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

Via Webex
April 5th, 2023 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Welch
	Final Review of CR444: Pro se Defendant		Tab 2	Judge Welch
	Discussion of Imperfect Self-Defense Definition Instruction (New CR-???)		Tab 3	Judge Welch, Jeff Mann, Sandi Johnson, and Janet Lawrence
	Review of Possible Projects			Judge Welch/Bryson King
1:30	Adjourn			

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

UPCOMING MEETING SCHEDULE:
Meetings are held via Webex on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

May 3, 2023
June 7, 2023
July 5, 2023
August 2, 2023
September 6, 2023
October 4, 2023
November 1, 2023
December 6, 2023

TAB 1

Meeting Minutes – February 1st, 2023

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

Via Webex
January 4th, 2023 – 12:00 p.m. to 1:30 p.m.

DRAFT

COMMITTEE MEMBER:	ROLE:	PRESENT	EXCUSED
Hon. James Blanch	District Court Judge [Chair]	•	
Hon. Brendan McCullagh	Justice Court Judge	•	
Sandi Johnson	Prosecutor	•	
Jennifer Andrus	Linguist/Communications Professor	•	
Hon. Linda Jones	Emeritus District Court Judge		•
Hon. Teresa Welch	District Court Judge	•	
Sharla Dunroe	Defense Attorney	•	
Janet Lawrence	Defense Attorney	•	
Jeffrey Mann	Prosecutor	•	
Richard Pehrson	Prosecutor	•	
Dustin Parmley	Defense Attorney	•	
Freyja Johnson	Defense Attorney	•	
Brian Williams	Prosecutor	•	

GUESTS:

None

STAFF:

Bryson King

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting.
The committee reviewed January 4th, 2023 meeting minutes. Sandi Johnson moved to approve the minutes. Brian Williams seconded the motion. With no objection, the motion passes and the minutes are approved.

Judge Blanch informs the committee that after 9 years as the chair of the committee, he will be stepping down and the Judicial Council will appoint a new chair. He expresses his gratitude for the significant effort and contributions the committee members have made during his tenure as chair.

(2) AGENDA ITEM 1: PARTIAL DEFENSE (CONTINUED) – COMPLETE PACKET – CR 1451, CR510-540

Jeff Mann begins the discussion with a short review of the completed packet for 1451 and 510-540. Sandi Johnson proposes a change to correct typos in the instructions and discusses a concern related to the definition of imperfect self-defense, given the committee hasn't defined it before. Jeff explains that the statute and case law don't say more than what the instruction already provides. The committee discusses the suggestion of creating a new instruction to define imperfect self-defense. Judge Blanch requests the committee vote on whether to create a new imperfect self-defense instruction, with two committee members voting in favor and the remainder voting

against. Following more discussion, Judge Blanch suggested that Sandi work with Jeff, Judge Welch, and Janet Lawrence to create language for a separate, proposed instruction.

(3) AGENDA ITEM 2: SELF-REPRESENTED PARTIES AND STANDBY COUNSEL – PROPOSED CR444 AND CR445.

Judge Blanch then turns the committee's attention to new instructions regarding pro se defendants and standby counsel. Committee members offer their opinions regarding the usefulness of the instruction and its practical purpose. Judge Welch suggested that the committee reference *State v. Rohwedder*, specifically the concurrence, in drafting language for the role of standby counsel in a case where that applies. Judge Blanch discusses language from the *Rohwedder* case and its applicability to the proposed instruction. The committee continues its discussion, focusing on potential adverse inferences to pro se representation and presence of standby counsel. The committee also discusses the responsibilities of pro se defendants involving compliance with procedural rules and evidence in trial. Judge Blanch suggests the committee combine the pro se instruction and standby counsel instruction with a committee note that mentions the instruction be used only when required, and not necessarily because a defendant is pro se or standby counsel is in place. The committee also discusses adding a provision in the instructions that states a defendant did not qualify for appointed counsel and has elected to represent themselves. The committee makes some final edits to the proposed instruction for readability and adds some language to the committee notes to indicate how the instruction can be used, if necessary, in pro se cases. Richard Pehrson moves to approve the instruction and Freya Johnson seconds. Without objection the motion carries and the instruction will be published.

(4) ADJOURN

The meeting adjourned at approximately 1:20 p.m. The next meeting will be held on March 1st, 2023, starting at 12:00 noon.

TAB 2

Final Review of CR444: Pro Se Defendant

NEW:CR444 Pro se Defendant

The Sixth Amendment to the United States Constitution guarantees that a person charged with a crime has the right to the assistance of counsel. This Constitutional guarantee also provides that an individual charged with a crime has the right to proceed to trial representing himself/herself. In this case the defendant will be representing himself/herself. You are not to let the fact that (DEFENDANT'S NAME) is representing himself/herself influence your decision in this case. Instead, you must decide this case based upon the law in the court's instructions and the evidence received during the course of the trial. When (DEFENDANT'S NAME) is acting as a lawyer in the case, [his] [her] words are not evidence. The rules that govern courtroom proceedings apply equally to both parties in this circumstance.

[(STANDBY COUNSEL'S NAME) has been appointed as standby counsel to the defendant but not to act as his/her attorney. In electing to represent himself/herself, the defendant has assumed the full responsibility of acting as his/her own attorney.]

References

State v. Rohwedder, 2018 UT App. 182 (2018) (Mortensen, J., concurring).
State v. Frampton, 737 P.2d 183 (Utah 1987).

Committee Notes

The circumstances involving pro se representation by defendants can vary widely. Depending on the court's pretrial rulings and the legal circumstances, the parties should consider omitting this instruction or making appropriate modifications to this instruction.

Last Revised - 00/00/0000

TAB 3

Definition of Imperfect Self-Defense: Proposed Instruction and Case Law

NEW:CR??? – Definition of Imperfect Self-Defense

Imperfect self-defense occurs when the defendant reasonably, but incorrectly, believes that force is necessary to defend [himself] [herself], or a third party, against another person's imminent use of unlawful force.

References

Committee Notes

Last Revised - 00/00/0000

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta State v. Lynch, Utah App., January 6, 2011

192 P.3d 867
Supreme Court of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Erik Kurtis LOW, Defendant and Appellant.

No. 20050807.
|
Aug. 22, 2008.

Synopsis
Background: Defendant was convicted by jury in the Third District Court, Silver Summit, Bruce C. Lubeck, J., of manslaughter, and he appealed. The Court of Appeals certified the case for transfer to the Supreme Court.

Holdings: The Supreme Court, Parrish, J., held that:

[1] defendant's presentation of self-defense evidence gave trial court a reasonable basis to instruct on imperfect self-defense manslaughter;

[2] instruction on extreme emotional distress manslaughter, over defendant's objection, was erroneous;

[3] erroneous instruction on extreme emotional distress manslaughter was plain error; and

[4] double jeopardy clause prevented retrial for murder.

Reversed and remanded.

West Headnotes (47)

[1] **Criminal Law** Necessity of Objections in General

Criminal Law Necessity of specific objection

Generally speaking, a timely and specific objection must be made at trial in order to preserve an issue for appeal.

24 Cases that cite this headnote

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

Appellate courts require specific objections in order to bring all claimed errors to the trial court's attention to give the trial court an opportunity to correct the errors if appropriate.

7 Cases that cite this headnote

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

Where there is no clear or specific objection and the specific ground for objection is not clear from the context, the theory cannot be raised on appeal.

15 Cases that cite this headnote

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

If a party makes an objection at trial based on one ground, this objection does not preserve for appeal any alternative grounds for objection.

19 Cases that cite this headnote

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

Because defendant did not raise his specific objection to manslaughter instructions before the district court, he failed to preserve it for appeal; defendant objected to the imperfect self-defense manslaughter instruction in the district court, claiming that jury would confuse it with his claim of perfect self-defense and that there was no evidence to show that his actions were legally unjustifiable, and defendant objected to the extreme emotional distress manslaughter instruction on ground that there was no factual basis for it, but defendant never objected to the manslaughter instructions for the reason that he urged on appeal, namely that these two forms

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of manslaughter were affirmative defenses and courts had no authority to force affirmative defenses upon defendants.

[6] **Criminal Law** Necessity of Objections in General

When a party fails to preserve an issue for appeal, appellate court 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. U.S.C.A. Const.Amend. 6.

24 Cases that cite this headnote

[7] **Criminal Law** Necessity of Objections in General

To prevail under plain error review, a defendant must demonstrate that: [1] an error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome.

15 Cases that cite this headnote

[8] **Homicide** Imperfect Self-Defense

Homicide Extreme emotional disturbance or distress; temporary insanity

Extreme emotional distress and imperfect self-defense are affirmative defenses to murder, rather than lesser included offenses of murder. West's U.C.A. § 76–5–203(4)(a).

2 Cases that cite this headnote

[9] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

Courts look first to the statute's plain language to determine its meaning.

[10] **Statutes** Natural, obvious, or accepted meaning

Statutes Language

When interpreting statute, courts presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.

2 Cases that cite this headnote

[11] **Criminal Law** Defenses in general

When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented—either by the prosecution or by the defendant—that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant.

7 Cases that cite this headnote

[12] **Criminal Law** Defenses in general

A court may properly instruct the jury as to an affirmative defense, even if the defendant objects to the instruction, if the defendant has presented evidence supporting the affirmative defense at trial.

4 Cases that cite this headnote

[13] **Criminal Law** Duty of judge in general

Trial court has a duty to instruct the jury on the relevant law, and the court may, even over the defendant's objection, give any instruction that is in proper form, states the law correctly, and does not prejudice the defendant.

1 Case that cites this headnote

[14] **Criminal Law** Defenses in general

If a defendant presents evidence of an affirmative defense, the defendant is not prejudiced when the jury is instructed regarding that defense, and thus, the court may give the affirmative defense instruction as long as it is in proper form and correctly states the law.

5 Cases that cite this headnote

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[15] **Criminal Law** Matters of defense in general

When a defendant presents no evidence relating to an affirmative defense, a court may not instruct the jury on that affirmative defense.

6 Cases that cite this headnote

[16] **Criminal Law** Defenses in general
Criminal Law Defenses in general

When a criminal defendant expresses his intent to not assert an affirmative defense, the prosecution should not be allowed to present evidence of that defense and subsequently request a jury instruction regarding the defense; to allow the prosecution to do so would effectively foist an affirmative defense upon the defendant, and this would be improper because, as a general rule, a defendant cannot be forced to assert an affirmative defense. West's U.C.A. § 76–1–504.

1 Case that cites this headnote

[17] **Criminal Law** Defenses in general

A defendant is entitled to a jury instruction regarding an affirmative defense whenever there is evidence providing a factual basis for the defense.

[18] **Criminal Law** Defenses in general
Criminal Law Matters of defense in general

The prosecution is entitled to a jury instruction regarding an affirmative defense if the defendant has presented evidence supporting that defense, but the prosecution is not entitled to an affirmative defense instruction if the defendant has proffered no evidence in support of that affirmative defense.

2 Cases that cite this headnote

[19] **Homicide** Imperfect Self-Defense

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. West's U.C.A. §§ 76–2–402(1), 76–5–203(4)(a).

6 Cases that cite this headnote

[20] **Homicide** Imperfect Self-Defense
Homicide Self-Defense

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. West's U.C.A. §§ 76–2–402(1), 76–5–203(4)(a).

