IN THE UTAH COURT OF APPEALS

STATE OF UTAH	)	
	(	
Plaintiff/Appellee.	)	**BRIEF OF APPELLANT**
	(	
vs.	)	**Case No. 20170193-CA**
	(	
ANTHONY CHARLES MURPHY,	)	**Dist. Ct. Case No. 091100683-FS**
	(	
Defendant/Appellant.	)	**(Appellant is incarcerated)**

This appeal follows the final judgment and conviction following a six-day jury trial of Aggravated Sexual Assault, First Degree Felony, Utah Code Ann. § 76-5-405, Aggravated Kidnapping, First Degree Felony, Utah Code Ann. § 75-5-302, Forcible Sexual Abuse, First Degree Felony, Utah Code Ann. § 76-5-404, and Aggravated Assault, Second Degree Felony, Utah Code Ann. § 76-5-103, respectively, the First Judicial District Court, Cache County, State of Utah, the Honorable Thomas Willmore presiding.

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Cases

JURISDICTION AND NATURE OF PROCEEDINGS

The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-3-102(3)(i) (2008), whereby the defendant in a district court criminal action may take an appeal to the Supreme Court from a final order for a first degree or capital felony. Appellant was convicted of Aggravated Sexual Assault, First Degree Felony, Utah Code Ann. § 76-5-405, Aggravated Kidnapping, First Degree Felony, Utah Code Ann. § 75-5-302, Forcible Sexual Abuse, First Degree Felony, Utah Code Ann. § 76-5-404, and Aggravated Assault, Second Degree Felony, Utah Code Ann. § 76-5-103.

The Utah Supreme Court pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure transferred this matter to the Utah Court of Appeals for disposition on March 24, 2017

STATEMENT OF ISSUES AND STANDARD OF REVIEW

a. Issue. **WHETHER THE TRIAL COURT ERRORED IN ALLOWING 404(b) EVIDENCE** (Issue preserved)

Determinative law**.** *State v. Verde*, 296 P.3d 673 (Utah 2012), *State v. Cuttler*, 367 P.3d 981 (Utah 2015), *State v. Labrum*, 318 P.3d 1151, (Utah Ct. App. 2014), *State v.*

Hildreth, 238 P.3d 444 (Utah Ct. App. 2010).

Standard of review**.** This is an issue that the Court reviews for abuse of Discretion

b. Issue. **PROSECUTORIAL MISCONDUCT** (Issue preserved)

Determinative law. *State v. Davis*, 311 P.3d 538 (Utah Ct. App 2013)

State v. Larrabee, 321 P.3d 1136 (Utah 2013).

Standard of review. Doctrine of plain error (when the issue is not preserved) or Ineffective assistance of counsel; Whether a reasonable likelihood exists that absent the misconduct there would have been a more favorable result for the Defendant.

c. Issue. **THE TRIAL COURT ERRORED IN NOT GRANTING MOTION FOR MISTRIAL** (Issue preserved)

Determinative law. *State v. Wach*, 24 P.3d 948, (Utah 2001), *State v. Butterfield*, 27 P.3d 1133, (Utah 2001).

Standard of review. Doctrine of plain error

d. Issue. **TRIAL COURT ERRORED IN NOT MERGING CHARGES** (Issue preserved in part)

Determinative law. *State v. Cummins*, 839 P.2d 848 (Utah Ct. App. 1992), *State v. Harmon*, 956 P.2d 262 (Utah 1998) *State v. Finlayson*, 994 P.2d 1243 (Utah 2000), Utah Code§76-1-402(1).

Standard of review. This is an issue that the Court reviews for abuse

of discretion.

e. Issue. **INEFFECTIVE ASSISTANT OF COUNSEL** (Issue not reserved)

Determinative law. *Strickland v. Washington*, 466 U.S. 688 (1984); *State v. Templin*, 805 P.2d 182 (Utah 1990).

Standard of review. Whether counsel's representation of Defendant fell below the objective standard of reasonableness and whether that failure prejudiced the Defendant's right to a fair trial.

f. Issue. **THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS** (Issued preserved)

Determinative law. *State v. Robbins*, 210 P.3d 288 (Utah 2009); *State v. Rowley*, 198 P.3d 109 (Utah Ct. App. 2008); *State v. Casey*, 82 P.3d 1106 (Utah 2003).

