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
March 6, 2019 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Blanch
	Assault Instructions - *Special Verdict Form Review* - *Assault Against Peace Officer / Military Service Member* - *Assault Against School Employee* - *Assault / Aggravated Assault by Prisoner* - *Related Definitions*		Tab 2	Sandi Johnson
	Imperfect Self-Defense Instruction - *State v. Lee* - *State v. Ramos* - *State v. Navarro* - *Materials from Karen Klucznik*		Tab 3	Judge Blanch Karen Klucznik
1:30	Adjourn			

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):

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

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
January 9, 2019 – 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 (no conference line)		•
Scott Young	•	
VACANT – Criminal Defense Attorney		
VACANT – Criminal Defense Attorney		
VACANT – Criminal Law Professor		

GUESTS:

None

STAFF:

Michael Drechsel
Jiro Johnson (minutes)
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch was unable to attend the meeting due to a jury trial. At Judge Blanch's request, Mr. Drechsel directed the meeting. Mr. Drechsel welcomed the Committee for January 9, 2019.

The committee considered the minutes from the December 5, 2018 meeting.
Ms. Johnson moved to approve the draft minutes.
Judge Jones seconded the motion.
The motion passed unanimously.

(2) AGGRAVATED ASSAULT SPECIAL VERDICT FORM:

In the December meeting, the Committee had begun consideration of a special verdict form for Aggravated Assault. Mr. Johnson discussed her efforts to draft such a form with the Committee. She had prepared some draft

options, which were provided to the Committee (and made available online as "Meeting Materials – Supplement"). Those materials were displayed to the Committee as the Committee discussed the special verdict form issues. Ms. Johnson expressed her growing preference for special verdict forms. If special verdict forms are used, it may require the Committee to re-assess some of the assault instructions that have been approved by committee during the last few meetings. Ms. Johnson advocated for keeping both the instructions previously drafted and include the special verdict form, so that both options are available to practitioners depending on the needs in a particular case.

At 12:13pm Mr. Young joined the Committee

Ms. Johnson said that, as it applies to aggravated assault, it would likely be best to not use a special verdict form (though she provided a proposed form as part of the discussion). She explained that a special verdict form would be appropriate for enhancing an aggravated assault (Third Degree Felony variety) to a Second Degree Felony, but did not see the need for such a form for a Third Degree Felony.

Ms. Klucznik stated that the first instruction regarding aggravated assault should not have a special verdict form for the three different Third-Degree aggravated assault variations. Judge Jones agreed with Ms. Klucznik.

Ms. Klucznik was also worried that prosecutors may be confused that separating assault with special verdict forms can be a problem because prosecutors have to charge aggravated assault and defendants must be bound over on aggravated assault. Before going to trial, a prosecutor cannot charge for a misdemeanor assault and then instruct the jury as to aggravated assault in a special verdict form. The Committee discussed whether prosecutors would reference the MUJI instructions when making charging decisions. Mr. Nelson stated that that wasn't likely to be a concern. More interesting to Mr. Nelson was whether a jury would make incorrect inferences in deliberations from receiving an instruction on an underlying crime (i.e., assault) with a special verdict form that raises the level of offense (i.e., to aggravated assault). Mr. Phelps suggested that might lead to more compromise verdicts.

Ms. Klucznik then raised concern that jurors may not make it to instructions at the back of the packet and may not get to a special verdict form, resulting in a conviction in a lesser crime because the jury did not read the special verdict form. Mr. Phelps noted that the only way to be sure is to extensively poll the jury. The committee discussed whether there was a way to structure the special verdict form to ensure that the jury has considered the application of the special verdict form. Judge Jones felt that perhaps the special verdict form could say "check any that apply" as opposed to "check all that apply" to avoid the perception that the jurors have to check a box on the special verdict form. Ms. Johnson felt that a general instruction to the jury about how to use the verdict forms that tells the jury that if they feel the special verdict form does not apply could resolve Judge Jones' concerns.

Ms. Klucznik also raised another concern, that use of special verdict forms pose a greater risk to defendants. By requiring the state to have all elements in a single elements instruction, then the burden of proof is higher because the entire charge hangs in the balance. Special verdict forms eliminate the all or nothing status of an instruction that includes all of the elements. Ms. Klucznik was concerned that this eliminates the defendant's choice to ask for a lesser included because the special verdict form would automatically imply the lesser included. Judge Jones expressed a preference for having elements put inside the elements instruction and not in the special verdict form. Judge Jones highlighted State v. Lowe, 2008 UT 58, which she felt had language that indicated the defendant has a right to chart their own defense. On the other hand, Ms. Klucznik noted that under other case law if a lesser included offense is wholly subsumed by the greater offense, the prosecution will get a lesser included instruction no matter what. Ms. Klucznik wondered if there is a constitutional issue by not providing the defendant a choice, especially where a lesser included might be at issue.

The Committee continued to discuss the proper approach: 1) all elements in a single instruction VS 2) use of special verdict forms. The approach endorsed by the Committee will affect a large number of instruction across a wide range of various offenses (including Aggravated Sexual Abuse of a Child, and upcoming areas like robbery and burglary). Ultimately more members of the Committee did not believe that the use of special verdict forms created constitutional issues.

Ms. Johnson suggested that the committee could have multiple forms, one that is a single complete elements instruction without any special verdict form, and one with the underlying offense accompanied by a special verdict instructions to, for instance, modify aggravated assault to a Second Degree felony. Ms. Andrus believes that the special verdict form option will be more clear for the jury because it breaks the decision-making process down to simpler steps for consideration. Mr. Nelson wondered whether having two separate instructions will cause more or less confusion and more or less disagreement between the parties, which requires more work for judges.

The Committee turned to consideration of the actual language in Ms. Johnson's drafted special verdict forms (first two pages of "Meeting Materials – Supplement"). The Committee agreed that there should NOT be a special verdict form taking an assault charge (MB) to aggravated assault (F3). That language was stricken from the draft. As it related to the special verdict form for Class A Misdemeanor assault for a pregnant person, Ms. Klucznik and Ms. Andrus recommended a change to make the instruction more readable so that the special verdict form language would read "(VICTIM'S NAME) was pregnant at the time of the assault and (DEFENDANT'S NAME) **knew** of the pregnancy" as opposed to the original language "(VICTIM's NAME) was pregnant at the time of the assault and (DEFENDANT'S NAME) **had knowledge** of the pregnancy."

