, ***1174** *State v. Spillers,* 2007 UT 13, ¶ 23, 152 P.3d 315. Unlike in *Spillers,* however, as explained above, there is no evidence in this case to suggest that Lee used excessive force in reasonably responding to a threat from T.H., or that Lee's actions were otherwise reasonable but legally unjustifiable.

¶ 31 We also do not read our supreme court's decision in *State v. Low,* 2008 UT 58, 192 P.3d 867, as requiring a reversal in this case. In *Low,* the supreme court reviewed the trial court's decision to include, over the defendant's objection, an imperfect self-defense instruction requested by the state. *Id.* ¶ 31. The supreme court held that the imperfect self-defense instruction was appropriate, explaining that "when a defendant presents evidence of perfect self-defense, he necessarily presents evidence of imperfect self-defense because 'for both perfect and imperfect self-defense, the same basic facts [are] at issue.' " *Id.* ¶ 32 (alteration in original) (quoting *Spillers,* 2007 UT 13, ¶ 23, 152 P.3d 315). However, this conclusion was based on the court's observation that "perfect self-defense and imperfect self-defense require the defendant to present the same evidence: that the defendant had a reasonable belief that force was necessary to defend himself." *Id.* It is therefore clear that the supreme court was considering only the evidence necessary for an imperfect self-defense claim to be "put into issue" such that an instruction on the affirmative defense was properly given to the jury. *Id.* ¶¶ 34, 45 (citation and internal quotation marks omitted). The court went on to recognize that there is a fundamental difference between the two defenses, specifically, "whether the defendant's conduct was, in fact, 'legally justifiable or excusable under the existing circumstances.' " *Id.* ¶ 32 (quoting Utah Code Ann. § 76–5–203(4)(a)(ii) (LexisNexis Supp.2007)).

¶ 32 Thus, *Low* stands for the proposition that once evidence is introduced by either party that the defendant reasonably believed that he was justified in using force, the trial court must instruct the jury on both self-defense and imperfect self-defense upon the request of a party, and that its failure to do so would be error. *See id.; see also Garcia,* 2001 UT App 19, ¶ 8, 18 P.3d 1123 (explaining that an instruction on self-defense must be given when there is a reasonable basis in the evidence to do so, irrespective of "whether the evidence is produced by the prosecution or by the defendant"). It does not, however, stand for the proposition that any time a defendant presents evidence that he reasonably believed that his use of force was justified, the complete evidentiary picture before the jury would *necessarily* support a conviction for imperfect self-defense manslaughter. Rather, in the absence of evidence from which a jury could find that the defendant's belief was reasonable, but his conduct was not "legally justifiable or excusable under the existing circumstances," a conviction for imperfect self-defense manslaughter would not be supported by the evidence. *See Low,* 2008 UT 58, ¶ 32, 192 P.3d 867 (citation and internal quotation marks omitted).

¶ 33 There is no evidence in this case to suggest that Lee used excessive force in reasonably responding to a threat from T.H. or that Lee's actions were otherwise reasonable but legally unjustifiable. Because the jury could not have concluded that Lee caused T.H.'s death under circumstances constituting imperfect self-defense, there is no reasonable probability that the jury would have returned a more favorable verdict for Lee if properly instructed. Thus, while Trial Counsel performed deficiently by not objecting to the erroneous Instruction 16, Lee has not demonstrated that he was prejudiced by

that deficient performance, and is therefore not entitled to relief on this basis.

CONCLUSION

¶ 34 We deny Lee's motion to remand for an evidentiary hearing because Lee did not adequately support the motion with affidavits alleging nonspeculative facts. Lee has failed to demonstrate that the jury instruction on murder was erroneous. While the jury instruction on imperfect self-defense manslaughter was erroneous, Lee has not demonstrated that he was prejudiced by Trial Counsel's failure to object to the erroneous instruction under the circumstances. Lee has also failed to demonstrate that Trial ***1175** Counsel was ineffective on any other basis. Accordingly, we affirm Lee's convictions.

VOROS, Judge (concurring):

¶ 35 I concur in the majority opinion. I write only to clarify why, in my judgment, Lee was not prejudiced by the erroneous instruction on imperfect self-defense on the facts of this case and under controlling statutory law.

¶ 36 The interplay between perfect self-defense and imperfect self-defense is subtle. Perfect self-defense is a complete defense to any crime. *See State v. Knoll,* 712 P.2d 211, 214 (Utah 1985) ("[S]elf-defense is a *justification* for killing and a defense to prosecution." (citation and internal quotation marks omitted)); *see also State v. Spillers,* 2007 UT 13, ¶ 23, 152 P.3d 315 (referring to this first type of self-defense as "perfect self-defense"). It is available to one who reasonably believed that force was necessary to defend against unlawful force:

> A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force.