Standard of review. "In reviewing a jury verdict, we view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict. *State v. Maestas*, 299 P.3d 892, (Utah 2012)

CONSTITUTIONAL PROVISIONS STATUTES AND RULES

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

RULES

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Utah Constitution;
- a statute; or
- rules applicable in courts of this state.

Irrelevant evidence is not admissible.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character Evidence; Crimes or Other Acts

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses**.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(2) Permitted Uses; Notice in a Criminal Case**.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

STATUTES

76-5-405 Aggravated sexual assault

(1) A person commits aggravated sexual assault if:

(a) in the course of a rape, object rape, forcible sodomy, or forcible sexual abuse, the actor:

(i) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;

(ii) compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iii) is aided or abetted by one or more persons;

(b) in the course of an attempted rape, attempted object rape, or attempted forcible sodomy, the actor:

(i) causes serious bodily injury to any person;

(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;

(iii) attempts to compel the victim to submit to rape, object rape, or forcible sodomy, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iv) is aided or abetted by one or more persons; or

(c) in the course of an attempted forcible sexual abuse, the actor:

(i) causes serious bodily injury to any person;

(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;

(iii) attempts to compel the victim to submit to forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iv) is aided or abetted by one or more persons.

76-5-404 Forcible sexual abuse.

(1) A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

76-5-302 Aggravated kidnapping.

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:

(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) acts with intent:

(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;

(ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;

(iii) to hinder or delay the discovery of or reporting of a felony;

(iv) to inflict bodily injury on or to terrorize the victim or another;

(v) to interfere with the performance of any governmental or political function; or

(vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.

(2) As used in this section, "in the course of committing unlawful detention or kidnapping" means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:

(a) Section 76-5-301, kidnapping; or

(b) Section 76-5-304, unlawful detention.

76-5-103 Aggravated assault

(1) Aggravated assault is an actor's conduct:

(a) that is:

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

(ii) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

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

(b) that includes the use of:

(i) a dangerous weapon as defined in Section 76-1-601;

(ii) any act that impedes the breathing or the circulation of blood of another person by the actor's use of unlawful force or violence that is likely to produce a loss of consciousness by:

(A) applying pressure to the neck or throat of a person; or

(B) obstructing the nose, mouth, or airway of a person; or

(iii) other means or force likely to produce death or serious bodily injury.

76-1-402 Separate offenses arising out of single criminal episode -- Included offenses.

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

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ANTHONY CHARLES MURPHY,	)	**Dist. Ct. Case No. 091100683-FS**
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Defendant/Appellant.	)	**(Appellant is incarcerated)**

STATEMENT OF THE CASE

ANTHONY CHARLES MURPHY, following a jury trial, on May 4, 2016, was convicted of Count (I) Aggravated Sexual Assault, First Degree Felony, County (II) Aggravated Kidnapping, First Degree Felony, Count (III) Forcible Sexual Abuse, First Degree Felony and County (IV) Aggravated Assault, Second Degree Felony. On June 27, 2016, the court sentenced the appellant on Count (I), Count (II), and Count (III) to a term not less than fifteen years to life at the Utah State Prison, and Count (III) was ordered to an indeterminate term of not less than a year or more than Fifteen years in the Utah State Prison. Lastly, the court imposed an indeterminate term not to exceed five years in the Utah State Prison. The trial court ordered Count (I) and County (II) to run consecutively, and Count (III) and Count (IV) to run concurrently, and the appellant is incarcerated. The Honorable Thomas Willmore presiding.

STATEMENT OF THE FACTS

On May 31, 2009, in Smithfield Utah, Mr. Murphy and his wife, T.W were outside in their backyard drinking beer and tequila and became highly intoxicated. [1]R2 28-30, R2 30-31. Around 7:30 in the evening, Mr. Murphy received a text message from a woman, and T.W saw that the text message became very upset about the message. R2 31:9-14. For a period of time, T.W angrily yelled at Mr. Murphy and then decided to go inside the house and lay down to calm down. R2 32. A short time later, Mr. Murphy went into the bedroom to make up with T.W. R2 32:22. "Come on baby. Let's work this out." Id.