Mr. Young left at 12:51pm.

The Committee noted that there was a standalone instruction for Assault Against a Pregnant Person, Assault Causing Substantial Bodily Injury, and Assault with a special verdict form for the pregnant / substantial injury component. But there wasn't a combined pregnant / substantial injury instruction that didn't require a special verdict form. Ms. Johnson emailed a draft of a combined instruction to committee staff, as follows:

Assault Class A Causing Substantial Bodily Injury and/or Victim Pregnant [DV]

1) (DEFENDANT'S NAME);
    a) Intentionally, knowingly, or recklessly;
        i) Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
        ii) Committed an act with unlawful force or violence that
            (a) caused bodily injury to (VICTIM'S NAME); or
            (b) created a substantial risk of bodily injury to (VICTIM'S NAME); and
    b) (VICTIM'S NAME) was pregnant; and
    c) (DEFENDANT'S NAME) had knowledge of the pregnancy;

OR

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

Mr. Drechsel asked whether the standard assault instructions should be titled "Simple Assault" or just "Assault." Judge Jones felt that "simple" should be removed because that is not statutory. The Committee agreed. Mr. Drechsel removed "Simple" from the title of that instruction.

The Committee continued discussing the ramifications of using special verdict forms, where, if used too often, the forms could result a greater degree of confusion because everything is so fragmented onto different forms. Ms. Johnson stated that she has had good experience with jurors and special verdict forms, even in complicated matters. Mr. Nelson stated the same.

The Committee felt it may be prudent to finalize the language and review and approve at a future meeting (especially where Judge Blanch had not been able to attend today due to his jury trial matters he was handling).

Ms. Johnson explained how to organize the forms online by degree of offense so that practitioners had the maximum amount of flexibility for the forms between the various versions of assault and their different degrees of offense, as follows:

Class B Misdemeanor
Assault

Class A Misdemeanor
Assault of Pregnant Person / Substantial Bodily Injury (combined instruction)
Assault of Pregnant Person (stand-alone)
Assault Causing Substantial Bodily Injury (stand-alone)
Assault (MB) + SVF for Pregnant Person / Substantial Bodily Injury

Third Degree Felony
Aggravated Assault

Second Degree Felony
Aggravated Assault (combined instruction with all possible elements included)
Aggravated Assault (F3) + SVF for "serious bodily injury" OR "loss of consciousness"

Etc. [with the following added by staff after the meeting to complete the thinking behind this method of organization]:

First Degree Felony
Aggravated Assault - Officer (combined instruction with all possible elements)
Aggravated Assault (F3) + SVF for "targeting officer" AND "serious bodily injury"

These might then include a committee note that states "Depending on the facts of your case, you may choose to employ [the stand-alone version by #] or the [SVF version by #]."

The Committee instructed staff to prepare and organize the instructions in this way for the next meeting.

The Committee returned the conversation to the language in the special verdict forms ("Meeting Materials – Supplement"). The Committee first considered what the appropriate method would be to ensure the jury has considered the special verdict form. The various options were: **1)** leave blank and sign (i.e., "if you have found that none of the above apply, leave the form blank, sign the bottom, and return to the judge); **2)** checkbox options for "has proven" / "has not proven"; **3)** a "none of the above" checkbox after a list of any potentially applicable factors (see example in "Meeting Materials – Supplement"); **4)** multiple checkboxes for each option that are in columns for "has proven" and "has not proven" without a "none of the above" checkbox at the end. Ms. Johnson noted that the judge can be the gatekeeper to review the forms to ensure that they are returned appropriately. As part of the discussion, Ms. Johnson, Judge Jones, and Ms. Klucznik noted that the use of special verdict forms will always require a jury to define specifically what theory of the case they are unanimous about (which is potentially harder for the state, but would never be an issue under the arguments raised in State v. Hummel, 2017 UT 19). The Committee discussed an intro instruction to the special verdict form(s) (i.e., "You have been provided the following special verdict form, which you must carefully consider. Any of the forms that you find to be not relevant to your decision in the case should be left blank, signed by the foreperson, and returned to the judge at the conclusion of your deliberations." The Committee did not agree to that specific language; it was merely a quick example of what such an intro instruction might say.) The Committee decided that looking at a few of the various options would be helpful.

Ms. Andrus asked to alter the special verdict form for Aggravated Assault as a Second Degree Felony to change "the act that **impeded** the breathing or the circulation of blood produced a loss of consciousness" to "as it relates to element 3B, the act **interfering with** the breathing or the circulation of blood produced a loss of consciousness."

The Committee discussed other options for that word that would be more common. The Committee agreed to the "**interfering with**" language change.

Mr. Drechsel asked if there was a need for a vote on anything that the Committee had accomplished today. Ms. Johnson stated that every meeting on the assault instructions had resulted in adopting model instructions that were subsequently changed at the next meeting. The Committee agreed that any further approval of assault materials should happen after the Committee completes all of its assault-instruction-related work, so the materials can be approved as a complete group.

Mr. Nelson left at 1:23pm and the Committee no longer had a quorum.

Ms. Klucznik noted that the "peace officer" and "service member in uniform" instructions probably need to be separated. She will make further review and return with any proposed modifications at the next meeting.

(3) IMPERFECT SELF-DEFENSE INSTRUCTION:

This item was not considered by the Committee at this meeting. It will be moved to the next meeting agenda. Ms. Klucznik stated that she would provide additional materials to Committee staff to be included in the next agenda materials packet.

(4) BURGLARY AND ROBBERY INSTRUCTIONS:

This item was not considered by the Committee at this meeting. It will be moved to a future meeting agenda.

(5) ADJOURN

The meeting adjourned at approximately 1:35 p.m. The next meeting will be held on February 6, 2019, starting at 12:00 noon.