Utah Code Ann. § 76–2–402(1) (LexisNexis 2003). But this general rule is subject to a crucial corollary: the use of lethal force is justified only in the reasonable belief that it is "necessary to prevent death or serious bodily injury ... or to prevent the commission of a forcible felony." *Id.* [3]

[3] For purposes of this statutory section, a forcible felony includes aggravated assault, most homicides, kidnapping, many sex crimes, and any other felony involving "the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury." Utah Code Ann. § 76–2–402(4) (LexisNexis 2003). An assault is aggravated if the actor uses a dangerous weapon or "other means or force likely to produce death or serious bodily injury." *Id.* § 76–5–103(1). A dangerous weapon is "any item capable of causing death or serious bodily injury" or, under certain circumstances, a facsimile or representation of the item. *Id.* § 76–1–601(5).

¶ 37 In contrast, imperfect self-defense is a partial defense, reducing a charge of murder or attempted murder to manslaughter or attempted manslaughter. *State v. Low,* 2008 UT 58, ¶ 22, 192 P.3d 867. It is available to one who reasonably *but incorrectly* believed that his use of lethal force was legally justified:

> It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another ... under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

Utah Code Ann. § 76–5–203(4)(a), (a)(ii) (LexisNexis Supp.2006).

¶ 38 In *State v. Low* our supreme court identified the factor distinguishing perfect self-defense from imperfect self-defense: "whether the defendant's conduct was, in fact, 'legally justifiable or excusable under the existing circumstances.' " 2008 UT 58, ¶ 32, 192 P.3d 867 (quoting Utah Code Ann. § 76–5–203(4)(a)(ii) (LexisNexis Supp.2007)). In other words, if, under the facts as he reasonably believed them to be, the defendant's conduct was legally justifiable, he then acted in perfect self-defense. If, under the facts as he reasonably believed them to be, he reasonably but incorrectly believed his actions were legally justifiable, he acted in imperfect self-defense.

¶ 39 Ordinarily "for both perfect and imperfect self-defense, 'the same basic facts [are] at issue.' " *Spillers,* 2007

UT 13, ¶ 23, 152 P.3d 315 (alteration in original) (quoting *State v. Howell*, 649 P.2d 91, 95 (Utah 1982)). So when would a person ever reasonably but incorrectly believe he was entitled to use force to defend himself? *Spillers* suggests the answer.

¶ 40 Spillers shot a man who, Spillers testified, had struck him with a gun on the back of the head and was poised to strike again. *Id.* ¶ 3. The State argued that the evidence permitted the jury to reach one of only two results: either Spillers had committed murder or he had acted in perfect self-defense. *Id.* ¶¶ 21–23. But the supreme court concluded that the evidence was amenable to a ***1176** third interpretation: Spillers was entitled to defend himself against his assailant, but not with lethal force. *Id.* ¶ 23. In other words, where Spillers's assailant was using his gun as a club, a jury might find that Spillers reasonably but incorrectly believed that lethal force was "necessary to prevent death or serious bodily injury ... or to prevent the commission of a forcible felony." Utah Code Ann. § 76–2–402(1) (LexisNexis 2003). Accordingly, the court held that the trial court erred in denying Spillers an imperfect self-defense instruction. *Spillers*, 2007 UT 13, ¶ 23, 152 P.3d 315.

¶ 41 We learn from *Spillers* that a defendant is entitled to an instruction on imperfect self-defense if a jury could conclude from the evidence that he reasonably but incorrectly believed he was justified in using lethal force against a non-lethal attack. Stated more generally, imperfect self-defense applies when a defendant makes a reasonable mistake of *law*—when he acts "under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances." Utah Code Ann. § 76–5–203(4)(a)(ii) (LexisNexis Supp.2006). On the other hand, perfect self-defense applies when a defendant makes a reasonable mistake of *fact*—when his conduct was justifiable under the facts as he reasonably believed them to be. [4]

[4] Of course, perfect self-defense also applies when a defendant makes neither a mistake of law nor a mistake of fact.

