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
December 5, 2018 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes	Discussion / Action	Tab 1	Judge Blanch
	Assault Instructions - *Assault – Pregnant Person* - *Aggravated Assault* - *Final cumulative review to number and ensure internal consistency*	Discussion / Action	Tab 2	Sandi Johnson
	Defense of Self or Other - *Review new instruction CR510 (previously approved by committee March 7, 2018) prior to publication, in light of "HB 102 - Use of Force Amendments" from 2018 legislative session*	Discussion / Action	Tab 3	Judge Blanch
	Object Rape / Definition of Penetration - *CR1607. Object Rape* - *CR1608. Object Rape of a Child* - *State v. Patterson*	Discussion / Action	Tab 4	Judge Blanch
	Imperfect Self-Defense Instruction - *State v. Lee* - *State v. Ramos*	Discussion / Action	Tab 5	Judge Blanch
1:30	Adjourn			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 1:30 p.m. (unless otherwise specifically noted):

January 9, 2019
February 6, 2019
March 6, 2019
April 3, 2019
May 1, 2019
June 5, 2019
September 4, 2019
October 2, 2019
November 7, 2019
December 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 November 7, 2018

NOTES:

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

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
November 7, 2018 – 12:00 p.m. to 1:30 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *Chair*	•	
Jennifer Andrus		•
Mark Field		•
Sandi Johnson		•
Judge Linda Jones		•
Karen Klucznik	•	
Judge Brendan McCullagh	•	
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall	•	
Scott Young	•	
VACANT – Criminal Defense Attorney		
VACANT – Criminal Defense Attorney		
VACANT – Criminal Law Professor		

GUESTS:

None

STAFF:

Michael Drechsel
Jiro Johnson (minutes)

(1) WELCOME AND APPROVAL OF MINUTES:

The committee considered the minutes from the October 3, 2018 meeting.
Mr. Phelps moves to approve the minutes from last meeting.
Second from Mr. Young
The motion passed unanimously.

(2) PROPOSED COMMITTEE NOTE RE: CONTROLLED SUBSTANCE INSTRUCTIONS:

Judge Blanch discussed the reasoning for returning to this topic and asked Mr. Phelps to discuss the issues arising with controlled substances. Mr. Phelps made explanation regarding the situation to refresh the recollection of the committee members. Judge McCullagh expressed concern with bending Utah jury instructions to accommodate federal courts. Judge McCullagh also discussed the types of scenarios that come before the immigration courts, primarily if someone pleads to "possession of marijuana or spice" as a resolution to the case (not stating

specifically which substance is involved), the fact that spice is not a controlled substance on the federal schedule leaves the immigration court barred from discerning which substance was actually at issue for the purposes of the immigration court. Ms. Klucznik questioned whether an item is a controlled substance has a separate jury instruction. Judge Blanch said that back in October 2015 the Committee opted to combine the instructions so that the controlled substance instruction includes what schedule a controlled substance is and the specific name of the involved substance as elements of the crime. Mr. Young stated that the committee had previously agreed about the instruction now in effect and so the issue is whether the Committee should revisit that decision and either add a note to the instruction that Utah law does not require finding a specific controlled substance by the jury or change the instruction. Ms. Klucznik questioned whether having a jury instruction that identifies a controlled substance as a specific schedule of drug, without a jury deciding that issue, would prevent an immigration court from connecting a controlled substances charge to the controlled substance in the separate instruction.

Judge Blanch stated the options were that the instruction could be redone to avoid this unintended federal outcome or just leave the instruction alone. Ms. Klucznik said it may be best to leave this instruction alone because this is a Utah issue and we shouldn't involve ourselves in sorting out potential federal matters. Judge McCullagh expressed his preference for not having a comment. Mr. Phelps reminded the committee that the type of controlled substance is not an element for a crime. Mr. Drechsel stated that a jury could find that a drug is a controlled substance without coming to agreement as to the type of drug, say cocaine or heroin, and still convict. Judge McCullagh pointed out that those are in different schedules so that is a bad example. Mr. Young stated that our job is to simplify the jury instructions and felt that modifying the instruction may not be the Committee's purpose. Judge Blanch asked what would be the best solution if a change were to happen, a comment, or reverting the instruction back to two instructions, which would be accomplished by deleting the following language (marked with a strikeout) from the current version of CR1203:

> CR1203 Possession of a Controlled Substance.
> (DEFENDANT'S NAME) is charged [in Count ___] with committing Possession of a Controlled Substance [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:
>
> 1. (DEFENDANT'S NAME);
> 2. Intentionally and knowingly;
> 3. Possessed ~~(NAME OF CONTROLLED SUBSTANCE/COUNTERFEIT SUBSTANCE),~~ a schedule [I] [II] [III] [IV] [V] [controlled substance] [counterfeit substance][; and]
> 4. [The defense of _____ does not apply].
>
> After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

This method would then require a second instruction that stated "(NAME OF CONTROLLED SUBSTANCE) is a Schedule [I] [II] [III] [IV] [V] controlled substance."

Mr. Phelps moved to have the committee reconsider the previous vote approving the current instruction. That motion was seconded by Mr. Young, in order to at least allow the committee the opportunity to continue to debate the need for action. Mr. Phelps, Young, and Nelson were in favor, Ms. Klucznik and McCullagh voted no.
The motion to reconsider the previous decision passed. The committee then continued to discuss the matter. After the discussion was exhausted, Mr. Phelps motioned to amend the instruction by having it read "Possessed a schedule [I][II][III][IV][V] [controlled substance] [counterfeit substance] [; and]". That motion failed for lack of a second. Judge Blanch thanked the committee for the time it spent on this issue.