TAB 2

Assault Instructions

NOTES: This section is organized into two subparts.

First, a several instructions are organized as requested by the committee at the last meeting, as follows:

Class B Misdemeanor
Assault

Class A Misdemeanor
Assault of Pregnant Person / Substantial Bodily Injury (combined instruction)
Assault of Pregnant Person (stand-alone)
Assault Causing Substantial Bodily Injury (stand-alone)
Assault (MB) + SVF for Pregnant Person / Substantial Bodily Injury

Third Degree Felony
Aggravated Assault

Second Degree Felony
Aggravated Assault (combined instruction with all possible elements included)
Aggravated Assault (F3) + SVF for "serious bodily injury" OR "loss of consciousness"

Second, there are assault-related instructions that have not been considered by the committee, as follows:

- Assault Against Peace Officer / Military Service Member
- Assault Against School Employee
- Assault by Prisoner
- Aggravated Assault by Prisoner
- Related Definitions

CR_____ ~~Simple~~ Assault (Use SVF for SBI or Pregnant Victim).

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

1. (DEFENDANT'S NAME)
2. Intentionally, knowingly, or recklessly
   a. attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
   b. committed an act with unlawful force or violence that
      i. caused bodily injury to (VICTIM'S NAME); or
      ii. created a substantial risk of bodily injury to (VICTIM'S NAME).
3. [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

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

CR_____ Assault – Pregnant Person or Substantial Bodily Injury.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a Pregnant Person or Committing Assault that Caused 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
    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 EITHER

3. (VICTIM'S NAME) was pregnant; and
4. (DEFENDANT'S NAME) had knowledge of the pregnancy;

OR

5. Intentionally, knowingly, or recklessly;
    a. Committed an act with unlawful force or violence; and
    b. The act caused substantial bodily injury to (VICTIM'S NAME).

6. [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)

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_____ Assault – Pregnant Person.

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

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly
    a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
    b. Committed an act with unlawful force or violence that
        i. caused bodily injury to (VICTIM'S NAME); or
        ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. (VICTIM'S NAME) was pregnant; and
4. (DEFENDANT'S NAME) had knowledge of the pregnancy; and
5. [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)

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 – 12/05/2018

CR_____ Assault – Causing Substantial Bodily Injury.

(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 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

CR_____ Special Verdict Form – Assault – Pregnant Person / Substantial Bodily Injury

(Case Caption Information)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Assault, as charged in Count [#].

We also unanimously find beyond a reasonable doubt that (check all that apply):

_____ (DEFENDANT'S NAME) caused substantial bodily injury to (VICTIM'S NAME).

_____ (VICTIM'S NAME) was pregnant at the time of the assault and (DEFENDANT'S NAME) knew of the pregnancy.

DATED this _____ day of (Month), 20(**).

_____
Foreperson

Last Revised - 00/00/0000

CR_____ Aggravated Assault (Must Use SVF for 3rd Degree or 2nd Degree).

(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.~~3. [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

Committee Notes

Depending on the facts of the case, practitioners should include a special verdict form under the following circumstances:

- where there is "serious bodily injury" OR "loss of consciousness" (see Utah Code § 76-5-103(2)(a)); or
- where there is "targeting law enforcement officer" AND "serious bodily injury" (see Utah Code §76-5-103(2)(b)).

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 – 12/05/2018

CR_____ Aggravated Assault (For Use With SVF Only for 2nd Degree).

(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~~ interfered with 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. [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

Committee Notes

Depending on the facts of the case, practitioners should include a special verdict form under the following circumstances:

- where there is "serious bodily injury" OR "loss of consciousness" (see Utah Code § 76-5-103(2)(a)); or
- where there is "targeting law enforcement officer" AND "serious bodily injury" (see Utah Code §76-5-103(2)(b)).

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 – 12/05/2018

CR_____ Special Verdict Form – Aggravated Assault 2nd Degree

(Case Caption Information)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Aggravated Assault, as charged in Count [#].

We also unanimously find beyond a reasonable doubt that **OPTION ONE –** (check all that apply):

_____ The act resulted in serious bodily injury.

_____ The act interfering with the breathing or the circulation of blood produced a loss of consciousness.

_____ **OPTION TWO –** None of the above.

OPTION THREE – If you find beyond a reasonable doubt that none of the above circumstances apply, leave all boxes unchecked and sign the form.

DATED this _____ day of (Month), 20(**).

_____
Foreperson

Last Revised - 00/00/0000

INSTRUCTIONS THAT HAVE NOT YET BEEN REVIEWED BY THE COMMITTEE

CR_____ Assault Against a Peace Officer or Military Servicemember in Uniform.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a [Peace Officer][Military Servicemember in Uniform] [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. [Knowing that (VICTIM'S NAME) was a peace officer];
3. 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); or
    c. threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or
    d. made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);
4. (VICTIM'S NAME) was [acting within the scope of (his)(her) authority as a peace officer][on orders and acting within the scope of authority granted to the military servicemember in uniform].
5. [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 § 76-5-102.4

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_____ Definitions - Assault Against a Peace Officer or Military Servicemember in Uniform.

"Peace officer" means:
1. A law enforcement officer certified under Section 53-13-103;
2. A correctional officer under Section 53-13-104;
3. A special function officer under Section 53-13-105; or
4. A federal officer under Section 53-13-106.

"Military servicemember in uniform" means:
1. A member of any branch of the United States military who is wearing a uniform as authorized by the member's branch of service; or
2. A member of the National Guard serving as provided in Section 39-1-5 or 39-1-9.

References
Utah Code § 76-5-102.4

Committee Notes

Last Revised - 00/00/0000

CR_____ Assault Against School Employees.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a School Employee [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. Knowing that (VICTIM'S NAME) was an employee or volunteer of a public or private school;
3. 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); or
    c. threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or
    d. made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);
4. (VICTIM'S NAME) was acting within the scope of (his)(her) authority as an employee or volunteer of a public or private school.
5. [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

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_____ Assault by Prisoner.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault by Prisoner [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. At the time of the act (DEFENDANT'S NAME) was
   a. In the custody of a peace officer pursuant to a lawful arrest; or
   b. Was confined in a jail or other penal institution or a facility used for confinement of delinquent juveniles.
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.