¶ 42 We can distill *Low* and *Spillers* into a two-part inquiry. To determine whether either version of self-defense is available, we assess both the defendant's understanding of the facts and the defendant's understanding of the law. If the defendant's understanding of the facts is correct (or incorrect but reasonable) and the defendant's understanding of the law is correct, perfect self-defense is available. If the defendant's understanding of the facts is correct (or incorrect but reasonable) and the defendant's understanding of the law is incorrect but reasonable, imperfect self-defense is available. And if either the defendant's understanding of the facts is unreasonable or the defendant's understanding of the law is incorrect and unreasonable, neither perfect self-defense nor imperfect self-defense is available.

¶ 43 Here, Lee argues in effect that his understanding of the facts was incorrect but reasonable. He testified that, as the altercation escalated, T.H. pointed Lee's own gun at him, Lee grabbed it back, and T.H. reached behind him for what Lee believed was "another gun." If this version of events was true, Lee reasonably but incorrectly believed that T.H. was about to employ lethal force against him, justifying his own use of lethal force. Lee thus qualified for a perfect self-defense instruction because his understanding of the facts was reasonable and his understanding of the law was correct—if T.H. had a gun and intended to use it, Lee was legally entitled to respond with lethal force.

¶ 44 But Lee did not qualify for an imperfect self-defense instruction, because he never claimed that his understanding of the law was reasonable but incorrect; he never claimed that, under the circumstances as he reasonably believed them to be, he reasonably but incorrectly believed he had a right to respond with lethal force. One can imagine a scenario where imperfect self-defense would have been available. Had Lee testified that he shot T.H. because he believed T.H. was pulling, say, brass knuckles out of his back pocket, Lee may have been entitled to an instruction on imperfect self-defense. In that situation, he could argue that he reasonably believed that the circumstances justified his use of lethal force when in fact they justified only his use of non-lethal force.

¶ 45 In short, this case presents the very factual dichotomy that *Spillers* did not: the testimony at Lee's trial allowed only two options—that Lee was "either guilty of murder or [entitled to acquittal] under a [perfect] self-defense theory." *See* 2007 UT 13, ¶ 23, 152 P.3d 315. Accordingly, I conclude that Lee was not prejudiced by trial counsel's ***1177** failure to object to the erroneous jury instruction on imperfect self-defense.

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2018 WL 4016577

Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Harlin Argelio RAMOS, Appellant.

No. 20160075-CA
|
Filed August 23, 2018

Third District Court, Salt Lake Department, The Honorable James T. Blanch, No. 141904935

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Judge David N. Mortensen authored this Opinion, in which Judges Jill M. Pohlman and Diana Hagen concurred.

Opinion

MORTENSEN, Judge:

***1** ¶1 "*Please don't kill me. I have kids.*" Victim's plea was in vain, as Defendant Harlin Argelio Ramos stabbed him eight times, including a fatal thrust to the heart. After fleeing the scene, police located and arrested Ramos. In his interview, Ramos alleged that Victim had been the aggressor and that he had only acted in self-defense. The State charged Ramos with murder. At trial, the judge instructed the jury on both perfect and imperfect self-defense, and on the lesser-included offense of imperfect-self-defense manslaughter. One of those instructions was flawed, but the error was not prejudicial. The jury convicted Ramos as charged, and he timely appeals. We affirm.

BACKGROUND

The Murder

¶2 Shortly after 1:00 a.m. on a mid-April morning, Victim and Friend had just finished watching a late movie at a movie theater. Because they had driven separately, Victim walked Friend to her car and she drove him back to his own. Before parting ways, the two talked in the car. While they conversed, Friend noticed two men—Ramos and his accomplice (Accomplice)—walk in front of her car and look at her in a way that "made [her] very uncomfortable." The men's behavior alarmed her so much that she removed her Taser from the glove compartment and rested it on the center console. Victim, however, seemed unconcerned about the men and continued their conversation.

¶3 Just as Victim was about to exit the vehicle, Ramos suddenly opened the passenger door and thrust his "whole arm" inside. Friend thought Ramos was reaching for her keys in an attempt to rob her. Victim pushed Ramos away and the two struggled outside of the car. Meanwhile, Friend closed her passenger door and went to call 911, but accidentally dropped her phone on the car floor. She then locked her car doors, honked her horn, screamed for help, and tried to find her phone.

¶4 When Friend looked back up, Victim and Ramos were no longer within eyesight, so she opened her door and stepped out of her car to find them. She heard Victim screaming "Please don't kill me. I have kids. Please don't kill me." Friend then grabbed her Taser and ran around to the front of her car. She found Victim on the ground with Ramos straddling Victim's lower abdomen and upper legs. She thought that Ramos was punching Victim, so she approached Ramos from behind and applied her Taser to the back of his pant leg, but it had no effect.