6 Cases that cite this headnote

[21] **Homicide** Reasonableness of apprehension
Homicide Reasonableness of belief or apprehension

The difference between perfect self-defense and imperfect self-defense is the determination of whether the defendant's conduct was, in fact, legally justifiable or excusable under the existing circumstances. West's U.C.A. § 76–5–203(4)(a)(ii).

4 Cases that cite this headnote

[22] **Homicide** Manslaughter

When a defendant presents evidence of perfect self-defense, he necessarily presents evidence of imperfect self-defense, and the prosecution is entitled to a jury instruction on imperfect self-defense, even over the defendant's objection. West's U.C.A. § 76–5–203(4)(a).

3 Cases that cite this headnote

[23] **Homicide** Manslaughter

Because defendant presented evidence of self-defense, there was a reasonable basis for the district court to instruct the jury regarding imperfect self-defense over defendant's objection; defendant introduced

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evidence, including his own testimony, that he shot victim in self-defense, and defendant testified that he fired the gun only after victim charged him and that he was in fear for his life when he fired the gun. West's U.C.A. § 76–5–203(4)(a).

[24] **Homicide** Manslaughter

Because defendant did not introduce any evidence of extreme emotional distress, it was error for the district court to include a jury instruction for extreme emotional distress manslaughter over defendant's objection; by including the instruction over defendant's objection, the district court foisted upon defendant the affirmative defense of extreme emotional distress, which defendant did not wish to assert. West's U.C.A. § 76–5–203(4)(a).

1 Case that cites this headnote

[25] **Criminal Law** Necessity of Objections in General

The second element a defendant must establish to prevail under plain error review is that the error should have been obvious to the trial court, and an error is obvious when the law governing the error was clear at the time the alleged error was made; error may also be obvious if a review of the plain language of the relevant statute reveals the error.

21 Cases that cite this headnote

[26] **Criminal Law** Particular Instructions

Because extreme emotional distress was clearly listed as an affirmative defense to murder, it was obvious error for the district court to force the affirmative defense on defendant by including the extreme emotional distress manslaughter instruction over defendant's objection, and this satisfied the second prong of the plain error standard. West's U.C.A. § 76–5–203(4)(a).

2 Cases that cite this headnote

[27] **Criminal Law** Necessity of Objections in General

The final element a defendant must demonstrate to establish plain error is that the error was harmful, and error is harmful if it is of such a magnitude that there is a reasonable likelihood of a more favorable outcome for the defendant; this harmfulness test is equivalent to the prejudice test applied in assessing claims of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

14 Cases that cite this headnote

[28] **Criminal Law** Defenses

District court's error in including an extreme emotional distress manslaughter instruction over defendant's objection, when defendant did not introduce any evidence of extreme emotional distress, was harmful; district court's error was harmful because appellate court did not know whether the jury convicted defendant for manslaughter based on the extreme emotional distress instruction or on the imperfect self-defense instruction. West's U.C.A. § 76–5–203(4)(a).

[29] **Homicide** Homicide in duel

A necessary element of a murder conviction is the absence of affirmative defenses.

1 Case that cites this headnote

[30] **Criminal Law** Reasonable Doubt
Criminal Law Defenses in general

The State carries the burden of proving beyond a reasonable doubt each element of an offense, including the absence of an affirmative defense once the defense is put into issue. West's U.C.A. § 76–1–502.

5 Cases that cite this headnote

[31] **Homicide** Murder in general; definitions

Murder instruction was erroneous because it lacked the necessary element that the State

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show the absence of the affirmative defenses of extreme emotional distress and imperfect self-defense; necessary element of a murder conviction was the absence of affirmative defenses. West's U.C.A. § 76–1–502.

1 Case that cites this headnote

[32] **Double Jeopardy** Double Jeopardy

Double jeopardy guarantee protects a defendant from (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. U.S.C.A. Const.Amend. 5; West's U.C.A. Const. Art. 1, § 12; West's U.C.A. § 77–1–6(2)(a).

1 Case that cites this headnote

[33] **Double Jeopardy** Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial

Double jeopardy guarantee does not protect a defendant from a retrial for an offense when his conviction for that same offense has been reversed on appeal as a result of trial error. U.S.C.A. Const.Amend. 5; West's U.C.A. Const. Art. 1, § 12; West's U.C.A. § 77–1–6(2)(a).

[34] **Double Jeopardy** Conviction of Lower as Acquittal of Higher Grade or Degree of Offense

When the conviction of a lesser offense implies an acquittal of a greater offense, double jeopardy bars retrial of the greater offense if the conviction for the lesser offense is reversed on appeal. U.S.C.A. Const.Amend. 5; West's U.C.A. Const. Art. 1, § 12; West's U.C.A. § 77–1–6(2)(a).

[35] **Double Jeopardy** Conviction of Lower as Acquittal of Higher Grade or Degree of Offense

Double jeopardy clause prevented State from retrying defendant for first-degree murder after jury convicted him of the lesser offense of manslaughter; manslaughter conviction constituted an implied acquittal of the greater offense of murder. U.S.C.A. Const.Amend. 5; West's U.C.A. Const. Art. 1, § 12; West's U.C.A. § 77–1–6(2)(a).

1 Case that cites this headnote

[36] **Double Jeopardy** Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial

Double jeopardy does not generally bar a second trial when a conviction is successfully vacated on appeal, and thus, when a criminal defendant is charged with murder but convicted of manslaughter, and the manslaughter conviction is reversed on appeal, double jeopardy does not bar retrial for manslaughter. U.S.C.A. Const.Amend. 5; West's U.C.A. Const. Art. 1, § 12; West's U.C.A. § 77–1–6(2)(a).

3 Cases that cite this headnote

[37] **Criminal Law** Effect

Double Jeopardy Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial

Homicide Imperfect Self-Defense

Homicide Extreme emotional disturbance or distress; temporary insanity

While double jeopardy protections did not prevent the State from retrying defendant for manslaughter, the statutory framework prevented the State from retrying him for extreme emotional distress manslaughter or imperfect self-defense manslaughter; defendant was convicted of manslaughter based upon either extreme emotional distress or imperfect self-defense, but extreme emotional distress and imperfect self-defense existed only as affirmative defenses to murder, and as such, extreme emotional distress manslaughter and imperfect self-defense manslaughter were no longer chargeable offenses, and it would be improper to allow the State to retry defendant for offenses with which he could not have been originally charged. U.S.C.A. Const.Amend. 5; West's U.C.A. Const. Art. 1, § 12; West's U.C.A. §§ 76–5–203(4)(a), 77–1–6(2)(a).

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4 Cases that cite this headnote

[38] **Criminal Law** Effect
Double Jeopardy Conviction of Lower as Acquittal of Higher Grade or Degree of Offense
Although double jeopardy barred the State from retrying defendant for murder and the Utah Criminal Code barred the State from charging defendant with extreme emotional distress manslaughter and imperfect self-defense manslaughter, nothing prohibited the State from filing an amended information containing charges for other forms of manslaughter or other lesser offenses that the State believed were supported by the facts of the case; to allow defendant to escape trial for offenses that might be supported by the facts because of appellate court's reversal of his manslaughter conviction would provide him with an unjustified windfall, and permitting the State to retry defendant for manslaughter and/or lesser offenses that were supported by the facts correctly balanced defendant's right to be free from double jeopardy with the State's interest in punishing those who have committed crimes. U.S.C.A. Const.Amend. 5; West's U.C.A. Const. Art. 1, § 12; West's U.C.A. § 77–1–6(2)(a).

[39] **Criminal Law** Custodial interrogation in general
Custodial interrogation occurs, for *Miranda* purposes, where there is (1) custody or other significant deprivation of a suspect's freedom and (2) interrogation.

[40] **Criminal Law** Warnings
“Interrogation,” for *Miranda* purposes, is either express questioning or its functional equivalent, and it incorporates any words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

1 Case that cites this headnote

[41] **Criminal Law** Necessity in general
Criminal Law Interrogation in General
While statements arising from interrogation are governed by the Fifth Amendment, volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by *Miranda*. U.S.C.A. Const.Amend. 5.

[42] **Criminal Law** Warnings
Words or actions normally attendant to arrest and custody do not constitute “interrogation” for *Miranda* purposes.

[43] **Criminal Law** Necessity in general
Defendant's voluntary statements to police did not fall under the scope of *Miranda*.

[44] **Criminal Law** Booking or biographical questions
Officer's statements which were questions normally attendant to arrest and custody, and officer's agreements with defendant's unsolicited and voluntary statements, did not constitute “interrogation” or its functional equivalent for purposes of *Miranda*.

[45] **Criminal Law** Necessity in general
Criminal Law Particular cases or questions
Officer's refusal to read defendant his *Miranda* rights, coupled with officer's statements during the conversation with defendant, qualified as words or actions that officer should have known would elicit incriminating statements from defendant, and therefore, officer's words and actions were the functional equivalent of express questioning, thus requiring suppression of defendant's statements.

1 Case that cites this headnote

[46] **Criminal Law** Testimony of accused

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Criminal Law Grounds for Admission of Former Testimony

Generally, a defendant's testimony at a former trial is admissible in evidence against him in later proceedings; however, when a defendant is compelled to testify as a result of evidence that is illegally obtained and improperly admitted, the defendant's testimony is inadmissible in a later trial.

[47] **Criminal Law** Grounds for Admission of Former Testimony

Criminal Law Hearing, ruling, and objections

When a defendant is compelled to testify as a result of evidence that is illegally obtained and improperly admitted, the defendant's testimony is inadmissible in a later trial, and thus, if a defendant chooses not to testify at retrial and the prosecution seeks to admit the defendant's testimony from the first trial, the court must determine why the defendant testified in the first trial, and the burden is on the prosecution to show that the government's illegal action did not induce the defendant's testimony.

***871** Third District, Silver Summit, No. 031500082; The Honorable Bruce C. Lubeck. [1]

Attorneys and Law Firms

Mark L. Shurtleff, Att'y Gen., Christopher D. Ballard, Asst. Att'y Gen., Salt Lake City, for plaintiff.

Elizabeth Hunt, Salt Lake City, for defendant.

AMENDED OPINION

On Certification from the Utah Court of Appeals

PARRISH, Justice:

¶ 1 Erik Kurtis Low was charged with the murder of Michael Hirschey and ultimately convicted of manslaughter by a jury. Low argues on appeal that the district court erred by instructing the jury on extreme emotional distress manslaughter and imperfect self-defense manslaughter over his objection. We hold that the jury was properly instructed as to imperfect self-defense manslaughter, but we find merit in Low's argument with respect to the inclusion of the instruction for extreme emotional distress manslaughter. We accordingly reverse Low's manslaughter ***872** conviction and remand for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

¶ 2 Low met Hirschey, Kevin McCall, and Darick Touchette at a bar in Park City, Utah, on May 7, 2003. The group later went to Hirschey's apartment and began ingesting cocaine. As Low was preparing his portion of the cocaine for smoking, Hirschey objected to Low's choice to smoke, rather than snort. Touchette then knocked the cocaine out of Low's hand and ground it into the carpet. While Low was on the ground looking for the cocaine, Touchette and Hirschey ridiculed him and called him a "loser."