References
Utah Code § 76-5-102.5

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 by Prisoner (Use SVF if Intentionally Caused SBI).

(DEFENDANT'S NAME) is charged [in Count ____] with committing Aggravated Assault By Prisoner [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. At the time of the act (DEFENDANT'S NAME) was
   a. [In the custody of a peace officer pursuant to a lawful arrest; or]
   b. [Was confined in a jail or other penal institution or a facility used for confinement of delinquent juveniles].
5. [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 § 76-5-103.5

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

Imperfect Self-Defense Instruction

NOTES:

CR_____ Special Verdict Form – Imperfect Self-Defense Justification.

(Case Caption Information)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of [Aggravated Murder][Murder], as charged in Count [#].

We also unanimously find the State

_____ Has proven
_____ Has failed to prove

beyond a reasonable doubt that at the time (DEFENDANT'S NAME) committed the offense of [Aggravated Murder][Murder], (DEFENDANT'S NAME) the defense of perfect self-defense did not apply.

DATED this _____ day of (Month), 20(**).

_____
Foreperson

Last Revised - 00/00/0000

MURDER under § 76-5-203, with imperfect self defense

(DEFENDANT'S NAME) is charged [in Count __] with committing Murder [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. [a. Intentionally or knowingly caused the death of another][;]
   [b. Intending to cause serious bodily injury to another, (DEFENDANT'S NAME) committed an act clearly dangerous to human life that causes the death of another][;]
   [c. Acting under circumstances evidencing a depraved indifference to human life, (DEFENDANT'S NAME) knowingly engaged in conduct which created a grave risk of death to another and thereby caused the death of another][;]
   [d. While engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or as a party to the predicate offense,
      i. a person other than a party was killed; and
      ii. (DEFENDANT'S NAME) acted with the intent required as an element of the predicate offense][;]
   [e. recklessly caused the death of a peace officer or military service member in uniform while in the commission of
      i. an assault against a peace officer;
      ii. interference with a peace officer making a lawful arrest, if (DEFENDANT'S NAME) used force against a peach officer; or
      iii. an assault against a military service member in uniform.]

[3. The defense of self-defense, defense-of-others, defense-of-habitation does not apply.]

After you carefully consider all the evidence in this case, if you are not convinced that all of these elements have been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Murder.

On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must consider whether the defendant acted in imperfect self-defense. If you find that the State has proven beyond a reasonable doubt that the defendant did not act in imperfect self-defense, then you must find him GUILTY of MURDER. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in imperfect self-defense, then you must find him GUILTY of MANSLAUGHTER.

Supplemental Instruction on Imperfect Self-Defense

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 under the then existing circumstances. The effect of the defense is to reduce the crime of Murder to Manslaughter.

The defendant is not required to prove that the defense applies. Rather, before the jury can convict the defendant of Murder, 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 not be convicted of Murder. He may only be convicted of Manslaughter.

Murder Instruction when imperfect self-defense instruction given

The defendant, [NAME], is charged with Aggravated Murder. You cannot convict (him)(her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, [NAME];
2. a. Intentionally or knowingly; or
   b. Intending to cause serious bodily injury to another, committed an act clearly dangerous to human life; or
   c. Acting under circumstances evidencing a depraved indifference to human life, the actor knowingly engaged in conduct which created a grave risk of death to another;
3. Caused the death of [VICTIM'S NAME];
4. That the defense of Self-Defense does not apply[.][; and]
5. That the defense of Imperfect Self-Defense does not apply.

After you carefully consider all the evidence in this case, if you are convinced that the State has proven each and every element beyond a reasonable doubt, you must find the defendant GUILTY of murder.

After you carefully consider all the evidence in this case, if you are not convinced that the State has proven beyond a reasonable doubt elements 1, 2, and 3, you must find the defendant NOT GUILTY of Murder but you may consider whether the State has proven that he is guilty of Reckless Manslaughter.

After you carefully consider all the evidence in this case, if you are not convinced that the State has proven beyond a reasonable doubt element 4, you must find the defendant NOT GUILTY of MURDER or any lesser offense of Murder that is based on the same facts.

After you carefully consider all the evidence in this case, if you are convinced that the State has proven beyond a reasonable doubt elements 1, 2, 3, and 4 but you are not convinced that the State has proven beyond a reasonable doubt element 5, you must find the defendant NOT GUILTY of Murder, but GUILTY of Imperfect Self-Defense Manslaughter.

if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Murder. On the other hand, if you are not convinced that all of these elements have been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Murder.

Introductory Instruction when instructing on both Reckless Manslaughter and Imperfect Self-Defense Manslaughter.

Manslaughter is a lesser-included offense of Murder. Manslaughter may be committed in two different ways: (1) by recklessly causing the death of another; and (2) by committing murder under circumstances constituting Imperfect Self-Defense.

Reckless Manslaughter Instruction

You cannot convict [Defendant] of Reckless Manslaughter unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. [Defendant's name]
2. Recklessly
3. caused the death of [Victim's Name]; and
4. The defense of Self-Defense does not apply.

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

Imperfect Self-Defense Manslaughter Instruction

You cannot convict [Defendant] of Imperfect Self-Defense Manslaughter unless you find:

1. The State has proven beyond a reasonable doubt all the elements of murder as defined in Instruction ___; and
2. The State has not disproven beyond a reasonable doubt the defense of Imperfect Self-Defense as defined in Instruction ___.

After you carefully consider all the evidence in this case, if you are convinced that each and every element of Murder has been proven beyond a reasonable doubt and that the State has not disproven beyond a reasonable doubt the defense of Imperfect Self-Defense, then you must find the defendant GUILTY of Imperfect Self-Defense Manslaughter. On the other hand, if you are not convinced that all of the elements of Murder have been proven beyond a reasonable doubt or if you are convinced that the State had disproven beyond a reasonable doubt the defense of Imperfect Self-Defense, then you must find the defendant NOT GUILTY of Imperfect Self-Defense Manslaughter.