¶5 Realizing that the Taser needed to contact skin, Friend pulled down the collar of Ramos's jacket and applied the Taser to the back of his neck. Ramos tried to fight her off, and she ran back to her car, locked her car doors, began honking her horn and screaming for help. Having located her phone, she then dialed 911. Ramos and Accomplice then fled the scene on foot and were soon thereafter picked up by a taxi driver.[1] As Friend waited for someone to answer her 911 call, she saw Victim stagger in front of her

car and fall near her door. Friend opened her door and heard Victim say, "I'm dying. Please help me."

[1] The taxi driver (Taxi Driver) and Ramos were well-acquainted: Ramos used Taxi Driver's service regularly, getting rides approximately "two to three times a week," and Taxi Driver allowed Ramos to use Taxi Driver's home address to purchase a cell phone because Ramos lacked a permanent address. The day before the murder, Taxi Driver also paid for Ramos's room at the motel where Ramos was later arrested by police.

***2** ¶6 As the 911 operator answered, an off-duty paramedic (Paramedic) responded to Friend's cries for help. Paramedic testified that, as he approached, he saw Ramos "cross in front of him and look directly at him." Paramedic rolled Victim onto his back to triage and treat his injuries, and soon thereafter he started CPR.

¶7 Meanwhile, Witness, whose apartment overlooks the crime scene, was watching television at home when he heard a woman screaming for help. From his vantage point, Witness saw two men assaulting another man and pinning him to the ground. Thinking that a robbery was in progress, Witness went to help, but by the time he arrived, Paramedic had already begun treatment. Police and on-duty paramedics soon arrived and took over, but Victim had already passed away.

¶8 Victim suffered nine sharp-force injuries: three to his chest, two to his upper back, two to his abdomen, one to his armpit, and one to the back of his right hand that was consistent with a defensive injury. All wounds were likely inflicted by a single-edged knife. The blade had entered Victim's chest and penetrated completely through his heart, "fully perforat[ing]" his "right ventricle." This was "a lethal injury" that stopped Victim's heart "within minutes." Victim's left lung was punctured twice, once from the front and once from the back, which hastened his death.

The Arrest

¶9 Before police arrived, Ramos and Accomplice[2] fled the scene as Victim bled out. On arrival, police found two backpacks on site, one of which contained a cell phone receipt with Ramos's name on it, as well as his identification card. Police eventually located Ramos at a motel and arrested him. In the motel room, police found a t-shirt, a black jacket, and black athletic pants—all bloodstained—in the trash can in Ramos's room. DNA testing revealed Victim's blood on the t-shirt, jacket, and pants. Additionally, Ramos's fingerprint was on the front passenger door of Friend's car.

[2] Accomplice never contacted police about the case, nor were the police ever able to find him.

¶10 Ramos was given his *Miranda* warnings[3] and agreed to be interviewed by police. He informed police that he did not speak English, so the interview was conducted in Spanish. His interview resulted in several conflicting accounts. Initially, Ramos said that he and Accomplice had planned to meet a "taxi" from "someone who had a white sedan" and had mistaken Friend's car for the taxi. He further alleged that as he approached the door, Victim had jumped out and started hitting him in the head, grabbed his throat, and lifted him completely off of the ground. Ramos stated that as Victim hit him, Ramos said " 'sorry, sorry,' and 'no problem,' " in English, but Victim continued to choke Ramos until he "became desperate" because he was "being asphyxiated." Ramos said he exclaimed, "Help me, help me, he is going to kill me," and then pulled out his knife and stabbed Victim.

[3] *See generally* *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¶11 When a detective told Ramos to "tell the truth," Ramos responded by claiming he was "confused" and maintained that he was attacked by Victim. But he then stated that he believed that Victim was somehow associated with a violent street gang and feared that they had come to harm him.

¶12 When the detective again asked Ramos to tell the truth, Ramos gave yet another version of the events, claiming that he had approached the vehicle because "he was selling drugs and he thought the people in the car wanted some." He continued to state that Victim had exited the car, began hitting and choking him, and because Ramos had drugs in his mouth that night, he spit them out when he was choked. But police did not recover any drugs at the murder scene or in Ramos's backpack or motel room. Ramos also told police initially that he dropped the knife as he fled the scene, but later said that he "may have thrown it away" with his clothing. Despite a thorough search, police did not find a knife in the area.