(3) ASSAULT INSTRUCTIONS:

Ms. Klucznik asked to return to the special verdict definitions to query why "residence" was included in the definitions since it didn't appear elsewhere in the instructions. The committee pointed out that "residence" DID appear elsewhere in the instructions and thus needed to be defined. Ms. Klucznik was also concerned that

"reside" had definitional language for dwelling permanently, but the "residence" language includes language for a temporary dwelling place. Ms. Klucznik then wondered whether the jury has to be unanimous for finding that a defendant was a cohabitant with a victim in the special verdict form. The committee addressed these issues through discussion.

At 12:54pm, Judge Westfall joined the meeting via telephone, having been involved in court hearings and unavailable to participate until this time. Mr. Drechsel updated Judge Westfall regarding who was present in the meeting and what the committee was presently discussing.

The committee then discussed the decision to not include the DV language in the elements instruction, and what the result of a hung jury on the issue of cohabitant status would be. The committee discussed that sometimes, if there was no unanimous decision regard the cohabitant status, the prosecutor may simply decide it is not worth re-trying that specific issue to a new jury and would simply proceed on the non-DV assault. Judge McCullagh stated that the cohabitant finding would be important in DV cases filed in district court because those cases are class A misdemeanors (or greater) due to being enhanced based on prior domestic violent convictions for a defendant AND being a current case involving new DV. In that way, the DV is more like an element of the offense, though the committee agreed that the instructions should still be structured to use a special verdict form for the cohabitant status. Ms. Klucznik asked if there are other enhanced crimes where a special verdict form is used. Mr. Nelson stated that he has used a similar instruction format (primary offense and special verdict form) for other enhancements.

Judge Blanch discussed the three instructions regarding Assault under Tab 3 of the meeting materials. The first was the definition of Assault involving Substantial Bodily Injury instruction. Ms. Klucznik noted that the DV notation is not necessary at this point because of the special verdict form for cohabitants. The committee agreed and Mr. Drechsel eliminated the DV brackets in the three draft instructions currently under consideration at this meeting. Mr. Drechsel also removed that same bracketed "[DV]" language from the instructions approved at the previous meeting. This will require the committee to review those instructions at the next meeting in December and re-approve them. Mr. Drechsel added a final cumulative review of all assault-related instructions to the next agenda to accomplish this purpose.

In terms of the "assault involving substantial bodily injury" instruction, Judge McCullagh stated that the Committee may be structuring the instructions incorrectly. He explained that in his view there is only one offense of "assault" which can be sentenced at a higher degree (a class A misdemeanor) when the result of the assault is substantial bodily injury. This point was discussed by the committee, which ultimately decided that although Judge McCullagh's point is correct, in practice the parties typically don't approach the case in that way. Instead, they often will request a lesser included offense instruction (for assault) if it seems warranted under the circumstances of the case. Judge McCullagh also agreed with this assessment.

The Committee discussed whether the mens rea element only applied to "committed an act with unlawful force or violence" or to all of the elements. In this instruction, it was agreed that the mens rea requirement is only in regard to the action taken and not the result achieved.

At this time (1:27 p.m.), it was necessary for Mr. Nelson to leave the meeting for a prior commitment.

Ms. Klucznik questioned whether element 4 for self-defense required the burden language and was concerned that it de-emphasized the prosecution's burdens for elements 1-3 and also noted that the references must eliminate the code provisions for domestic violence. The committee agreed that it was better to be absolutely clear about the burden and standard of proof related to defenses (if any) so that language will remain in the instructions. Judge Blanch requested that the elements for 2 and 2(a) be combined and that the domestic violence code citations be removed from the references. The committee agreed. As a result of the discussion, the committee proposed the following language:

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, or recklessly committed an act with unlawful force or violence;
3. The act caused substantial bodily injury to (VICTIM'S NAME).
4. [The prosecution has proven beyond a reasonable doubt that the defense of _____ does not apply.]

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

References
Utah Code § 76-5-102(3)(a)

Committee Notes
In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated mens rea (intentional, knowing, or reckless). Practitioners should review State v. Barela, 2015 UT 22.

Last Revised –11/07/2018

Mr. Young motioned to adopt those edits, Judge McCullagh seconded.
Committee unanimously voted to alter the instructions as request by Judge Blanch.

(4) HB 102 – USE OF FORCE AMENDMENTS:

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the December meeting.

(5) OBJECT RAPE / DEFINITION OF PENETRATION:

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the December meeting.

(6) IMPERFECT SELF-DEFENSE INSTRUCTION:

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the December meeting.

(7) ADJOURN

The meeting adjourned at approximately 1:35 p.m. The next meeting will be held on December 5, 2018, starting at 12:00 noon.

TAB 2

Assault Instructions

NOTES: The committee will continue its work on the assault instructions (assault – pregnant person / aggravated assault) and will make a final, cumulative review of the instructions as a set to ensure consistency. Instructions will be numbered by the committee.

CR_____ Assault – Pregnant Person ~~[DV]~~.

(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; and
5. [T~~hat t~~he prosecution has proven beyond a reasonable doubt that the defense of _____ does not apply.]

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

References

Utah Code § 76-5-102(3)(b)
~~Utah Code § 77-36-1~~
~~Utah Code § 77-36-1.1~~

Committee Notes

In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Last Revised – 00/00/0000

CR_____ Aggravated Assault ~~[DV]~~.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Aggravated 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. 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. [T~~hat t~~he prosecution has proven beyond a reasonable doubt that the defense of _____ does not apply.]

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

References

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

Committee Notes

In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Last Revised – 00/00/0000

TAB 3

Defense of Self or Other

NOTES: The committee will review the new instruction (CR510 – previously approved by committee March 7, 2018) prior to publication, in light of "HB 102 - Use of Force Amendments" from 2018 legislative session.

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.

2018 UT App 161

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