T.W and Mr. Murphy went back outside in the backyard and began dancing. R2 32:24-25. A short time later, T.W says that Mr. Murphy began spinning her to fast and she fell down on the grass. R2 34:3-8. Once on the ground, T.W testified that Mr. Murphy ripped her clothes and underwear off and she began screaming for help. Id. Somehow, T.W was able to get up and run into the house. Id.

At the top of the stairs, T.W says that Mr. Murphy pushed her down and drug her into the family room. In the family room, Mr. Murphy took his clothes off and put his knees on her chest while T.W was on the floor. While fighting the ground, T.W testified that Mr. Murphy was hitting her in the face with his penis and telling her to "suck it bitch.

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[1] The trial transcripts do not have continuous page numbers. In the appellant brief, the trial record is referred in the following format. R1 is trial day one. R2 is trial day two. R3 is trial day three. R4 is trial day 4. R5 is trial day five. R6 is trial day six. Following the trial day number is the page number and the line number.

R2 36:4-12, R2 36:15-20. T.W resisted and fought, but eventually gave in and in, and began performing oral sex on Mr. Murphy. R2 39:2-15. T.W begged the assault to stop and tried crawling into the hallway, but Mr. Murphy grabbed her by the throat and put her up against a wall with one hand. R2 37. While being strangled, T.W says she passed out and urinated on herself. Id.

After blacking out, Mr. Murphy pulled her upstairs, but T.W was trying to find her keys and leave the house. R2 39:22-25. Once upstairs, Mr. Murphy turned on the cold water in the bath tub and picked up T.W and threw her in the tub. R2 40. Throughout the entire altercation, T.W says her memory is unclear to some of the events. R2 41. But, T.W next remembers trying to get her robe and keys again to leave. Id. And, then she suddenly remembers being in the in the upstairs bedroom. R2 41:13-25. After leaving the bedroom, T.W says Mr. Murphy pushed her down the stairs for the second time. Id. During the entire altercation, T.W testified that Mr. Murphy hit and slapped her in the face. R2 46:4-16

Once down stairs, Mr. Murphy dragged her to the "pink bedroom", and for a second time she passed out while sucking on Mr. Murphy's penis because she couldn't breathe. R2 42. The next memory T.W has, after passing out, is Mr. Murphy being on top of her and rolling over and passing out. R2. 43:2-7. After Mr. Murphy passed out, T.W ran to get her keys and robe and drove to a friend's house. R2 43. T.W was very upset, and in her words "hysterical," when she arrived at her friend's house. R2 45.

T.W spent the night at her friend's house and went back home in the morning. R2 49-50, R2 54-55. The next day, T.W and the friend went into the house, while Mr. Murphy

was a sleep. T.W then showered and got her clothes to getting ready for work at hobby lobby. While at work, T.W told her co-workers about the altercation and they called the police. R2 49-50, R2 54-55.

When police arrived at Hobby Lobby, T.W gave her statement to the initial officer, and later to a police detective. R2 55:22-25. T.W only discussed the physical assault, but never mentioned the sexual assault. Id. T.W says that she didn't mention the sexual assault because she did not remember a lot of things about that day, but her memory gradually came back to her as time passed. R2 55:23-25. Sometime later, T.W meet with the detective and discussed the sexual and physical assault. R2 61. As a result, Mr. Murphy is arrested and charged.

Mr. Murphy testified at the trial and says that T.W is lying about the altercation. He testified that his wife, T.W, was drunk and in a jealous rage on the night of the altercation. R5 117. Furthermore, Mr. Murphy says that his wife was often jealous, and had some serious mental health issues. R5 117. At times, T.W even became very suicidal. During Mr. Murphy's testimony, he recounts numerous instances where his wife had a mental break down and lost control, and even at times had to be admitted into the behavior health unit at the hospital. R5 121-125.

On the day of the alleged assault, Mr. Murphy agrees that T.W and him were having a good day until Mr. Murphy received a text message from a friend. R5 133. The friend was notifying him about a death of a mutual friend. Id. Upon receiving the text message, T.W got really upset about the text message, and began screaming and yelling. Id. Mr.