The Taxi Driver

***3** ¶13 Three days after the murder, the police interviewed Taxi Driver. He also testified at trial, but his two accounts differ significantly. During his police interview, Taxi Driver told police that Ramos called him "around 1:00 a.m., 1:30 a.m., or 1:40 a.m." But when police asked to see Taxi Driver's phone log, he said that he had deleted it. A review of Ramos's phone records showed no outgoing calls to Taxi Driver during the 1:00 a.m. hour. Instead, Ramos's log showed only that Taxi Driver had called him at 1:08 a.m. that morning. Taxi Driver testified that after he got Ramos's call, it took him "fifteen or twenty minutes to drive from his West Valley home to [the murder scene], and that he parked and waited another fifteen or twenty minutes before [Ramos] and [Accomplice] 'arrived.' " Taxi Driver also initially told police that he did not see the fight and that Ramos claimed to have been hit, but did not mention being strangled.

¶14 Taxi Driver testified differently at trial. There, he stated that he operated a private taxi service and that on the night of the murder, Ramos called him in the early morning for a ride. Taxi Driver claimed that he saw both Ramos and Accomplice getting into a car. He then saw an angry man get out of that car and heard Ramos say in Spanish, "This isn't the right car, sorry."[4] Taxi Driver said that the man refused to accept the apology and fought with Ramos. Taxi Driver further testified that he never saw Ramos with a knife but did see a woman try to tase Ramos. Taxi Driver stated that Ramos looked "dizzy" and fell, and that he "was bleeding all over [the left side of] his face," but photographs taken upon Ramos's arrest show only one abrasion on his forehead and no other injury to his face.

4 Taxi Driver arrived in his car, a white Nissan Versa. The Versa was a hatchback without tinted windows. Friend's car was a white four-door Toyota Corolla sedan with tinted rear windows.

¶15 When asked about the discrepancies in his accounts, Taxi Driver testified that he was "nervous" during the police interview and "might have omitted a few details here and there." Taxi Driver asserted that he had testified to "the truth"—that he witnessed the fight, including Ramos being choked, and that Ramos had asked for help because the man was "killing him."

The Strangulation Evidence

¶16 Ramos suffered minor injuries. At the time of his arrest, he had scratches on his neck, a scrape on his forehead, and one abrasion above his left clavicle. At trial, two experts testified to his injuries, Defense Expert and Medical Examiner. Medical Examiner testified that he did not see evidence of petechial hemorrhaging[5] or other signs of strangulation, and opined that "[y]ou'd expect to see damage both externally as well as internally" if a person were lifted completely off the ground by their neck. In contrast, Defense Expert testified that Ramos showed signs of strangulation—abrasions on his neck and petechiae on his skin.[6] Her opinion was founded on her review of police photographs taken when they arrested Ramos, as well as her own examination and interview of Ramos more than thirteen months after the murder. However, Defense Expert conceded that the scratches could have been consistent with having been tased on the neck by Friend.

5 Petechial hemorrhaging is caused by significant strangulation. *State v. Lopez*, 789 P.2d 39, 41 n.2 (Utah Ct. App. 1990). "High pressure arterial blood continues to pump into the head from the heart while blood is unable to leave the head through the veins because of the ligature. As the pressure builds, blood vessels burst, resulting in hemorrhaging in the skin and the whites of the eyes." *Id.*

6 When medical personnel examined him the day of his arrest, Ramos did not mention, much less complain, that he had been strangled. He also showed no difficulty eating or drinking and never asked police for any medical treatment.

Summary of Proceedings

¶17 The State charged Ramos with one count of murder. At trial, Friend testified that she heard Victim screaming, "Please don't kill me. I have kids. Please don't kill me." Thereafter, the prosecutor asked Friend what kind of cell phone Victim had and whether she knew "what was on the screen of his cell phone?" Friend responded, "He had a picture of his two little boys." When the prosecutor asked,

"A picture of his two little boys?" Friend nodded her head affirmatively. The prosecutor never introduced the picture of Victim's two boys.

***4** ¶18 The judge then instructed the jury on both perfect and imperfect self-defense, and on the lesser-included offense of imperfect-self-defense manslaughter. While the imperfect-self-defense instruction correctly instructed the jury on the State's burden of proof, both parties agree that the instruction on imperfect-self-defense manslaughter misstated that burden. [7] Instruction 34, which defined the elements of imperfect-self-defense manslaughter, contradicted Instruction 48 and misinformed the jury about the State's burden to disprove imperfect self-defense. Instruction 34 incorrectly told the jury that it could convict Ramos of imperfect-self-defense manslaughter only if it found, beyond a reasonable doubt, that the defense applied. The instruction stated,

> You may consider the lesser included offense of "Manslaughter Involving a Dangerous Weapon." To do so you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense. That on or about April 19, 2014, in Salt Lake County, Utah:
>
> 1. The defendant ... individually or as a party to the offense;
>
> 2. Either:
>
> (a) Recklessly caused the death of [Victim]; or
>
> (b) Caused the death of [Victim] under circumstances where the defendant reasonably believed the circumstances provide a legal justification or excuse for his conduct, although the conduct was not legally justifiable or excusable under the existing circumstances; and
>
> 3. A dangerous weapon was used in the commission or furtherance of this act.
>
> 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 of Manslaughter Involving a Dangerous Weapon. 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 of Manslaughter Involving a Dangerous Weapon.