CR1410 Explanation of Imperfect Self-Defense as Partial Defense to Aggravated Murder or Murder.

Imperfect self-defense is a partial defense to the charge of [aggravated] murder [attempted aggravated murder/ *murder/*attempted murder]. It applies when the defendant caused the death of another while incorrectly, but reasonably, believing that (his) (her) conduct was legally justified or excused. The effect of the defense is to reduce the crime of _____ to _____.

The defendant is not required to prove that the defense applies. Rather, *for this jury to convict the defendant of [aggravated murder/attempted aggravated murder/murder/attempted murder],* 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 _____.

State v. Lee, **2014 UT App 4**

¶ 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 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.

¶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.

¶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]

FN7
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."

FN8
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.

....

¶28 In *State v. Garcia*, 2017 UT 53, 424 P.3d 171, 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.

State v. Navarro, **2019 UT App 2**

¶32 Here, the jury received three instructions regarding the burden of proof. Instruction 55 explained that "[t]he defendant is not required to prove that the defense [of imperfect self-defense] applies. Rather, the State must prove beyond a reasonable doubt that the defense does not apply." And Instruction 71 explained, "The laws of Utah do not require the defendant to prove self-defense. Once self-defense or imperfect 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." These instructions correctly stated the relevant law.

¶33 However, Instruction 53, to which Defendant's counsel acquiesced, erroneously placed the burden on Defendant to prove that imperfect self-defense applied beyond a reasonable doubt:

> You cannot convict the Defendant, Ernesto Navarro, of the offense of Manslaughter unless you find from all the evidence, and *beyond a reasonable doubt*, each and every one of the following elements: 1. That the defendant, Ernesto Navarro, ... 2. *committed the offense of Murder under circumstances amounting to imperfect self-defense....*

(Emphases added). The State concedes that Instruction 53 was erroneous but argues that Defendant was not prejudiced by the error because he was not entitled to claim imperfect self-defense.

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff and Appellee,
v.
JOSEPH LOGAN LEE,
Defendant and Appellant.

Opinion
No. 20110707-CA
Filed January 9, 2014

Second District Court, Ogden Department
The Honorable Michael D. Lyon
No. 061902692

Randall W. Richards, Attorney for Appellant
Sean D. Reyes and Karen A. Klucznik, Attorneys
for Appellee

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

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

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 (continued...)

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.

¶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

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1. (...continued)
41, ¶ 3, 82 P.3d 1064 (citation and internal quotation marks omitted).

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.

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

¶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

¶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. 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 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 ("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]

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 (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. 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 (citation and internal quotation marks omitted; *see also State v. Larrabee*, 2013 UT 70, ¶ 19. 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. "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

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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.

counsel's performance was professionally unreasonable." *Archuleta v. Galetka*, 2011 UT 73, ¶ 42, 267 P.3d 232 (quoting *Strickland*, 466 U.S. at 697).

A. Failure To Investigate and Call the Witness

¶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. 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

¶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

¶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 (1984) (citation and internal quotation marks omitted). *Accord State v. Larrabee*, 2013 UT 70, ¶ 19.

¶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 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. 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 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

¶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.

¶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

¶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 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 (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.

2. Manslaughter Instruction

¶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 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. 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.

¶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, *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). 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 (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 (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 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]

¶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).

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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).

¶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 (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 (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 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.

¶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]

¶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.

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

¶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 failure to object to the erroneous jury instruction on imperfect self-defense.

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
HARLIN ARGELIO RAMOS,
Appellant.

Opinion
No. 20160075-CA
Filed August 23, 2018

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

Debra M. Nelson, Attorney for Appellant

Sean D. Reyes and Christopher D. Ballard, Attorneys
for Appellee

JUDGE DAVID N. MORTENSEN authored this Opinion, in which JUDGES JILL M. POHLMAN and DIANA HAGEN concurred.

MORTENSEN, Judge:

¶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."

¶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.

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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.

¶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.

¶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

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

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

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.

¶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

¶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.

¶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."

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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.

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.

Summary of Proceedings

¶17 The State charged Ramos with one count of murder. At trial, Friend testified that she heard Victim screaming, "Please

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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.

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.

¶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-

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."

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.

¶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]

¶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

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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.

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 (1984); *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92.[9]

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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, (continued…)

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. 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.

¶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.

(…continued)
"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.

¶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. "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). When assessing the "reasonable probability that the jury would have returned a more favorable verdict . . . if properly instructed," *Lee*, 2014 UT App 4, ¶ 33, the court must "consider the totality of the evidence" before the jury, *see Hutchings*, 2012 UT 50, ¶ 28. 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, 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. 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.

¶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 (1984); *see also Lee*, 2014 UT App 4, ¶¶ 29–33 (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. 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 (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.

¶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. 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.

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.

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
ERNESTO NAVARRO,
Appellant.

Opinion
No. 20151019-CA
Filed January 4, 2019

Third District Court, Salt Lake Department
The Honorable Paul B. Parker
No. 141907986

Nathalie S. Skibine, Attorney for Appellant

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

JUDGE MICHELE M. CHRISTIANSEN FORSTER authored this Opinion, in which JUDGES JILL M. POHLMAN and DIANA HAGEN concurred.

CHRISTIANSEN FORSTER, Judge:

¶1 Two groups of rival gang members encountered each other and began shooting. When the shooting stopped, a man in one group was dead, killed instantly by a bullet that hit his neck and severed his spine. Defendant Ernesto Navarro was in the other group and was convicted of several charges including murder. He now challenges those convictions on two grounds.

¶2 Defendant contends that he received constitutionally ineffective assistance of counsel because (1) his trial counsel failed to object on hearsay grounds to a detective's testimony concerning another witness's trial testimony and (2) his trial counsel failed to correct a jury instruction that misstated the law regarding imperfect self-defense. Because Defendant did not

suffer prejudice from the detective's testimony or the erroneous jury instruction, we conclude that Defendant did not receive constitutionally ineffective assistance of counsel. We therefore affirm.