¶ 3 Later that night, Hirschey showed the others his gun collection, which included a .357 magnum handgun. During the course of the evening, Low was the continued recipient of more teasing, manhandling, and threats. While Low was urinating, Hirschey grabbed him by the neck from behind, hit him on the back of the head, and told him that if he ratted on Hirschey or his friends, Hirschey would "waste him." Later, Hirschey, who had been a successful competitive wrestler, flipped Low onto the floor and wrestled with him on the ground, causing Low's neck to become sore. McCall and Hirschey then pushed Low's legs up over his shoulders while stepping on his groin in an apparent attempt to "alleviate" the neck pain. Following this incident, Low went to the back of the apartment for approximately twenty minutes, then returned to the living room and passed out on the floor. While Low was passed out, Hirschey poured five large tumblers of water on him, picked him up and slammed him into a chair, and tried to force him to drink a large bottle of hot water. When Low got up to walk to the back of the apartment, Hirschey followed him and gave him a "wedgie" by grabbing the back of Low's underwear and lifting it up with both hands.

¶ 4 Ten or fifteen seconds after Low and Hirschey left the living room, McCall heard someone say "Oh" and then heard a pop. Low then walked back into the living room. McCall could see Hirschey's feet sticking out into the hallway and

asked Low what happened, to which Low responded, “He is dead.” McCall got out his cell phone to call 911, but Low took McCall's hand and pushed the cell phone back into his pocket. Low then asked McCall for his car keys, which McCall dropped on the floor before running outside. Once outside the apartment, McCall hid under a car and called 911.

¶ 5 When police officers arrived at the apartment complex, Officer Ron King parked his cruiser facing a football field adjacent to the apartment complex because dispatch had reported that a person was seen walking toward the field. Officer King's headlights were shining toward a group of three trees next to a fence dividing the apartment complex from the football field. At that point, Low emerged and approached Officer King. Officer King ordered Low to stop, at which point Low said, “I'm the one you're looking for” and “I have something for you.” Officer King asked what the “something” was, and Low responded that it was a “.357 mag.” Officer King searched Low and found a .357 magnum handgun tucked in the front of Low's waistband.

¶ 6 Officer King handcuffed Low and turned on his pocket recorder. Low asked Officer King to read him his rights. Officer King responded by stating, “When I start asking you questions, at the proper time, I'll read you your rights, okay?” After Officer King placed Low in the back seat of the police cruiser, he and Low engaged in conversation during which Low made some potentially incriminating statements.

¶ 7 Officer King subsequently transported Low to the police station. While left handcuffed and alone in an interview room with a closed circuit television, Low took a .357 magnum bullet out of his pocket and kicked it under the table. While Low was being booked into jail, he asked an officer, “What do you get for killing somebody?” When the officer responded that he did not understand the question, Low repeated, “How long do you stay in jail for killing somebody?” Later, when another inmate asked Low what he was in jail for, Low said that he killed someone.

*873 PROCEDURAL BACKGROUND

¶ 8 The State charged Low with murder, theft, and carrying a concealed dangerous weapon without a valid permit. At trial, Low admitted that he shot Hirschey but claimed that he acted in self-defense. Low testified that when he left the living room, Hirschey grabbed him and threw him into a spare bedroom. When Low tried to get up, he saw Hirschey in the doorway with a gun pointed at him. Low tried to run past Hirschey, but Hirschey pushed him back into the room. Low then struggled with Hirschey in an attempt to gain control of the gun. At one point, the gun was pointed at Low's head and Hirschey was attempting to pull the trigger, but Low blocked the hammer to keep the gun from firing. Low ultimately got control of the gun and backed up. Hirschey took a step back and then charged Low. Low screamed “Don't!” and shot Hirschey twice in rapid succession.

¶ 9 During trial, the district court dismissed the theft claim based on the court's determination that the State had failed to produce evidence to support the charge. Additionally, the court denied the State's motion to instruct the jury on manslaughter. The jury found Low guilty of carrying a concealed weapon but was unable to reach a verdict on the murder charge. The court sentenced Low to one year in jail for the weapons charge, ordered a mistrial on the murder charge, and set a date for a new trial on the murder charge.

¶ 10 At the second trial, the State again asked for a manslaughter instruction. Over Low's objection, the district court granted the State's request and included instructions on both extreme emotional distress manslaughter and imperfect self-defense manslaughter. The jury found Low not guilty of first degree murder but convicted him of manslaughter. Low was sentenced to one to fifteen years in prison for manslaughter, with a one-year enhancement for illegal use of a handgun in committing a felony.

¶ 11 Following sentencing, Low filed a timely notice of appeal with the court of appeals. The court of appeals subsequently certified the case for transfer to this court pursuant to rule 43 of the Utah Rules of Appellate Procedure. We have jurisdiction pursuant to Utah Code section 78A–3–102(3)(b) (2008).

ANALYSIS

¶ 12 Low presents several assignments of error. Specifically, he argues that (1) the district court improperly included jury instructions for extreme emotional distress manslaughter and imperfect self-defense manslaughter over his objection, (2) the district court included an erroneous flight instruction, (3) the district court improperly admitted his custodial statements, and (4) the district court improperly admitted his testimony from the first trial. Additionally, Low argues that if

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we reverse his conviction, his constitutional right to be free from double jeopardy bars the State from retrying him.

I. IMPERFECT SELF–DEFENSE AND EXTREME EMOTIONAL DISTRESS MANSLAUGHTER

¶ 13 Low's first assignment of error is that the district court improperly instructed the jury on extreme emotional distress manslaughter and imperfect self-defense manslaughter. Because extreme emotional distress manslaughter and imperfect self-defense manslaughter are both affirmative defenses under Utah law, Low argues that the choice of whether to assert them belongs to the defendant. Low contends that the district court committed reversible error by including the manslaughter instructions over his objection. We conclude that the district court did not err by including the imperfect self-defense instruction, but we agree with Low that the court did err by including the extreme emotional distress manslaughter instruction. We accordingly reverse Low's manslaughter conviction and remand for further proceedings consistent with this opinion.

A. Procedural History

¶ 14 During Low's first trial, the State asked for an imperfect self-defense manslaughter instruction. The district court noted that Low had "done nothing to advance ... imperfect self-defense as an affirmative ***874** defense" and, accordingly, that such an instruction was "potentially a substantial violation of [Low's] constitutional right to prepare and present a defense." The court therefore denied the State's motion to include the imperfect self-defense manslaughter instruction. [2]

¶ 15 At Low's second trial, the State again asked that the jury be instructed on manslaughter. Specifically, the State asked for both an extreme emotional distress manslaughter instruction and an imperfect self-defense manslaughter instruction. Low objected to the imperfect self-defense manslaughter instruction, arguing that the jury would confuse it with his claim of perfect self-defense and that there was no evidence to show that his actions were legally unjustifiable. Low also objected to the extreme emotional distress manslaughter instruction, arguing that there was no factual basis for it. The district court overruled Low's objections and included both instructions.

B. Preservation

¶ 16 The State argues that Low failed to preserve the claim he urges on appeal with respect to the inclusion of the manslaughter instructions. Low argues on appeal that the manslaughter instructions were erroneously given because extreme emotional distress and imperfect self-defense are affirmative defenses to—and not lesser included offenses of—murder. The State contends that this objection is different from the objections he raised in the district court. We agree.

[1] **[2]** **[3]** **[4]** ¶ 17 " 'Generally speaking, a timely and *specific* objection must be made [at trial] in order to preserve an issue for appeal.' " *State v. Winfield,* 2006 UT 4, ¶ 14, 128 P.3d 1171 (quoting *State v. Pinder,* 2005 UT 15, ¶ 45, 114 P.3d 551) (emphasis added) (alteration in original). "Utah courts require specific objections in order to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate." *State v. Brown,* 856 P.2d 358, 361 (Utah Ct.App.1993) (internal quotation marks omitted). "Where there is no clear or specific objection and the specific ground for objection is not clear from the context[,] the theory cannot be raised on appeal." *State v. Johnson,* 2006 UT App 3, ¶ 13, 129 P.3d 282 (internal quotation marks omitted). Thus, if a party makes an objection at trial based on one ground, this objection does not preserve for appeal any alternative grounds for objection. *See, e.g., State v. Schreuder,* 726 P.2d 1215, 1222 (Utah 1986); *State v. Smedley,* 2003 UT App 79, ¶¶ 9–13, 67 P.3d 1005.

[5] ¶ 18 In this case, Low objected to the imperfect self-defense manslaughter instruction in the district court, claiming that the jury would confuse it with his claim of perfect self-defense and that there was no evidence to show that his actions were legally unjustifiable. Low objected to the extreme emotional distress manslaughter instruction on the ground that there was no factual basis for it. However, Low never objected to the manslaughter instructions for the reason that he now urges as grounds for reversal: that these two forms of manslaughter are affirmative defenses and that "[c]ourts have no authority to force affirmative defenses upon criminal defendants." Because Low did not raise this specific objection before the district court, he failed to preserve it for appeal.

C. Standard of Review

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[6] ¶ 19 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. Weaver,* 2005 UT 49, ¶ 18, 122 P.3d 566; *State v. Hansen,* 2002 UT 114, ¶ 21 n. 2, 61 P.3d 1062. Because Low failed to preserve his claim regarding the manslaughter instructions in the district court, we can review it only for plain error, exceptional circumstances, or ineffective assistance.

***875** **[7]** ¶ 20 As discussed below, we hold that it was plain error for the district court to instruct the jury on extreme emotional distress manslaughter. "To prevail under plain error review, a defendant must demonstrate that '[1] an error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome.' " *State v. Ross,* 2007 UT 89, ¶ 17, 174 P.3d 628 (quoting *State v. Lee,* 2006 UT 5, ¶ 26, 128 P.3d 1179). We discuss each of these elements in turn.

D. Error

[8] ¶ 21 We begin our plain error analysis by considering whether the district court erred when it instructed the jury on extreme emotional distress manslaughter and imperfect self-defense manslaughter. To make this determination, we look to the Utah Criminal Code and conclude that extreme emotional distress and imperfect self-defense are affirmative defenses to murder, rather than lesser included offenses of murder. We then consider whether a court may instruct the jury regarding an affirmative defense over the objection of a criminal defendant. We then apply these rules to Low's case and determine that although the district court properly instructed the jury on imperfect self-defense manslaughter, it improperly instructed the jury on extreme emotional distress manslaughter.

1. Statutory Structure of Imperfect Self–Defense Manslaughter and Extreme Emotional Distress Manslaughter

¶ 22 Prior to 1999, extreme emotional distress manslaughter and imperfect self-defense manslaughter were listed in Utah's manslaughter statute as types of manslaughter. Utah Code Ann. § 76–5–205(1) (1995).[3] In 1999, extreme emotional distress and imperfect self-defense were removed from the manslaughter statute and inserted into the murder statute as affirmative defenses to murder. *Id.* § 76–5–203(3) (1999). The current version of the murder statute provides in part:

> 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:
>
> (i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or
>
> (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.

Id. § 76–5–203(4)(a) (Supp.2007) (emphasis added). Under the statute, the assertion of a successful affirmative defense of either extreme emotional distress or imperfect self-defense reduces murder to manslaughter or attempted murder to attempted manslaughter. *Id.* § 76–5–203(4)(d). The manslaughter statute now reads: "Criminal homicide constitutes manslaughter if the actor ... commits a homicide which would be murder, but the offense is reduced pursuant to Subsection 76–5–203(4)." *Id.* § 76–5–205(1)(b) (2003).