[7] The State concedes that Instruction 34 was flawed. The three other related instructions were correctly given. First, Instruction 33 correctly stated the elements instruction for murder, informing the jury that to convict Ramos of murder, the State had to prove beyond a reasonable doubt that Ramos intentionally or knowingly killed Victim without any legal justification. Second, Instruction 39 correctly explained the State's burden to disprove self-defense, stating, "Once self-defense is raised by the defendant, it is the prosecution's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense." Instruction 39 continued, "The defendant has no particular burden [of] proof but is entitled to an acquittal if there is any basis in the evidence sufficient to create reasonable doubt." Finally, Instruction 48 correctly instructed the jury on the State's burden of proof on imperfect self-defense. It explained that the defense applies when a "defendant caused the death of another while incorrectly, but reasonably, believing that his conduct was legally justified or excused." It also explained that if the State did not carry its burden, Ramos could "only be convicted of Manslaughter Involving a Dangerous Weapon."

¶19 The jury was further instructed that it could consider the offense of manslaughter under Ramos's imperfect-self-defense theory only if it found "from all of the evidence and beyond a reasonable doubt each and every one of the ... elements of that offense." These statements impermissibly shifted the burden to Ramos because they either infer that the burden rests upon Ramos or they are vague concerning which party bears the burden of proof. [8]

[8] Jury instructions should, at all times, clearly express that the State bears the burden of proof. *See* *State v. Lee*, 2014 UT App 4, ¶ 27, 318 P.3d 1164.

***5** ¶20 The jury convicted Ramos of murder, and he timely appeals.

ISSUES AND STANDARDS OF REVIEW

¶21 Ramos brings two claims on appeal. He first contends that his trial counsel was constitutionally ineffective for failing to object (1) to the erroneous imperfect-self-defense manslaughter jury instruction and (2) to the prosecutor's

questions regarding photos of Victim's children on his cell phone. "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 (cleaned up).

¶22 Ramos also argues that the cumulative effect of trial counsel's error "should undermine this Court's confidence in the jury's verdict." "Under the cumulative error doctrine, we will reverse only if the cumulative effect of the several errors undermines our confidence that a fair trial was had." *State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7 (cleaned up).

ANALYSIS

I. Ramos's Counsel Was Not Constitutionally Ineffective

¶23 "To ensure a fair trial, the Sixth Amendment of the U.S. Constitution guarantees the right to effective assistance of counsel." *State v. Campos*, 2013 UT App 213, ¶ 23, 309 P.3d 1160; *see also* U.S. Const. amend. VI. To prevail on an ineffective assistance of counsel claim, a defendant must (1) "identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness," and (2) show that "but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Montoya*, 2004 UT 5, ¶¶ 23–24, 84 P.3d 1183 (cleaned up). In other words, to show constitutional ineffectiveness, Ramos must prove both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687–89, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92. [9]

[9] Ramos also argues that the court's failure to ensure proper jury instruction constitutes plain error. But a party to an appeal cannot take advantage of an error that it invited the trial court to commit. *See Pratt v. Nelson*, 2007 UT 41, ¶ 17, 164 P.3d 366. Thus, "a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction." *State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742 (cleaned up). Here, Ramos did not merely fail to object; he agreed to the instruction. When the court discussed the proposed jury instruction for imperfect-self-defense manslaughter, trial counsel stated, "We don't have an issue with this instruction, Judge." Counsel therefore invited the error in the instruction and precluded any plain error review.

A. Failure to Object to the Flawed Jury Instruction

¶24 Because imperfect self-defense is an affirmative defense, Ramos was entitled to the benefit of it—reduction of a murder conviction to manslaughter—unless the State proved beyond a reasonable doubt that the defense did not apply. *See State v. Low*, 2008 UT 58, ¶ 45, 192 P.3d 867; *State v. Lee*, 2014 UT App 4, ¶ 27, 318 P.3d 1164; *Campos*, 2013 UT App 213, ¶ 38, 309 P.3d 1160. The State concedes that sufficient evidence exists in the record to support the trial court's giving of a self-defense instruction. Thus, Ramos was entitled to a proper self-defense instruction. Accordingly, Ramos contends that his trial counsel was constitutionally ineffective by failing to object to the flawed jury instruction.