BACKGROUND

¶3 Victim, a gang member, was driving a stolen Chevrolet Avalanche. His nephew (Nephew) was riding in the front passenger seat while Victim's two nieces sat in the back. The group encountered a sedan containing four members of a rival gang. Traveling in the sedan were Defendant, Driver, Passenger, and another individual who did not testify at trial.

¶4 The sedan stopped to investigate a man wearing blue—the color of a rival gang. According to Driver, if the person belonged to a rival gang, "[they] would have got out and fought with him or done anything, because if he's a rival gang member, then usually [they] go and . . . do something to him." However, the sedan occupants determined that the man was not from a rival gang and continued driving. They then noticed that the Avalanche was following them and that it was driven by someone—Victim—wearing red, the color of another rival gang.

¶5 People in both vehicles, including Defendant, began using hand gestures to signal their gang affiliation, commonly referred to as "throwing up gang signs." However, Driver refused to stop the sedan because he sensed "something was going to happen" and the sedan belonged to his mother. Eventually, Driver drove down an alley to elude the pursuing Avalanche.

¶6 After losing the Avalanche, Driver parked the sedan at Defendant's apartment. They went inside "to get something to drink" and turned on a video game console. When they decided to leave the apartment, Defendant took his gun with him because he "was concerned." Defendant's group continued on foot. According to Defendant, they left to go to the store to buy

some food and did not expect to meet the Avalanche occupants again. But according to Driver, Defendant said, "Let's go get these fools," and, according to Passenger, Defendant said, "We got to do something about him if we see him again."

¶7 Meanwhile, after losing sight of the sedan, Victim drove off to pick up three of his brothers-in-law, two of whom were members of his gang and at least one of whom had a gun on his person. With these reinforcements, Victim then began driving around, looking for the sedan or Defendant's group intending to fight them.

¶8 Victim eventually spotted the empty sedan. He continued driving the Avalanche around until he found Defendant's group walking down an alley. Victim stopped the Avalanche at a right angle to the alley.

¶9 Shortly thereafter, a flurry of gunfire erupted, drawing the attention of other nearby witnesses. One of the shots killed Victim. Another wounded Nephew. Everyone in the Avalanche, except Victim, scrambled to get out of the vehicle and then fled. Defendant's group also ran away.

¶10 At least thirteen shots were fired. Police later found seven spent bullet casings from Defendant's .40 caliber firearm and five spent casings from Passenger's 9mm firearm in the alley where Defendant's group had been standing. Outside the driver's side passenger door of the Avalanche, police found one spent casing and matched it to a 9mm gun found next to the driver's seat inside the Avalanche.

¶11 Defendant's group returned to his apartment, where he took a shower to remove any gunshot residue. He then left the apartment, taking both his and Passenger's guns, and attempted to stash them where they would not be found by police. According to Defendant, Passenger instructed him "to not talk to the police," and threatened that if Defendant did talk to police, "that would mean danger [to Defendant's] life or [his] family."

¶12 Police officers eventually located and arrested Defendant. When he was arrested, Defendant gave a false name. At trial, Defendant admitted that he had lied to the arresting officers. For example, he acknowledged that although he had owned his gun for about six months, he told the arresting officers that he had only received his gun on the day he was arrested. Defendant further acknowledged that he lied to police by telling them he had never been to the apartment even though he had lived there for two months, and by telling them that he had been working at a hospital on the day of the shooting.

¶13 Defendant was charged with murder, obstruction of justice, and felony discharge of a firearm. Following a jury trial, he was convicted on all counts.

ISSUE AND STANDARD OF REVIEW

¶14 Defendant contends that he was deprived of his constitutional right to effective assistance of counsel. *See generally Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). "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 (quotation simplified).

ANALYSIS

¶15 Defendant contends that he was deprived of the effective assistance of counsel in two ways. First, he asserts that his trial counsel was ineffective for failing to object to certain testimony

he characterizes as hearsay. Second, he asserts his counsel was ineffective for failing to object to an erroneous jury instruction.

¶16 To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because both deficient performance and resulting prejudice are requisite elements for a claim of ineffective assistance of counsel, failure to prove either element necessarily defeats the claim. *Id.* at 697; *State v. Hards*, 2015 UT App 42, ¶ 18, 345 P.3d 769.

I. Hearsay

¶17 Defendant first contends that his trial counsel "should have objected to hearsay statements" elicited from a detective "concerning prior consistent statements by the State's key witnesses"—Nephew and one of Victim's nieces. Specifically, he argues that the State was allowed "to ask a string of questions bolstering the credibility of [Nephew] and another witness from his group on the most contested issue at trial: who shot first."

¶18 A statement is hearsay when the declarant makes the statement outside of court and the statement is offered into evidence at trial to prove the truth of the matter asserted. *See* Utah R. Evid. 801(c). However, as relevant here, when the declarant is subject to in-court cross-examination, such a statement will be considered non-hearsay when the statement "is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." *Id.* R. 801(d)(1)(B).

¶19 At trial, Nephew testified that Defendant's group had fired first and that no shots had been fired by Victim's group. Nephew admitted that after picking up reinforcements, the Avalanche occupants went "looking for them guys, the guys that were in front of [Victim's group] in the green sedan." When

asked why, he testified, "I believe we were going to go fight them." And despite believing that at least one of his companions had a gun, Nephew claimed that they planned to fight "[w]ith our fists." According to Nephew, they encountered Defendant's group shortly after finding the empty sedan. Nephew stated that Defendant's group had at least two guns visible and that no one in the Avalanche had a gun out. Victim stopped the Avalanche, and without words being exchanged, "firing happened." When pressed on who shot first, Nephew answered that "[t]he first shot came from the right side . . . of the vehicle" "from the alley." Nephew further testified that no shots were fired from the Avalanche.