[9] **[10]** ¶ 23 "Under our rules of statutory construction, we look first to the statute's plain language to determine its meaning." *State v. Gallegos,* 2007 UT 81, ¶ 12, 171 P.3d 426 (internal quotation marks omitted). "We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." *State v. Holm,* 2006 UT 31, ¶ 16, 137 P.3d 726.

***876** ¶ 24 Under the plain language of Utah's murder and manslaughter statutes, extreme emotional distress manslaughter and imperfect self-defense manslaughter are affirmative defenses to murder. They are no longer lesser included offenses of murder. For this reason, we do not discuss whether the State was entitled to jury instructions for extreme emotional distress manslaughter and imperfect self-defense manslaughter based upon our prior case law regarding lesser included offenses. Rather, we are bound by the legislature's decision to categorize extreme emotional distress manslaughter and imperfect self-defense manslaughter as affirmative defenses to murder. We now

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address when a court may properly instruct the jury regarding such affirmative defenses.

2. Jury Instructions Regarding Affirmative Defenses

[11] ¶ 25 When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented—either by the prosecution or by the defendant—that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant. *See* *State v. Knoll,* 712 P.2d 211, 214 (Utah 1985) ("[W]hen there is a basis in the evidence, whether the evidence is produced by the prosecution or by the defendant, which would provide some reasonable basis for the jury to conclude that a killing was done to protect the defendant from an imminent threat of death by another, an instruction on self-defense should be given the jury."); *State v. Torres,* 619 P.2d 694, 695 (Utah 1980) (stating that a party is "entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it").

¶ 26 We have applied this rule with respect to the affirmative defenses of imperfect self-defense manslaughter and extreme emotional distress manslaughter. *See* *State v. Spillers,* 2007 UT 13, ¶¶ 16, 23, 152 P.3d 315; *State v. Shumway,* 2002 UT 124, ¶¶ 13, 14, 63 P.3d 94. For example, in *Spillers,* we held that a criminal defendant was entitled to a jury instruction on imperfect self-defense manslaughter because the evidence presented by the defendant could have been interpreted by the jury to establish imperfect self-defense. 2007 UT 13, ¶ 23, 152 P.3d 315. We also held that the defendant was entitled to a jury instruction on extreme emotional distress manslaughter because "a rational jury could, adopting Defendant's version of events, find that he was experiencing extreme emotional distress for which there was a reasonable explanation or excuse when he shot [the victim]." *Id.* ¶ 16. This rule does not apply in this case, however, because Low, unlike the defendants in *Spillers* and *Shumway,* did not request that the jury be instructed on extreme emotional distress manslaughter and imperfect self-defense manslaughter. In fact, Low strongly opposed the manslaughter instructions. We must, therefore, determine when a court may include jury instructions regarding affirmative defenses over a defendant's objection.

[12] **[13]** **[14]** ¶ 27 A court may properly instruct the jury as to an affirmative defense, even if the defendant objects to the instruction, if the defendant has presented evidence supporting the affirmative defense at trial. The court has a duty to instruct the jury on the relevant law, and the court may, even over the defendant's objection, "give any instruction that is in proper form, states the law correctly, and does not prejudice the defendant." *State v. Hansen,* 734 P.2d 421, 428 (Utah 1986). If a defendant presents evidence of an affirmative defense, the defendant is not prejudiced when the jury is instructed regarding that defense. Thus, the court may give the affirmative defense instruction as long as it is in proper form and correctly states the law.

[15] **[16]** ¶ 28 But when a defendant presents no evidence relating to an affirmative defense, a court may not instruct the jury on that affirmative defense. Indeed, when a criminal defendant expresses his intent to not assert an affirmative defense, the prosecution should not be allowed to present evidence of that defense and subsequently request a jury instruction regarding the defense. *See* Utah Code Ann. § 76–1–504 (2003) ("Evidence of an affirmative defense ***877** ... shall be presented by the defendant."). To allow the prosecution to do so would effectively foist an affirmative defense upon the defendant. This would be improper because, as a general rule, a defendant cannot be forced to assert an affirmative defense. *See* *State v. Arguelles,* 2003 UT 1, ¶ 84, 63 P.3d 731 (holding that a pro se defendant could not be forced to present mitigating evidence because "the court has no means to compel a defendant to put on an affirmative defense" (internal quotation marks omitted)); *see also* *Tremblay v. Overholser,* 199 F.Supp. 569, 570 (D.D.C.1961) (stating the court's opinion that "it is a deprivation of a constitutional right to force any defense on a defendant in a criminal case or to compel any defendant in a criminal case to present a particular defense which he does not desire to advance"); *State v. Jones,* 99 Wash.2d 735, 664 P.2d 1216, 1220 (1983) (stating that courts do not impose affirmative defenses, such as a valid alibi or legitimate self-defense, on an unwilling defendant).

[17] **[18]** ¶ 29 In summary, a defendant is entitled to a jury instruction regarding an affirmative defense whenever there is evidence providing a factual basis for the defense. The prosecution is entitled to a jury instruction regarding an affirmative defense if the defendant has presented evidence supporting that defense. But the prosecution is not entitled

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to an affirmative defense instruction if the defendant has proffered no evidence in support of that affirmative defense.

3. The Manslaughter Jury Instructions in Low's Case

¶ 30 Having laid out the standards for when a court may properly instruct a jury regarding an affirmative defense over a defendant's objection, we now apply the standards to the facts of Low's case.

a. Imperfect Self–Defense Manslaughter Instruction

¶ 31 We first consider whether the district court properly included the imperfect self-defense jury instruction over Low's objection. We conclude that the imperfect self-defense jury instruction was proper.

[19] **[20]** **[21]** ¶ 32 As previously noted, the prosecution is entitled to a jury instruction regarding an affirmative defense if the defendant has presented evidence supporting that defense. And 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.' " *Spillers,* 2007 UT 13, ¶ 23, 152 P.3d 315 (quoting *State v. Howell,* 649 P.2d 91, 95 (Utah 1982)) (alteration in original). Indeed, 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. *See* Utah Code Ann. § 76–2–402(1) (2003) (providing that perfect self-defense requires the defendant to show that he "*reasonably believe[d]* that force [was] necessary to defend himself ... against such other's imminent use of unlawful force" (emphasis added)); *id.* § 76–5–203(4)(a)(ii) (Supp.2007) (providing that imperfect self-defense requires the defendant to show that he acted "under a *reasonable belief* that the circumstances provided a legal justification or excuse for his conduct" (emphasis added)). The difference between perfect self-defense and imperfect self-defense is the determination of whether the defendant's conduct was, in fact, "legally justifiable or excusable under the existing circumstances." *Id.* § 76–5–203(4)(a)(ii) (Supp.2007).

[22] ¶ 33 Thus, when a defendant presents evidence of perfect self-defense, he necessarily presents evidence of imperfect self-defense, and the prosecution is entitled to a jury instruction on imperfect self-defense, even over the defendant's objection. Were it otherwise, a defendant could tactically raise the issue of self-defense so that a jury could not find beyond a reasonable doubt that he had committed murder, but could then prevent that same jury from convicting him of imperfect self-defense manslaughter simply by objecting to an imperfect self-defense instruction. We are unwilling to interpret the Utah Criminal Code in a manner that would give defendants such an unfair tactical advantage.

***878** **[23]** ¶ 34 In this case, the district court properly instructed the jury on imperfect self-defense manslaughter because Low introduced evidence, including his own testimony, that he shot Hirschey in self-defense. Low testified that he fired the gun only after Hirschey charged him and that he was in fear for his life when he fired the gun. Because Low presented evidence of self-defense, we find that there was a reasonable basis for the district court to instruct the jury regarding imperfect self-defense.

b. Extreme Emotional Distress Manslaughter Instruction

[24] ¶ 35 We next consider whether the district court properly included the extreme emotional distress manslaughter instruction over Low's objection. We conclude that it was error for the court to include the instruction.

¶ 36 The State argues that the jury instruction was proper because "there was evidence that defendant may have killed Hirschey while suffering extreme emotional distress." The State points to testimony from Low, McCall, and Touchette that Hirschey had teased, manhandled, and assaulted Low. This evidence, the State argues, raises the question of whether Low was suffering from extreme emotional distress when he shot Hirschey. We disagree.

¶ 37 Although there was evidence presented by both the prosecution and by Low that Hirschey had mistreated Low throughout the evening of the shooting, there was no evidence that Low was experiencing extreme emotional distress as a result of the mistreatment. Low never testified that he was angered or upset by the mistreatment. And the other witnesses testified that Hirschey's mistreatment did not cause Low to become angry or emotionally distressed. Touchette testified that Low took the mistreatment "in stride" and was not angry. McCall testified that Low "just kind of shrugged it off" and that, mere seconds before the shooting happened, Low did not appear mad at Hirschey.

¶ 38 By including the instruction over Low's objection, the district court foisted upon Low the affirmative defense of extreme emotional distress, which Low did not wish to assert. Because Low did not introduce any evidence of

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extreme emotional distress, it was error for the district court to include a jury instruction for extreme emotional distress manslaughter.

¶ 39 We find support for our decision in the case of *People v. Bradley,* 88 N.Y.2d 901, 646 N.Y.S.2d 657, 669 N.E.2d 815 (1996). In *Bradley,* a defendant charged with second degree murder asserted the affirmative defense of "not responsible by reason of a mental disease or defect." *Id.* 646 N.Y.S.2d 657, 669 N.E.2d at 816. The State asked the trial court to provide a first degree manslaughter instruction based on extreme emotional disturbance, and the court included the instruction over the defendant's objection. *Id.* The jury found the defendant guilty of manslaughter. *Id.* The Court of Appeals of New York held that it was error for the trial court to include the manslaughter instruction because the defendant's position at trial was that he suffered from a progressive mental illness that "prevented him from appreciating the moral and legal import of his actions," not that he suffered a "temporary loss of control." *Id.* The appellate court concluded that the defendant's right to chart his own defense had been infringed when the trial court instructed the jury regarding the affirmative defense of extreme emotional disturbance over the defendant's objection and reversed the conviction. *Id.*

¶ 40 In this case, Low's consistent position at trial was that he acted out of self-defense. Low did not present any evidence that his actions were due to a temporary loss of control caused by extreme emotional distress. It was therefore error for the district court to submit a jury instruction regarding extreme emotional distress, an affirmative defense that Low did not raise. This error satisfies the first prong of the plain error standard.

E. Obviousness

[25] ¶ 41 The second element a defendant must establish to prevail under plain error review is that "'"the error should have been obvious to the trial court.' " *Ross,* 2007 UT 89, ¶ 17, 174 P.3d 628 (quoting ***879** *Lee,* 2006 UT 5, ¶ 26, 128 P.3d 1179). An error is obvious when "the law governing the error was clear at the time the alleged error was made." *State v. Dean,* 2004 UT 63, ¶ 16, 95 P.3d 276. An error may be obvious if a review of the plain language of the relevant statute reveals the error. *See State v. Portillo,* 914 P.2d 724, 726 (Utah Ct.App.1996).

[26] ¶ 42 Under the plain language of Utah Code section 76–5–203(4)(a), extreme emotional distress manslaughter and imperfect self-defense manslaughter are affirmative defenses to murder. Because extreme emotional distress is clearly listed as an affirmative defense to murder, it was obvious error for the district court to force the affirmative defense on Low by including the extreme emotional distress manslaughter instruction over Low's objection. This satisfies the second prong of the plain error standard.