***6** ¶25 A court need not review the deficient performance element before examining the prejudice element. *See State v. Galindo*, 2017 UT App 117, ¶ 7, 402 P.3d 8. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Id.* (cleaned up). Here, we follow that course because Ramos cannot carry the heavy burden of demonstrating that the erroneous instruction prejudiced him.

¶26 To prove prejudice, Ramos must demonstrate "a reasonable probability" that but for counsel's performance, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Thus, even when a jury instruction is erroneous, the error may nevertheless be harmless given the evidence. *See State v. Hutchings*, 2012 UT 50, ¶¶ 24–28, 285 P.3d 1183; *see also Green v. Louder*, 2001 UT 62, ¶ 17, 29 P.3d 638 (noting that an erroneous jury instruction is harmless if "we are not convinced that without this instruction the jury would have reached a different result").

¶27 Ramos argues that we must presume prejudice because there is "a reasonable basis for the jury to conclude that imperfect self-defense applied," and therefore "there is necessarily a reasonable probability ...

that, but for counsel's error, the result would have been different." (quoting *State v. Garcia*, 2016 UT App 59, ¶ 25, 370 P.3d 970, *aff'd in part, rev'd in part,* 2017 UT 53, —— P.3d ——). When assessing the "reasonable probability that the jury would have returned a more favorable verdict ... if properly instructed," *Lee*, 2014 UT App 4, ¶ 33, 318 P.3d 1164, the court must "consider the totality of the evidence" before the jury, *see Hutchings*, 2012 UT 50, ¶ 28, 285 P.3d 1183. When we consider the totality of the evidence here, we do not find a reasonable probability that the result would have been different had the jury been properly instructed.

¶28 In *State v. Garcia*, 2017 UT 53, —— P.3d ——, our supreme court held that, based on the totality of the evidence, the defendant was not prejudiced by a similarly worded, erroneous imperfect-self-defense instruction. *Id.* ¶ 45 ("When we examine the record as a whole, counsel's error does not undermine our confidence in the jury's verdict finding [Defendant] guilty of attempted murder rather than attempted manslaughter. The evidence [in favor of attempted murder] overwhelmed the evidence that [Defendant] acted in imperfect self-defense.").

¶29 Like Ramos's jury instruction, the instruction in *Garcia* incorrectly stated that the jury "needed to find beyond a reasonable doubt that imperfect self-defense did not apply in order to convict [Defendant] of attempted manslaughter." *Garcia*, 2016 UT App 59, ¶ 11, 370 P.3d 970. This instruction was erroneous because it "improperly placed the burden upon [Defendant] to prove his affirmative defense beyond a reasonable doubt rather than correctly placing the burden on the State to *disprove* the defense beyond a reasonable doubt." *See State v. Lee*, 2014 UT App 4, ¶ 27, 318 P.3d 1164.

¶30 But on appeal, our supreme court concluded that the defendant suffered no prejudice because counsel's error did not undermine the court's confidence in the jury's verdict. "The evidence that [Defendant] was motivated by a desire to kill ... overwhelmed the evidence that [Defendant] acted in imperfect self-defense." *Garcia*, 2017 UT 53, ¶ 45. Said another way, just because there was enough evidence to justify giving the imperfect-self-defense instruction does not mean that the jury would have found that it applied. The State's evidence against Garcia was so overwhelming that even had the proper instruction been given, there was not a reasonable probability that the outcome would have been different, since the jury could not "reasonably have found that Garcia acted in imperfect self-defense such that a failure to instruct the jury properly undermines confidence in the verdict." *Id.* ¶¶ 42–44.

***7** ¶31 Similarly, Ramos suffered no prejudice because there was no reasonable probability that but for his counsel's performance, "the result of the proceeding would have been different" such that the error "undermine[s] [our] confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Lee*, 2014 UT App 4, ¶¶ 29–33, 318 P.3d 1164 (holding that even erroneous affirmative-defense instructions do not cause prejudice where overwhelming evidence against the defendant demonstrates that there is no reasonable probability that the jury would have found that defendant acted reasonably or with legal justification).