¶20 During Nephew's cross-examination, Defendant's counsel asserted that this account departed from the version Nephew initially told to the police. Counsel asked Nephew whether he had told "the police that originally [Victim] was taking [two occupants of the Avalanche] home, and then you guys were going to take [Victim's nieces] to dinner before the run in with [Defendant's Group] took place." Counsel also asked Nephew whether he remembered telling police that one of the Avalanche occupants "actually had a gun and that [he] heard it go off." Nephew denied that he had so informed the police.

¶21 Defendant's counsel then questioned Nephew about his statement to the police that he had recognized some of the people who had been firing at him, and Nephew admitted that this statement had been false:

> Q. You were interviewed at least three times, correct?
>
> A. Yes.
>
> Q. And it was the second day that you gave them the false information about three suspects that were totally innocent?

A. Yes.

Q. And your explanation of why you gave them three suspects was because you felt pressured by the police?

A. Yes.

Q. And instead of saying 'I don't know who they were,' you gave [inaudible] people?

A. I did tell them I didn't know who they were.

Q. And you also told them that one of the individuals goes by a street name of Radio, correct?

A. Yes, sir.

¶22 Defendant's counsel later called the detective to the stand to testify regarding Nephew's police report. The detective testified that after Nephew implicated Radio, the detective discovered Radio had been two and a half hours away from the shooting when it happened. According to the detective, when he confronted Nephew about Radio's alibi, Nephew admitted that Radio had not been involved, that Nephew had simply named a person with whom he had past dealings, and that Nephew had made up the name of one of the other people he had identified as a suspect. The State then questioned the detective:

Q. [Nephew] was consistent that [Victim] was the driver?

A. Yes.

Q. He was consistent that he was the passenger?

A. Yes.

> Q. He was consistent that there was another group throwing gang signs . . . that they encountered?
>
> A. Correct.
>
> Q. And he was consistent that there [were] men in the alley?
>
> A. Yes.
>
> Q. That those men in the alley had shot at his truck he was in first?
>
> A. That's correct.
>
> Q. He was consistent that he was hit in the arm and close to his hip?
>
> A. Yes.
>
> Q. Those are the type of facts that most related to your investigation, the shooting?
>
> A. Yes. Those facts were everything related to the shooting, yes.
>
> . . .
>
> Q. Did [Victim's niece] ever deviate that the men from the alley shot first at the truck?
>
> A. No.

¶23 Defendant contends that his counsel should have objected to this line of questioning. "The purpose of rule 801(d)(1)(B) is to admit statements that rebut a charge of recent fabrication or improper influence or motive, not to bolster the believability of a statement already uttered at trial." *State v. Bujan*, 2008 UT 47,

¶ 11, 190 P.3d 1255. Thus, even where testimony is properly admitted for rehabilitative purposes, it should be limited to "testimony that directly rebuts charges of recent fabrication," and not necessarily admitted in its entirety. *Id.* ¶ 10. Our supreme court has also suggested that a limiting instruction may be necessary to inform the jury that the testimony should be considered only for rehabilitative purposes. *See id.* ¶ 9. Defendant asserts that the string of questions calling out all of Nephew's prior consistent statements went beyond the scope of admissibility under rule 801(d)(1)(B) and inappropriately bolstered Nephew's testimony rather than merely rebutting a charge of prior inconsistent statements, particularly in the absence of a limiting instruction.

¶24 But even assuming Defendant's counsel performed deficiently by failing to object to this line of questioning or failing to request a limiting instruction, we ultimately conclude that Defendant cannot demonstrate prejudice resulting from this testimony. Defendant asserts that in the absence of the detective's testimony, "the State would [have been] hard pressed to meet its burden to prove beyond a reasonable doubt that [Defendant] did not act in self-defense." But we are not convinced that the introduction of Nephew's prior consistent statements had any significant impact on the ultimate verdict.

¶25 The Utah Supreme Court has recently explained that an appellate court "must 'consider the totality of the evidence before the judge or jury' and then 'ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.'" *State v. Garcia*, 2017 UT 53, ¶ 42, 424 P.3d 171 (quoting *Strickland v. Washington*, 466 U.S. 668, 695–96 (1984)). Accordingly, an appellate court must "examine the record as a whole" to determine whether the court's confidence in the jury's verdict is undermined. *Id.* ¶ 45.

¶26 While the detective's testimony may have reinforced Nephew's testimony to some degree, other credibility issues with his testimony remained—notably his admitted lies to police in the course of the investigation and his motivation to fabricate testimony both at the time he spoke to police and at the time of trial. Further, there was much more to the question of self-defense in this case than who shot first. A defendant cannot claim self-defense when he was "attempting to commit" or "committing . . . a felony" or "was the aggressor or was engaged in a combat by agreement." Utah Code Ann. § 76-2-402(2)(a) (LexisNexis 2012).

¶27 The totality of the evidence includes the testimony of Defendant and his companions, Driver, and Passenger. Defendant testified that his group left the apartment to buy some food, not to seek out the Avalanche or Victim's group. He also explained his decision to retrieve his gun and take it with him; he testified that he took it because he "was concerned." But Driver testified that Defendant stated, "Let's go get these fools," and Passenger testified that Defendant said, "We got to do something about him if we see him again." *See supra* ¶ 6. Thus, two of Defendant's own companions testified that the group left the apartment seeking a confrontation. His companions also testified "they always do something to" members of rival gangs when they see them; that Defendant had been "[t]hrowing up gang signs;" that Defendant had his gun out even before the Avalanche arrived in the alley; and that it was possible Defendant had fired first. This testimony was consistent with other testimony presented by the State, discussed above, suggesting that Defendant's group began the firefight.

¶28 Additionally, Defendant's actions and initial statements to police were evasive and designed to frustrate an investigation into his role in Victim's death. Defendant's companions testified that upon returning to the apartment, he attempted to hide the gun, remove gun residue from his person, and he expressed excitement that he could now get his gang tattoo as a result of

the shooting. Upon his arrest several days after the shooting, Defendant did not claim to have acted in self-defense. Instead, he first gave police a false name, denied driving the sedan, and denied having been anywhere in the area for years. Defendant also claimed to have been staying at a hotel but could not remember the hotel's name. Later, Defendant admitted he had been to the apartment, but only to feed some dogs; however, he could not name the owner of the dogs. Defendant also claimed that he had been working at a hospital on the day of the shooting. And still later, Defendant admitted that he had been staying at the apartment but denied having been present at the shooting. Finally, Defendant admitted that he had witnessed the shooting but denied firing his gun. It was not until trial that Defendant admitted he had fired his gun at the Avalanche, but only in self-defense. Defendant's evolving and uncorroborated account likely made it difficult for the jury to credit his trial testimony.