F. Harmfulness

[27] ¶ 43 The final element a defendant must demonstrate to establish plain error is that the error was harmful. *Dean,* 2004 UT 63, ¶ 22, 95 P.3d 276. An error is harmful if it is "of such a magnitude that there is a reasonable likelihood of a more favorable outcome for the defendant." *Id.* (internal quotation marks omitted). "This harmfulness test is equivalent to the prejudice test applied in assessing claims of ineffective assistance of counsel." *Id.*

[28] ¶ 44 The State argues that even if the manslaughter jury instructions were improper, there was no harm because the jury necessarily found Low guilty of murder and then reduced the murder charge to manslaughter based on the affirmative defenses. The State therefore argues that Low would necessarily have been convicted of murder had the jury not been instructed on manslaughter. We disagree.

[29] **[30]** **[31]** ¶ 45 A necessary element of a murder conviction is the absence of affirmative defenses. "It is fundamental that the State carries the burden of proving beyond a reasonable doubt each element of an offense, including the absence of an affirmative defense once the defense is put into issue." *State v. Hill,* 727 P.2d 221, 222 (Utah 1986); *see also* Utah Code Ann. § 76–1–502 (2003) (requiring the prosecution to negate an affirmative defense by proof if the defendant has presented evidence of the defense). The murder instruction in this case was erroneous because it lacked the necessary element that the State show the absence of the affirmative defenses of extreme emotional distress and imperfect self-defense. Because the absence of affirmative defenses is an element of murder, we are unpersuaded by the State's argument.

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¶ 46 Moreover, even if the murder instruction had not been erroneous, the plain language of the jury instructions did not require the jury to find all the elements of murder before it could consider whether to reduce the murder conviction to manslaughter, as the State contends. Rather, there was a jury instruction listing the elements of first degree murder and a separate jury instruction stating that the jury "may also consider whether the defendant has committed the offense of Manslaughter." Because the jury was not instructed to first find all of the elements of murder beyond a reasonable doubt and then—and only then—determine whether to reduce the murder conviction to a manslaughter conviction, the State's harmlessness argument fails.

¶ 47 The district court's error was harmful because we do not know whether the jury convicted Low for manslaughter based on the extreme emotional distress instruction or on the imperfect self-defense instruction. If the jury convicted Low of imperfect self-defense manslaughter, there would be no harm in light of our holding that the district court properly instructed the jury on imperfect self-defense. If, however, the jury convicted Low of extreme emotional distress manslaughter, Low's conviction is based upon an erroneous instruction, and the giving of that instruction was obviously harmful. The difficulty is that the verdict form in this case contains insufficient information for us to determine whether the jury convicted Low of imperfect self-defense manslaughter or extreme emotional distress manslaughter.

¶ 48 The verdict form instructed the jury to determine whether Low was (1) guilty of first degree murder, (2) guilty of manslaughter, ***880** or (3) not guilty. In the event that the jury found Low guilty of manslaughter, the verdict form did not require the jury to specify whether it was convicting Low for imperfect self-defense manslaughter or extreme emotional distress manslaughter. There is a reasonable possibility that the jury convicted Low of extreme emotional distress manslaughter. Had the district court not erroneously instructed the jury on this form of manslaughter, there is a reasonable likelihood that Low may not have been convicted at all. It is this "reasonable likelihood of a more favorable outcome" that makes the error harmful, *Dean,* 2004 UT 63, ¶ 22, 95 P.3d 276, and satisfies the third prong of the plain error standard.

¶ 49 In summary, we conclude that the district court erred by including an extreme emotional distress manslaughter instruction over Low's objection, that the error was obvious based on the plain language of the Utah Criminal Code, and that the error was harmful. Because the district court committed plain error, we reverse Low's conviction.

II. DOUBLE JEOPARDY

¶ 50 Having determined that the district court's error requires reversal, we must now determine whether a retrial would subject Low to double jeopardy. Low argues that double jeopardy prevents the State from retrying him for murder or for manslaughter. We hold that double jeopardy bars the State from retrying Low for murder and that the statutory scheme bars the State from retrying Low for extreme emotional distress manslaughter or imperfect self-defense manslaughter. The State may, however, amend its information and retry Low for other forms of manslaughter or lesser offenses.

A. Retrial for Murder

[32] ¶ 51 The United States Constitution, the Utah Constitution, and the Utah Code all provide citizens with protection from double jeopardy. U.S. Const. amend. V; Utah Const. art I, § 12; Utah Code Ann. § 77–1–6(2)(a) (2003). "[T]he double jeopardy guarantee contained in these provisions protects a defendant from (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Rudolph,* 970 P.2d 1221, 1230 (Utah 1998).

[33] **[34]** ¶ 52 The double jeopardy guarantee does not protect a defendant from a retrial for an offense when his conviction for that same offense has been reversed on appeal as a result of trial error. *Burks v. United States,* 437 U.S. 1, 15, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Green v. United States,* 355 U.S. 184, 189, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); *see also* *Rudolph,* 970 P.2d at 1230–31 ("[D]ouble jeopardy does not generally bar a second trial when a conviction was successfully vacated on appeal."). A caveat to this general rule is that when the conviction of a lesser offense implies an acquittal of a greater offense, double jeopardy bars retrial of the greater offense if the conviction for the lesser offense is reversed on appeal. *Price v. Georgia,*

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398 U.S. 323, 329, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970); *Green,* 355 U.S. at 190–91, 78 S.Ct. 221.

¶ 53 For example, the criminal defendant in *Price* was charged with murder and convicted of manslaughter, but successfully obtained a reversal of the manslaughter conviction on appeal. 398 U.S. at 324, 90 S.Ct. 1757. The United States Supreme Court held that the Double Jeopardy Clause barred retrial for murder because the defendant's conviction on the manslaughter charge implicitly acquitted him of the murder charge. *Id.* at 329, 90 S.Ct. 1757; *see also* *Green,* 355 U.S. at 190–91, 78 S.Ct. 221 (holding that the Double Jeopardy Clause barred retrial on first degree murder when the defendant was charged with first degree murder, was convicted of second degree murder, and was successful in obtaining a reversal of the second degree murder conviction on appeal).

¶ 54 The underlying rationale for the caveat is that (1) because a conviction on a lesser offense necessarily implies an acquittal of the greater offense and (2) because double jeopardy bars a second prosecution for the same offense after an acquittal, a defendant who is convicted of the lesser offense cannot be retried for the greater offense, even if the conviction for the lesser offense is reversed ***881** on appeal. *See* Utah Code Ann. § 76–1–403(2) ("A finding of guilty of a lesser included offense is an acquittal of the greater offense even though the conviction for the lesser included offense is subsequently reversed, set aside, or vacated."); *Rudolph,* 970 P.2d at 1230 ("[T]he double jeopardy guarantee ... protects a defendant from ... a second prosecution for the same offense after acquittal....").

[35] ¶ 55 In this case, Low was charged with first degree murder, but was convicted of manslaughter by a jury. The conviction of the lesser offense of manslaughter constitutes an implied acquittal of the greater offense of murder. [4] Because Low was acquitted of murder, double jeopardy prevents the State from retrying Low for that offense.

B. Retrial for Extreme Emotional Distress Manslaughter and Imperfect Self–Defense Manslaughter

[36] ¶ 56 As previously noted, "double jeopardy does not generally bar a second trial when a conviction [is] successfully vacated on appeal." *Rudolph,* 970 P.2d at 1230–31. Thus, when a criminal defendant is charged with murder but convicted of manslaughter, and the manslaughter conviction is reversed on appeal, double jeopardy does not bar retrial for manslaughter. *See* *Price,* 398 U.S. at 329, 90 S.Ct. 1757 (holding that the Double Jeopardy Clause barred retrial for murder, but not for manslaughter); *United States v. Larkin,* 605 F.2d 1360, 1368 (5th Cir.1979) ("[I]t is ... well settled that a defendant may be retried on a lesser offense, of which he was convicted at an initial trial, after that conviction was reversed on appeal...."). Because Low was convicted of manslaughter, double jeopardy would ordinarily not bar retrial for manslaughter.

[37] ¶ 57 While double jeopardy protections do not prevent the State from retrying Low for manslaughter, the statutory framework prevents the State from retrying him for extreme emotional distress manslaughter or imperfect self-defense manslaughter. Low was convicted of manslaughter based upon either extreme emotional distress or imperfect self-defense. [5] But under the plain language of the Utah Criminal Code, extreme emotional distress and imperfect self-defense exist only as affirmative defenses to murder. Utah Code Ann. § 76–5–203(4)(a) (Supp.2007). As such, extreme emotional distress manslaughter and imperfect self-defense manslaughter are no longer chargeable offenses. It would be improper to allow the State to retry Low for offenses with which he could not have been originally charged. We therefore conclude that the State cannot retry Low for extreme emotional distress manslaughter or imperfect self-defense manslaughter. [6]

C. Retrial for Manslaughter and Lesser Offenses

[38] ¶ 58 Although double jeopardy bars the State from retrying Low for murder and the Utah Criminal Code bars the State from ***882** charging Low with extreme emotional distress manslaughter and imperfect self-defense manslaughter, nothing prohibits the State from filing an amended information containing charges for other forms of manslaughter or other lesser offenses that the State believes are supported by the facts of the case. "[C]ourts have held that the Double Jeopardy Clause does not bar retrial of defendants on new indictments after their original convictions were reversed on appeal." *United States v. Newman,* 6 F.3d 623, 627 (9th Cir.1993); *see also* *United States v. Poll,* 538 F.2d 845, 847 (9th Cir.1976) ("[W]hen the first

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conviction has been reversed and the matter remanded, the slate has been wiped clean and the Government is free to prosecute the defendant on a different statutory violation regardless if it is considered the same or a separate offense.”); *Thomas v. State,* 473 So.2d 627, 629 (Ala.Crim.App.1985) (finding no double jeopardy violation when the defendant was indicted and convicted of intentional murder and robbery, the conviction was reversed on appeal because of an erroneous jury instruction, and the defendant was reindicted for felony murder and reckless murder).

¶ 59 To allow Low to escape trial for offenses that may be supported by the facts because of our reversal of his manslaughter conviction would provide him with an unjustified windfall. *Jones v. Thomas,* 491 U.S. 376, 387, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989) (“[N]either the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls.”). The Supreme Court has noted that

> [c]orresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.... [T]he practice of retrial serves defendants' rights as well as society's interest.

United States v. Tateo, 377 U.S. 463, 466, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964). Permitting the State to retry Low for manslaughter and/or lesser offenses that the State believes are supported by the facts correctly balances Low's right to be free from double jeopardy with the State's interest in punishing those who have committed crimes against society.

¶ 60 We therefore conclude that although the State cannot retry Low for murder, extreme emotional distress manslaughter, or imperfect self-defense manslaughter, the State may file an amended information and retry Low for other forms of manslaughter or lesser offenses.

III. ISSUES FOR RETRIAL

¶ 61 Although we reverse Low's conviction and remand the case for retrial based on the district court's erroneous inclusion of the extreme emotional distress manslaughter instruction, there are other issues presented on appeal that will likely arise during retrial. We therefore exercise our discretion to address those issues for purposes of providing guidance on remand. *See* *State v. James,* 819 P.2d 781, 795 (Utah 1991) (“Issues that are fully briefed on appeal and are likely to be presented on remand should be addressed by this court.”). Much of the briefing on these issues related to preservation and prejudice. Those matters do not concern us because our discussion of these issues is in the context of providing guidance for retrial, rather than in determining whether the district court erred in the previous trial. We therefore decline to address the State's preservation and prejudice arguments.