¶32 The evidence against Ramos was so overwhelming that there was no "reasonable probability" that but for counsel's performance regarding the jury instruction, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Ramos alleged imperfect self-defense, but several factors weigh heavily against his claim. Victim was stabbed not once, but nine times; Ramos was not alone, but attacked Victim with the help of Accomplice; Ramos's injuries, in comparison to Victim's, were minimal; and after repeatedly and fatally stabbing Victim, Ramos did not seek or await law enforcement, but instead fled. Finally, when Ramos was apprehended and talked to law enforcement, he gave significantly inconsistent stories about what happened.

¶33 Furthermore, because Instruction 48 more plainly and separately outlines the burden of proof, it is not reasonably likely that the jury was confused as to the burden of proof, such that the outcome of the case would have been different. Instruction 48 read,

> Imperfect self-defense is a partial defense to the charge of Murder. It applies when the defendant caused the death of another while incorrectly, but reasonably, believing that his conduct was legally justified or excused. The effect of the defense is to reduce the crime of Murder to Manslaughter Involving a Dangerous Weapon.
>
> The defendant is not required to prove that the defense applies. Rather, the State must prove beyond a

reasonable doubt that the defense does not apply. The State has the burden of proof at all times. If the State has not carried this burden, the defendant may only be convicted of Manslaughter Involving a Dangerous Weapon.

¶34 Where the instructions contained an express statement correctly identifying the party who bore the burden of proof, we find it unlikely that the jury misapplied the law. In the parlance of *Strickland*, we do not believe that the misstatement of the law changed the outcome in this case and we remain unpersuaded that correcting the instruction would likely change the result here.

¶35 Ramos's contention that he was prejudiced based solely on his entitlement to a correctly drafted imperfect-self-defense instruction fails. Because Ramos has not shown any error that undermines our confidence in the jury's verdict, we conclude that he did not receive ineffective assistance of counsel.

B. Failure to Object to Questioning Regarding Victim's Children

¶36 Ramos also argues that his trial counsel was constitutionally ineffective by failing to object to Friend's testimony that Victim had a picture of his two sons on his cell phone. As discussed, to show that his counsel was ineffective, Ramos must prove both that his counsel performed deficiently and that he was prejudiced as a result. *See* *Strickland v. Washington*, 466 U.S. 668, 687–89, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Because there were multiple strategic reasons not to object, Ramos cannot demonstrate that no reasonable attorney would have failed to object, and his contention fails.

***8** ¶37 First, counsel could have reasonably concluded that the testimony was relevant. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Utah R. Evid. 401(a). Counsel could have reasonably concluded that the testimony that Victim had a picture of his boys on his cell phone cleared this low threshold by helping corroborate Friend's account of the stabbing, including her testimony that Victim begged for his life because he had children.

¶38 Second, trial counsel could have reasonably concluded that the testimony about the cell phone picture was cumulative. The jury already knew from Friend's testimony that Victim was a father. Therefore, trial counsel could have reasonably chosen not to object based on the fact that the information was not new to the jury.

¶39 In sum, counsel had valid reasons not to object to the testimony Ramos now claims counsel should have opposed. Ramos therefore has not rebutted the presumption that his counsel's performance was objectively reasonable. *See* *Strickland*, 466 U.S. at 687–89, 104 S.Ct. 2052. Because he fails to demonstrate deficient performance, we need not address prejudice, and his argument fails.

II. Cumulative Error Doctrine Is Unavailing

¶40 Ramos' final contention is that because "the evidence that [he] was guilty of murder ... was not overwhelming" the cumulative errors in his trial undermine the jury verdict. We are not persuaded, having concluded that the only error that occurred at trial was harmless.

¶41 The cumulative error doctrine applies only when "collective errors rise to a level that undermine[s] [an appellate court's] confidence in the fairness of the proceedings." *See* *State v. Perea*, 2013 UT 68, ¶ 105, 322 P.3d 624. Here, we have not found any prejudicial error, and therefore the application of the cumulative error doctrine is inapplicable. *See* *State v. Killpack*, 2008 UT 49, ¶ 56, 191 P.3d 17, *abrogated on other grounds by* *State v. Wood*, 2018 UT App 98, —— P.3d ——.

CONCLUSION

¶42 Ramos's trial counsel did not provide constitutionally ineffective assistance in failing to object to the flawed imperfect-self-defense manslaughter jury instruction. Further, counsel did not provide ineffective assistance in not objecting to testimony regarding the picture of Victim's children on his cell phone. Finally, based on the lack of multiple errors, the requirements of the cumulative error doctrine have not been met.

¶43 Affirmed.

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