¶29 All this evidence amply supports a conclusion that Defendant actively sought a fight with Victim rather than acting in self-defense. Thus, we are not convinced that "there is a reasonable probability that . . . the result of the proceeding would have been different" without the detective's testimony. *See Strickland*, 466 U.S. at 694. Defendant therefore cannot show that he was deprived of the effective assistance of counsel with regard to the detective's testimony.

II. Jury Instruction

¶30 Defendant also contends that his trial counsel was constitutionally ineffective for failing to object to an erroneous jury instruction. Specifically, he argues that his counsel "approv[ed] a jury instruction stating that [Defendant] could be convicted of manslaughter only if the jury found beyond a reasonable doubt that imperfect self-defense applied" instead of stating that "[Defendant] could be convicted of manslaughter

only if the State failed to disprove imperfect self-defense beyond a reasonable doubt."

¶31 Utah law provides that a murder charge may be reduced to a manslaughter charge when the defendant erroneously believed that the killing was legally justified, such as in self-defense:

> It is an affirmative defense to a charge of murder . . . that the defendant caused the death of another . . . 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.

Utah Code Ann. § 76-5-203(4)(a) (LexisNexis 2012). "Once a defendant has produced some evidence of imperfect self-defense, the prosecution is required to disprove imperfect self-defense beyond a reasonable doubt." *State v. Lee*, 2014 UT App 4, ¶ 27, 318 P.3d 1164 (quotation simplified). "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." *Id.* (quotation simplified).

¶32 Here, the jury received three instructions regarding the burden of proof. Instruction 55 explained that "[t]he defendant is not required to prove that the defense [of imperfect self-defense] applies. Rather, the State must prove beyond a reasonable doubt that the defense does not apply." And Instruction 71 explained, "The laws of Utah do not require the defendant to prove self-defense. Once self-defense or imperfect 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." These instructions correctly stated the relevant law.

¶33 However, Instruction 53, to which Defendant's counsel acquiesced, erroneously placed the burden on Defendant to prove that imperfect self-defense applied beyond a reasonable doubt:

> You cannot convict the Defendant, Ernesto Navarro, of the offense of Manslaughter unless you find from all the evidence, and *beyond a reasonable doubt*, each and every one of the following elements: 1. That the defendant, Ernesto Navarro, . . . 2. *committed the offense of Murder under circumstances amounting to imperfect self-defense* . . . .

(Emphases added). The State concedes that Instruction 53 was erroneous but argues that Defendant was not prejudiced by the error because he was not entitled to claim imperfect self-defense.

¶34 In the State's view, Defendant was not entitled to claim imperfect self-defense because he could not have acted "'under a reasonable, but legally mistaken, belief that his use of deadly force was justified.'" (Quoting *Lee*, 2014 UT App 4, ¶ 29.) As discussed above, a defendant cannot claim self-defense when the defendant is engaged in committing a felony, is the aggressor, or is engaged in combat by agreement. *See* Utah Code Ann. § 76-2-402(2)(a).

¶35 Defendant was the only witness to testify that his group had not sought to confront Victim's group after leaving the apartment, and his uncorroborated account contradicted the testimony of other witnesses credited by the jury. The jury apparently found that Defendant's group had left the apartment in the hopes of confronting Victim's group. Given the overwhelming evidence that Defendant was the aggressor, there is no reasonable probability that the jury would have convicted Defendant of the lesser offense of manslaughter if Instruction 53 had properly explained the burden of proof. Because the evidence failed to establish a claim of imperfect self-defense,

Defendant did not suffer prejudice when one of the three instructions misstated the burden of proof.[1]

¶36 Because Defendant has not shown how the erroneous instruction prejudiced his case, he has failed to demonstrate that his counsel's assistance fell below the constitutionally required level. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that a defendant must prove both counsel's deficient performance and resulting prejudice to succeed on a claim of ineffective assistance of counsel); *see also State v. Hards*, 2015 UT App 42, ¶ 18, 345 P.3d 769 ("Because both deficient performance and resulting prejudice are requisite elements of an ineffective assistance of counsel claim, a failure to prove either element defeats the claim.").

III. Cumulative Error

¶37 In Defendant's reply brief, he asserts that "the two errors worked together—both the inadmissible hearsay and the faulty

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1. Our conclusion on this point is reinforced by the fact that the jury did not ask the court to reconcile or explain the conflicting instructions regarding the burden of proof for a claim of imperfect self-defense, suggesting that the jury did not believe that imperfect self-defense applied, regardless of who bore the burden of proof. It is also worth noting that both the State and the defense attempted to steer the jury away from manslaughter. The State implored the jury, "We are not [asking you to consider manslaughter]. We are asking you to convict the defendant of murder because that's what he did." The defense likewise eschewed a manslaughter request, stating, "We're not asking you to find him guilty of manslaughter. We're asking you to find . . . . [t]hat he was justified in defending himself. . . . Please find him not guilty." Thus, the jury may have paid very little attention to the manslaughter instruction that contained the erroneous language.

instruction prevented the jury from considering imperfect self-defense." However, "issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court." *Allen v. Friel*, 2008 UT 56, ¶ 8, 194 P.3d 903 (quotation simplified). Thus, Defendant has waived his cumulative-error claim.

CONCLUSION

¶38 Defendant's trial counsel's failure to object on hearsay grounds to testimony regarding Nephew's initial statement to a detective and counsel's failure to object to the erroneous jury instruction did not lead to any discernable prejudice. We therefore conclude that Defendant has not demonstrated that his counsel's assistance was constitutionally ineffective.

¶39 Affirmed.