¶ 62 The issues we examine are (1) whether the flight instruction was complete, (2) whether Low's custodial statements were properly admitted, and (3) whether Low's testimony from the first trial was properly admitted in the second trial.

A. Flight Instruction

¶ 63 Low argues that the jury instruction regarding flight, which was given in his second trial, was incomplete. The flight instruction provided:

> The flight or attempted flight after a killing of another is not sufficient in itself to establish a person's guilt, but is a fact which, if proved, may be considered by you ***883** in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

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¶ 64 This flight instruction is similar to the flight instruction at issue in *State v. Bales,* 675 P.2d 573, 574 (Utah 1983). In that case, we held that the flight instruction was not "completely free from criticism" because it did not "advise[ ] the jury that there may be reasons for flight fully consistent with innocence and that even if consciousness of guilt is inferred from flight it does not necessarily reflect actual guilt of the crime charged." *Id.* at 575; *see also* *State v. Franklin,* 735 P.2d 34, 39 (Utah 1987).

¶ 65 The flight instruction in this case is incomplete for the same reasons. Indeed, the State acknowledges the instruction's incompleteness. We do not express any opinion on whether the incomplete flight instruction would have warranted reversal in this case. Rather, if the district court provides a flight instruction on retrial, we advise the court to ensure that the instruction is complete.

B. Custodial Statements

¶ 66 Low argues that his custodial statements recorded by the arresting officer should have been suppressed. We agree and advise the district court to suppress those statements on retrial.

¶ 67 Prior to the first trial, Low filed a motion to suppress his custodial statements recorded by Officer King, arguing that they had been obtained in violation of Low's *Miranda* rights. The district court concluded that Low's statements were admissible, with the exception of a few inaudible comments. At trial, a transcript of the dialogue between Low and Officer King was read to the jury by Officer King. Additionally, some of Low's statements were used against him in cross-examination. In the second trial, Low did not ask the district court to revisit the issue of admissibility of the custodial statements, and a transcript of the dialogue was again read to the jury by Officer King. In addition, Low's testimony from the first trial was read to the jury. Thus, the jury heard the custodial statements through the live testimony of Officer King and in the reading of the State's cross-examination of Low from the first trial.

¶ 68 The Fifth Amendment guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. To protect this right, the Supreme Court held in *Miranda v. Arizona* that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[39] ¶ 69 "[C]ustodial interrogation occurs where there is (1) custody or other significant deprivation of a suspect's freedom and (2) interrogation." *State v. Levin,* 2006 UT 50, ¶ 34, 144 P.3d 1096. In this case, the State concedes that Low was in custody when Officer King activated his tape recorder. We therefore focus on the question of whether Low was interrogated.

[40] **[41]** **[42]** ¶ 70 "Interrogation is 'either express questioning or its functional equivalent' and it incorporates any 'words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.' " *Levin,* 2006 UT 50, ¶ 37, 144 P.3d 1096 (emphasis removed) (quoting *Rhode Island v. Innis,* 446 U.S. 291, 300–02, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)). While statements arising from interrogation are governed by the Fifth Amendment, "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [the *Miranda* decision]." *Miranda,* 384 U.S. at 478, 86 S.Ct. 1602. "The law of this state also recognizes that words or actions normally attendant to arrest and custody do not constitute interrogation." *State v. Dutchie,* 969 P.2d 422, 426 (Utah 1998).

¶ 71 In this case, Officer King did not initiate direct questioning of Low. Thus, the question before us is whether Officer King's statements and conduct were the "functional equivalent" of express questioning. *See* ***884** *State v. Yoder,* 935 P.2d 534, 545 (Utah Ct.App.1997). We must determine whether Officer King's words and actions were "words or actions [Officer King] should have known were reasonably likely to elicit an incriminating response from [Low]." *Id.*

[43] **[44]** ¶ 72 The facts of this case present a very close question. We agree with the State that many of Low's statements were voluntary statements that do not fall under the scope of *Miranda. See* 384 U.S. at 478, 86 S.Ct. 1602. We also agree with the State that many of Officer King's statements were questions normally attendant to arrest and custody, *see Dutchie,* 969 P.2d at 426, or agreements with Low's unsolicited and voluntary statements, *see Yoder,* 935 P.2d at 546, that do not constitute interrogation or its functional equivalent.

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[45] ¶ 73 But some of Officer King's statements were reasonably likely to elicit an incriminating response. For example, at one point during the conversation, Officer King told Low, "Sometimes you just need to talk to somebody, huh?" Shortly thereafter, Low stated, "I don't want to talk too much," to which Officer King responded, "That's up to you."

¶ 74 In addition to the statements themselves, we find significant Officer King's refusal to read Low his rights. Immediately upon being arrested, Low specifically asked Officer King, "Will you read me my rights, please." Officer King responded, "When I start asking you questions, at the proper time, I'll read you your rights, okay?" To a person untrained in the law, an officer's refusal to read him his rights may suggest that anything he says before being read his rights will not be used against him. Officer King's refusal to read Low his rights may have given Low a false sense of security in making statements to Officer King that, unknown to Low, were being recorded. This false sense of security arising from Officer King's refusal to read Low his rights taints the conversation that followed and increases our concern regarding Officer King's statements that Low "just need[ed] to talk to somebody" and that Low's decision to talk was "up to [him]." We accordingly hold that Officer King's refusal to read Low his rights, coupled with Officer King's statements during the conversation, qualify as words or actions that Officer King should have known would elicit incriminating statements from Low. Officer King's words and actions were, therefore, the functional equivalent of express questioning, and Low's statements must be suppressed.

¶ 75 We pause to clarify that our holding in this case does not suggest the existence of a constitutional violation in every case where a defendant asks to be read his rights, the officer declines to do so, and the defendant then makes unsolicited, voluntary statements. Nor do we opine on whether a constitutional violation would have occurred in this case absent Low's request to be read his rights and Officer King's refusal. Rather, we limit our determination to the specific facts presented herein and advise the district court that Low's custodial statements should be suppressed at retrial, if Low so requests.

C. Testimony from the First Trial

¶ 76 Low did not testify in the second trial, but the district court permitted the State, over Low's objection, to read to the jury his testimony from the first trial. Low argues that the district court erred by permitting the State to present his testimony from the first trial over his objection.

[46] **[47]** ¶ 77 Generally, "a defendant's testimony at a former trial is admissible in evidence against him in later proceedings." *Harrison v. United States,* 392 U.S. 219, 222, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968). However, when a defendant is compelled to testify as a result of evidence that is illegally obtained and improperly admitted, the defendant's testimony is inadmissible in a later trial. *Id.* at 222–24, 88 S.Ct. 2008. Accordingly, if a defendant chooses not to testify at retrial and the prosecution seeks to admit the defendant's testimony from the first trial, the court must determine why the defendant testified in the first trial. *See* *id.* at 223, 88 S.Ct. 2008 ("The question is not *whether* the [defendant] made a knowing decision to testify, but *why.*"). The burden is on the prosecution to "show that [the government's] illegal action did not induce [the defendant's] testimony." *Id.* at 225, 88 S.Ct. 2008; *see also* ***885** *United States v. Pelullo,* 105 F.3d 117, 125 (3d Cir.1997) ("The burden of proving that the defendant would have testified had the government not committed the violation lies with the government.").

¶ 78 In this case, the district court in the second trial acted under the assumption that Low's custodial statements had been legally obtained and properly admitted in the first trial. As a result, when deciding whether to allow the State to introduce Low's testimony from the first trial, the court took no evidence and made no findings regarding whether Low had been compelled to testify in the first trial as a result of the improper admission of his custodial statements. Our holding that Low's custodial statements were illegally obtained and improperly admitted may require the district court to make these determinations on remand. If Low chooses not to testify at retrial and the State asks for the admission of Low's testimony from the first trial, the district court will need to determine whether the erroneous admission of Low's custodial statements compelled him to testify in the first trial. If the State carries its burden in showing that Low was not compelled to testify due to the admission of the custodial statements, the court may admit Low's prior testimony. If, however, the State does not carry its burden, Low's prior testimony must be excluded.

CONCLUSION

¶ 79 We reverse Low's manslaughter conviction and remand for further proceedings consistent with this opinion.

¶ 80 Chief Justice DURHAM, Associate Chief Justice DURRANT, Justice WILKINS, and Justice NEHRING concur in Justice PARRISH'S opinion.

All Citations

192 P.3d 867, 611 Utah Adv. Rep. 14, 2008 UT 58

Footnotes

1 As per our practice, Judge Lubeck is listed as the district court judge because he signed the final order in this case. We note, however, that Judge Lubeck did not preside over the trial that we are reviewing.

2 In the first trial, the State also asked for a reckless manslaughter instruction. After noting that Low had admitted to intentionally killing Hirschey, the district court held that there was no evidence of recklessness and accordingly refused to give the reckless manslaughter instruction.

3 The pre–1999 manslaughter statute provided in part:

(1) Criminal homicide constitutes manslaughter if the actor:

(a) recklessly causes the death of another; or

(b) causes the death of another under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse; or

(c) causes the death of another under circumstances where the actor reasonably believes the circumstances provide a legal justification or excuse for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.

Utah Code Ann. § 76–5–205(1) (1995).

4 As we previously have noted in this opinion, the jury instruction regarding first degree murder was erroneous because it lacked the requirement that the State prove the absence of the affirmative defenses raised by Low. The omission of this element arguably made it easier for the jury to convict Low of first degree murder. And even with the omission, the jury still rejected first degree murder in favor of manslaughter. Because the State was unable to convince the jury to convict Low of murder, the jury's conviction of manslaughter constituted an implicit acquittal of the murder charge.

5 As previously noted, because the jury verdict form did not require that the jury identify the affirmative defense on which it relied to convict Low of manslaughter, we are unable to determine whether the jury relied on extreme emotional distress or imperfect self-defense.

6 The strange result in this case highlights an apparent practical problem with the legislature's decision to remove extreme emotional distress and imperfect self-defense from the manslaughter statute, where they were chargeable offenses, and redefine them only as affirmative defenses to murder. Despite the strange result, we are bound by legislative enactments and therefore must apply the law as written. *See Wagner v. Utah Dep't of Human Servs.,* 2005 UT 54, ¶ 63, 122 P.3d 599 ("[I]t is not our role as a judiciary to override the legislature ... [but] only to interpret and apply the law as it is."); *Fay v. Indus. Comm'n,* 100 Utah 542, 114

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P.2d 508, 516 (1941) ("It is our function to apply the law as written by the legislature, barring constitutional questions, and not to legislate because we think the law should be otherwise.").

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508 P.3d 1003
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Andy Phillips CABUTUTAN, Appellant.

No. 20200151-CA
|
Filed March 31, 2022

Synopsis
Background: Defendant was convicted in the Eighth District Court, Vernal Department, Edwin T. Peterson, J., of manslaughter. Defendant appealed.

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

[1] evidence that defendant engaged in combat by agreement was sufficient to overcome assertion of perfect self-defense;

[2] probative value of autopsy photos was not outweighed by unfair prejudice;

[3] probative value of crime scene photos was not outweighed by unfair prejudice; and

[4] defense counsel's failure to object to testimony of victim's wife about effect of victim's death on her life did not prejudice defendant.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (13)

[1] **Criminal Law** Weight and sufficiency
Criminal Law Weight of Evidence in General
Criminal Law Inferences or hypotheses from evidence

When reviewing a preserved sufficiency of the evidence claim, the Court of Appeals asks simply whether the jury's verdict is reasonable in light of all of the evidence taken cumulatively, under a standard of review that yields deference to all reasonable inferences supporting the jury's verdict.

[2] **Criminal Law** Reception and Admissibility of Evidence

The Court of Appeals reviews challenges to the admission of evidence for an abuse of discretion.

[3] **Criminal Law** Effective assistance

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 the Court of Appeals must decide whether the defendant was deprived of the effective assistance of counsel as a matter of law. U.S. Const. Amend. 6.

[4] **Homicide** Degree of proof in general

To prevail on a contention that the State presented insufficient evidence to overcome an assertion of perfect self-defense against a murder charge, a defendant would need to show either that, given the evidence presented at trial, a jury could not find, beyond a reasonable doubt, that the defendant committed the crime, or that perfect self-defense did not apply. Utah Code Ann. §§ 76-2-402, 76-5-203(4)(a).

[5] **Homicide** Imperfect Self-Defense
Homicide Self-Defense

Where applicable, "imperfect self-defense" results only in reduction of a conviction from murder to manslaughter, whereas "perfect self-defense" is a complete defense to any crime that, where applicable, results in acquittal. Utah Code Ann. §§ 76-2-402, 76-5-203(4)(a).

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[6] **Criminal Law** Matters of defense and rebuttal in general

Homicide Grade, degree, or classification of offense

Homicide Self-defense

As with any affirmative defense, an assertion of self-defense against a murder charge, be it perfect or imperfect, places the burden on the prosecution to disprove that defense once a defendant has produced some evidence of it. Utah Code Ann. §§ 76-2-402, 76-5-203(4)(a).

[7] **Homicide** Mutual combat

Evidence that defendant engaged in combat by agreement was sufficient to overcome defendant's assertion of perfect self-defense, and thus supported his conviction for manslaughter; jury heard in defendant's "own words" that he had "engaged in combat by agreement" and specifically that when challenged by victim, defendant "stepped up to" challenge, took off his shirt, and "came at" victim, and there was no evidence that, at any point, defendant attempted to withdraw from encounter. Utah Code Ann. §§ 76-2-402(3)(a)(iii), 76-5-203(4)(a).

[8] **Criminal Law** Documentary evidence

To prevail on a contention that the trial court abused its discretion in admitting photos over his objection, the defendant must demonstrate that the court applied the wrong legal standard or rendered a decision beyond the limits of reasonability.

[9] **Criminal Law** Purpose of admission

Criminal Law Photographs arousing passion or prejudice; gruesomeness

Criminal Law Effect of Admission

Probative value of autopsy photos, showing victim's skull with scalp skinned back to reveal internal injuries resulting from blow from shovel, was not outweighed by unfair prejudice, to show cause of death and degree of force from blow with shovel, in trial for murder in which defendant asserted self defense, even though defendant admitted to killing victim with shovel; photos and injury they showed could have helped jury determine how defendant used shovel and whether he wielded it only defensively or to inflict substantial blow, and jury was instructed that autopsy, not defendant, was to blame for any apparent gruesomeness of photos, which were not unfairly gruesome or disturbing. Utah Code Ann. § 76-2-402; Utah R. Evid. 403.

[10] **Criminal Law** Photographs arousing passion or prejudice; gruesomeness

Probative value of crime scene photos, showing victim and several weapons used in fight between victim and defendant, was not outweighed by unfair prejudice in trial for murder in which defendant asserted self-defense; seeing victim's external injury and spatial relationship of victim's body, as well as brick and pistol used by victim in fight, could assist jury, and photo was not unfairly gruesome or disturbing. Utah Code Ann. § 76-2-402; Utah R. Evid. 403.

[11] **Criminal Law** Prejudice in general

To prevail on a claim of ineffective assistance of counsel, defendant would have to show a reasonable probability that absent counsel's error, the outcome of his case would have been different. U.S. Const. Amend. 6.

[12] **Criminal Law** Determination

Because a defendant must satisfy both the deficiency and prejudice parts of the test for ineffective assistance of counsel, if the Court of Appeals determines that a defendant has made an insufficient showing on one component, the court need not address the other. U.S. Const. Amend. 6.

[13] **Criminal Law** Introduction of and Objections to Evidence at Trial

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Defense counsel's failure to object to testimony of victim's wife, that victim's death changed her "whole life" and deprived her of financial security, did not prejudice defendant, and thus did not amount to ineffective assistance of counsel, in prosecution for murder, in which defendant was convicted of lesser-included offense of manslaughter; overarching message from wife's testimony, that her life had radically changed since husband's death and that she now faced financial difficulty, was something jury would have discerned regardless, and, even without contested testimony, there was robust evidence for defendant's conviction and rejection of perfect self-defense from defendant's own testimony that he engaged in combat by agreement with victim and never withdrew from fight. U.S. Const. Amend. 6; Utah Code Ann. § 76-2-402(3)(a)(iii).

***1004** Eighth District Court, Vernal Department, The Honorable Edwin T. Peterson, No. 181800504

Attorneys and Law Firms

Aaron P. Dodd, Provo, and Kara H. North, Orem, Attorneys for Appellant

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Judge David N. Mortensen authored this Opinion, in which Judges Michele M. Christiansen Forster and Ryan M. Harris concurred.

Opinion

MORTENSEN, Judge:

¶1 Andy Phillips Cabututan's fight with his boss (Boss) started with words, a pistol, swinging fists, a kick to the groin, and a brick; but the fight ended with Boss's death after Cabututan struck Boss's head with a shovel. At Cabututan's murder trial, the jury rejected his assertion that he acted in perfect self-defense and ultimately convicted him of the lesser included offense of manslaughter. ***1005** Cabututan appeals on various grounds, but we affirm.

BACKGROUND [1]

¶2 At a time when Cabututan and Boss maintained a good relationship, Cabututan moved his camper onto Boss's property as part of an agreement to perform mechanical work on Boss's taxis. However, as the months passed, their relationship soured. Cabututan, in Boss's view, had failed to live up to his end of the bargain—namely, Cabututan sat in his camper instead of working on the taxis.

¶3 One morning, while Cabututan sat in his camper, he heard a sudden bang on his door. Boss had come to confront Cabututan about Cabututan's failure to do enough work. After opening the camper door, Cabututan walked past Boss, opened the door to his van and got in, and, leaving the van door open, began rolling a cigarette. For a moment, Cabututan listened as Boss "yell[ed] and scream[ed]," but he soon informed Boss that he would be moving. In response, Boss challenged him, "Come on out of there and we'll handle this."

¶4 So, as Cabututan told the police, he "stepped up to him," "[t]ook off [his] shirt[,] and came at him." But almost immediately, Boss produced a pistol. Cabututan, seeing a loaded pistol pointed straight at him, "just went into complete blank out self-defense mode," "took a swing at [Boss], and blocked ... the pistol." Boss lowered the pistol and Cabututan jumped to the side before seeing Boss raise the pistol again. Cabututan reacted quickly and "kicked [Boss] square in the nuts," but to Cabututan's surprise, "it didn't even [faze] him. He still had the pistol in his hand." When Boss raised the pistol again, Cabututan "just started dancing" and "moving around"—all amidst "a bunch of screaming" from both of them.

¶5 Eventually, Boss "reached down and picked up [a] brick," giving him "two weapons in his hand[s]" while Cabututan had none. But then Cabututan saw a shovel lying on the ground. Cabututan picked it up and swung it at Boss, but Boss "ducked to the side." Boss raised the pistol in one hand and had the brick "up ready to throw." Thinking that Boss would throw the brick, Cabututan swung the shovel again. Boss side-stepped and started to raise the pistol again, but Cabututan struck him with the shovel on the side of the head and he "dropped," falling "face first." Cabututan threw the shovel, "kind of freaked out and walked [away] and came back."

¶6 From her living-room window, Boss's wife (Wife) saw Cabututan "walking around, holding his head." When she went outside to find out what was going on, Cabututan told her that Boss "came after [him]" and pointed toward where Boss's body lay on the ground, face down. She then called 911, and Cabututan attempted to perform CPR. Despite these efforts, and the efforts of police and medical professionals, Boss died. At the scene, Cabututan provided police a statement detailing the fight's progression as described above, and later, the State charged Cabututan with murder.

¶7 At trial, defense counsel opted to pursue a theory of self-defense and conceded that Boss had died by Cabututan's hand, stating, "We all know [how Boss died]. He died—he got hit in the head with a shovel." Defense counsel, however, did object to several photos depicting both the autopsy and the crime scene. The autopsy photos showed a skull, with the scalp skinned back to reveal the internal injuries that resulted from the hit with the shovel. In defense counsel's estimation, the prejudicial impact to the jury far outweighed any probative impact that could result from the photos' admission; he asserted that the jury would just see "a morbid, blood[y], skinned back[ ] skull." The trial court, however, disagreed, stating that because "the State is going to be proving up the cause of death and the degree of force that caused the death ... the probative value of these [photos] outweigh[ed] the prejudicial value in that" the photos went toward "the degree of force that was exerted that would have caused the demise of the individual." As ***1006** for the crime scene photos, the court determined that they depicted the external injury and the spatial relationship between where the body, the brick, and the pistol were found on the scene. Defense counsel objected to these photos on grounds that they "sensationalized" the on-scene treatment to elicit sympathy from the jury. But, except for one photo excluded because it was "redundant," the court allowed the photos, in part, because they "show[ed] the alleged injury," as well as "a lot of other things that the State deem[ed] relevant" but that the court did not expressly identify.

¶8 In addition to testimony about the fight as described above, the State elicited testimony from Wife about how she experienced the incident, and when asked how the incident had affected her, she responded, "It's changed my whole life. I've lost everything. I even lost my dog. He died. I mean, [I] lost my financial [security] that I had before, where I'm having to work just to survive now." And later, the State elicited testimony from the medical examiner who conducted the autopsy. The medical examiner described the autopsy photos and testified that he determined the "manner of death" was—as a medical and not a legal matter—"homicide" due to "blunt head trauma."

¶9 Following the State's case, Cabututan moved for a directed verdict. He asserted that the State had failed to carry its burden of proving that his affirmative defense of "perfect self-defense" did not apply. In response, the State argued that it had "provided sufficient evidence that the jury could find that the defendant [was] in fact guilty of murder and that in fact self-defense [did] not apply." The State asserted that the instructions would "state that if [Cabututan] ... was engaged [in] combat by agreement," then perfect self-defense would not apply. And by Cabututan's "own words" combat by agreement was "exactly what happened, and the jury could so find." The court agreed and denied the motion.

¶10 The jury instructions informed the jury that to find Cabututan guilty of murder, it would have to agree on each of the elements of murder and that perfect self-defense did not apply. The jury was also instructed that if it found him guilty of murder, it would have to determine whether imperfect self-defense applied. The jury was informed that imperfect self-defense was a "partial defense" to murder, that it applied "when the defendant caused the death of another while incorrectly, but reasonably, believing that his conduct was legally justified or excused," and that its effect would be "to reduce the level of the offense." Ultimately—whether due to a determination that only imperfect self-defense applied or because it did not believe that the State had proved the elements of murder—the jury found Cabututan guilty of the lesser included offense of manslaughter.

ISSUES AND STANDARDS OF REVIEW

[1] **[2]** **[3]** ¶11 Cabututan now appeals and raises three primary issues for our review. First, he contends that the State presented insufficient evidence to overcome his claim of perfect self-defense. "When reviewing a preserved sufficiency of the evidence claim, we ask simply whether the jury's verdict is reasonable in light of all of the evidence taken cumulatively, under a standard of review that yields deference to all reasonable inferences supporting the jury's verdict." *State v. Darnstaedt*, 2021 UT App 19, ¶ 18, 483 P.3d 71 (cleaned up). Second, Cabututan contends that the trial court erred in admitting the photos. We review such challenges to the admission of evidence for an abuse of discretion. *Met v. State*, 2016 UT 51, ¶ 36, 388 P.3d 447.

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Third, Cabututan contends that defense counsel rendered ineffective assistance by failing to object to testimony about the effect of Boss's death on Wife. [2] "When a claim of ***1007** 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." *State v. Beckering*, 2015 UT App 53, ¶ 18, 346 P.3d 672 (cleaned up).

ANALYSIS

I. Sufficiency of the Evidence

[4] ¶12 To prevail on his contention that the State presented insufficient evidence to overcome his assertion of perfect self-defense, Cabututan would need to show either that, given the evidence presented at trial, a jury could not "find, beyond a reasonable doubt, that the defendant committed the crime," *see State v. Henfling*, 2020 UT App 129, ¶ 28, 474 P.3d 994 (cleaned up), or that perfect self-defense did not apply. But this is something Cabututan cannot do because his own statements provided the evidence necessary for the State to meet its burden to show guilt and disprove perfect self-defense beyond a reasonable doubt.

¶13 Under Utah self-defense law, "[a]n individual is justified in using force intended or likely to cause death or serious bodily injury only if the individual reasonably believes that force is necessary to prevent death or serious bodily injury to the individual ... as a result of imminent use of unlawful force." Utah Code Ann. § 76-2-402(2)(b) (LexisNexis Supp. 2021). But,

> [a]n individual is not justified in using force ... if the individual ... was the aggressor or was engaged in a combat by agreement, unless the individual withdraws from the encounter and effectively communicates to the other individual the intent to withdraw from the encounter and, notwithstanding, the other individual continues or threatens to continue the use of unlawful force.

Id. § 76-2-402(3)(a)(iii). This brand of self-defense is known as "perfect self-defense." *See* *State v. Bonds*, 2019 UT App 156, ¶ 44, 450 P.3d 120, *cert. granted on other grounds*, 466 P.3d 1072 (Utah 2020). However, even in the absence of legally justified perfect self-defense,

> [i]t 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 the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

Utah Code Ann. § 76-5-203(4)(a) (LexisNexis 2017). This brand of self-defense is known as "imperfect self-defense." *Bonds*, 2019 UT App 156, ¶ 44, 450 P.3d 120.

[5] **[6]** ¶14 "Where applicable, [imperfect self-defense] results only in reduction of a conviction from murder to manslaughter, whereas perfect self-defense is a complete defense to any crime that, where applicable, results in acquittal ...." *Id.* (cleaned up). And, as with any affirmative defense, an assertion of self-defense, be it perfect or imperfect, places the burden on the prosecution to "disprove" that defense "once a defendant has produced some evidence of" it. *Id.* ¶ 45 (cleaned up); *see also* *State v. Garcia*, 2001 UT App 19, ¶¶ 1, 16, 18 P.3d 1123 (identifying self-defense as an affirmative defense); *State v. Drej*, 2010 UT 35, ¶ 15, 233 P.3d 476 ("The Utah rule requires that the prosecution disprove the existence of affirmative defenses beyond a reasonable doubt once the defendant has produced some evidence of the defense." (cleaned up)).

[7] ¶15 Cabututan contends that the State failed to present sufficient evidence to overcome his assertion of perfect self-defense and that, accordingly, the trial court erred in denying his motion for a directed verdict and allowing the case to proceed to the jury. However, the entire evidentiary picture before the jury refutes that contention.

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¶16 At trial, the State pointed out that the jury had heard in Cabututan's "own words" that he had "engaged [in] combat by agreement." Specifically, the jury heard from Cabututan ***1008** that when Boss challenged him, he "stepped up to" the challenge, "[t]ook off [his] shirt[,] and came at" Boss. There was no evidence that, at any point, Cabututan attempted to withdraw from the encounter. Based on these facts, the jury could reasonably find that Cabututan participated in the fight by mutual agreement and at no point did he "withdraw[ ] from the encounter and effectively communicate[ ]" that "intent to withdraw." *See* Utah Code Ann. § 76-2-402(3)(a)(iii). Far from requiring the court to direct the verdict in Cabututan's favor, the evidence presented to the jury provided ample space for the jury to reject Cabututan's assertion that he acted in perfect self-defense and enter a conviction. Accordingly, we reject his claim that the evidence was insufficient to support a jury verdict of manslaughter.

II. Admission of the Photos

[8] ¶17 To prevail on his contention that the trial court abused its discretion in admitting the photos over his objection, Cabututan must demonstrate that the court applied "the wrong legal standard or" rendered a decision "beyond the limits of reasonability." *See Met v. State*, 2016 UT 51, ¶ 96, 388 P.3d 447 (cleaned up). Here, that means that Cabututan must demonstrate that the court abused its discretion in determining that the photos passed muster under rule 403 of the Utah Rules of Evidence, *see id.* ¶ 83—i.e., that the photos' "potential for unfair prejudice" did not "substantially outweigh[ ]" their "probative value," *id.* ¶ 89; *see also* Utah R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice ....").

¶18 Below, the court determined that the autopsy photos' probative value was not outweighed by unfair prejudice. Probative value existed, it ruled, because the State would "be proving up the cause of death and the degree of force that caused the death." And it concluded that any potential prejudice would be ameliorated because the court required that the State clarify for the jury that the autopsy photos were "not representative of the condition of the individual prior to" "opening the skull up" during autopsy. Similarly, the court determined that the crime scene photos warranted admission because, rather than sensationalize the crime scene, they "show[ed] the alleged injury" and the spatial relationship of the body, the brick, and the pistol.

[9] **[10]** ¶19 On appeal, Cabututan has not persuaded us that the court's ruling constituted an abuse of discretion. Rather, we agree with the State that although Cabututan admitted to killing Boss with the shovel, the photos could still assist the jury in determining that Cabututan had the requisite intent to commit the crime charged. Furthermore, the photos might also have been useful in assessing Cabututan's self-defense claim and how it correlated with the degree of force he used when he hit Boss with the shovel. Put simply, the photos and the injury they showed could have helped the jury determine the way Cabututan used the shovel and whether he wielded it for only defensive parries or to inflict a substantial blow. Moreover, we do not believe the jury would have ascribed the condition of Boss's body in the autopsy photos to the circumstances of the fight. Indeed, to prevent this possibility, the court specifically instructed the State to—and the State actually did—inform the jury that the autopsy (and not Cabututan) was to blame for any apparent gruesomeness. Further, as to the crime scene photos, we agree with the court's apparent view that seeing "the alleged injury" and the spatial relationship of the body, the brick, and the pistol could assist the jury in making its determination. And finally, having reviewed the photos ourselves, we do not perceive the photos as unfairly gruesome or disturbing. Accordingly, we conclude that the court did not abuse its discretion in admitting the photos.

III. Ineffective Assistance of Counsel

[11] **[12]** ¶20 To prevail on his claim of ineffective assistance of counsel, Cabututan must show not only that defense counsel performed deficiently but also that any deficient performance "prejudiced the defense." *See State v. Scott*, 2020 UT 13, ¶ 28, 462 P.3d 350 (cleaned up). In other words, Cabututan would have to show "a reasonable probability" that "absent counsel's error," "the outcome of his ... case would have been different." ***1009** *Id.* ¶ 43. And because "a defendant must satisfy both parts of this test[,] ... if we determine that a defendant has made an insufficient showing on one [component]," we need not address the other. *State v. Whytock*, 2020 UT App 107, ¶ 26, 469 P.3d 1150 (cleaned up).

[13] ¶21 Cabututan's contention that defense counsel rendered ineffective assistance fails for a lack of prejudice. Cabututan contends that defense counsel rendered ineffective assistance by failing to object when Wife testified, among

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other things, that Boss's death had "changed [her] whole life." Specifically, he argues that the testimony elicited undue sympathy from the jury. But we disagree that Wife's statements were reasonably likely to have had any material impact on the outcome of this case. Although Wife's testimony delved into specific details the jury might not have known otherwise, the overarching message from Wife's testimony—that her life had radically changed since Boss's death and that she now faced financial difficulty—was something the jury would have discerned regardless, and we see no reasonable probability that this particular testimony tipped the scales away from acquittal and toward a conviction of manslaughter for a death Cabututan admitted to causing.

¶22 More fundamentally, a lack of prejudice in this case also results from the fact that even without the contested testimony, the jury heard evidence from Cabututan that he willingly participated in the fight—an admission that undermined his perfect self-defense theory and, as discussed, created at least a question for the jury. *See supra* Part I. And given the fact that Cabututan conceded that he hit Boss with the shovel and that the blow resulted in his death, Cabututan would have to show that the failure to object to the contested testimony was the reason that the jury granted him the second-best outcome for his case—a conviction for manslaughter—as opposed to the best outcome for his case—an acquittal resulting from a finding of perfect self-defense. Under the circumstances presented here, even if defense counsel had objected to the contested testimony and the court had excluded it, such a change in the evidentiary landscape would not have altered the robust evidence that when Boss challenged Cabututan, Cabututan "stepped up to" the challenge, "[t]ook off [his] shirt[,] and came at" Boss and that he never backed down from the fight. Accordingly, it is not reasonably likely that Wife's testimony had any appreciable effect on the jury applying the statutory framework providing that a person who is engaged "in a combat by agreement" is, by law, not eligible for the protection of perfect self-defense, unless he communicates an intent to withdraw from the encounter and the other individual continues to engage in the attack. *See* Utah Code Ann. § 76-2-402(3)(a)(iii) (LexisNexis Supp. 2021). Thus, Cabututan's ineffective assistance claim fails for lack of prejudice.

CONCLUSION

¶23 Because sufficient evidence existed for the State to overcome its burden of showing that perfect self-defense did not apply, because the court did not abuse its discretion in admitting the photos, and because Cabututan cannot show ineffective assistance, we affirm Cabututan's conviction.

All Citations

508 P.3d 1003, 2022 UT App 41

Footnotes

1 "On appeal, we recite the facts from the record in the light most favorable to the jury's verdict and present conflicting evidence only as necessary to understand issues raised on appeal." *State v. Daniels*, 2002 UT 2, ¶ 2, 40 P.3d 611.

2 Cabututan also alleges that his counsel performed ineffectively by failing to object to a medical examiner's testimony. This contention stems from his concession that Boss died from a wound he inflicted with the shovel. According to Cabututan, because he conceded the cause of Boss's death, the jury did not need to hear the medical examiner's testimony, and allowing the testimony without objection paved the path for the State to admit the allegedly gruesome autopsy photos. However, as we will describe, the court did not abuse its discretion in admitting the autopsy photos. Thus, Cabututan's ineffective assistance of counsel claim related to the medical examiner's testimony, which is contingent on the inadmissibility of the autopsy photos, falls short, and we do not discuss it further.

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