Murphy described it as a jealous rage. Id. T.W was able to calm down, but was still on edge about the text message, and told Mr. Murphy that the woman was not going to text him again. R5 135:16-23. Mr. Murphy made a comment about maybe he'll just sleep with the woman. Id. After this comment, T.W became even more upset and leaped into the lawn chair that Mr. Murphy was sitting in. R5 136:1-12.

Once T.W jumped into the chair, T.W began violently hitting Mr. Murphy. Id. This hitting then turned into T.W grabbing a small kitchen knife and began cutting on Mr. Murphy's chest. Id. When Mr. Murphy noticed the knife he pushed her off of him with his feet. Id. T.W then went inside the house and grabbed her keys and left to her friend's house to stay the night. R5 138. At the trial, Mr. Murphy submitted photos into evidence of the knife wounds on his chest. R5 144.

SUMMARY OF THE ARGUMENT

Mr. Murphy argues that the trial court errored in the admission of 404(b) evidence, which was more prejudicial than probative, and substantially hindered his ability to receive a fair trial. Furthermore, the trial court had already found that the 404(b) evidence to be too prejudicial in a 2010 decision, but the trial court later overturned its own ruling in 2015. Lastly, the trial court errored by not conducting a thorough analysis under rule 403 prior to admitting the 404(b) evidence.

The prosecutor's statements in his closing argument rebuttal were inflammatory in nature, and insinuated that the jury should convict Mr. Murphy of the current charges based

on the admission of 404(b) evidence. In addition, the prosecutor's remarks to the jury implied that Mr. Murphy was acting in conformity with his character by saying "what are the odds." As a result of the prosecutor's remarks, Mr. Murphy did not receive a fair trial in violation of his rights.

The trial court errored in not granting a motion for a mistrial based illicit testimony made by T.W regarding Mr. Murphy's ex-wife shooting him five times. This statement was potentially solicited by the prosecution, and the trial court had already made a prior ruling not allowing it to be admitted. Consequently, the testimony was prejudicial and led to an unfair trial in violation of Mr. Murphy's rights.

Mr. Murphy also asserts that the aggravated kidnapping charged should merge with the aggravated aggravated sexual assault because the kidnapping was not a distinct and separate crime. Almost every rape involves some sort of detention. In order for the kidnapping to be charged separately it must be independent and distinct from the sexual assault.

Additionally, Mr. Murphy asserts that trial counsel was ineffective for failing to call any witnesses besides Mr. Murphy. Trial counsel also failed to conduct thorough investigation of the case and did not use any expert witnesses to rebut the multiple experts called by the prosecution. As a result, Mr. Murphy's case was prejudiced by trial counsel's performance in this regard, and there is a reasonable probability of a different outcome had other witnesses been called to support Mr. Murphy's side of the case.

Lastly, there was insufficient evidence to support the guilty verdict. The prosecution's case was based solely on the non-credible testimony of T.W who was highly

intoxicated on the night of the alleged assault, and continuously alerted her testimony.

ARGUMENT

I. THE TRIAL COURT ERRORED IN ALLOWING THE USE OF 404(b) EVIDENCE, WHICH DENIED MR. MURPHY HIS RIGHT TO A FAIR TRIAL

The admissibility of evidence of prior bad acts is governed by the Utah Rules of Evidence. Pursuant to these rules, evidence of prior bad acts may be admissible for non-character purposes, and offered for the proper purpose. The rule lists examples of proper purposes—to establish motive, opportunity, intent, etc.—but the list is illustrative and not exclusive. So long as the evidence is not aimed at suggesting action in conformity with bad character, it is admissible under rule 404(b)." *State v. Verde*, 296 P.3d 673, 678 (Utah 2012).

In order for the prior bad acts to admitted, the prosecution must first meet the requirements under the rules of evidence, which includes rule 401, rule 402, and rule 403. "And even if 404(b) evidence appears to have a dual purpose—to be aimed at both proper and improper inferences—it may nonetheless be excluded under rule 403 if its "probative value is substantially outweighed by the danger of unfair prejudice. *Id.*

In this case, the prosecution filed a motion to admit evidence of prior bad acts under 404(b) in 2010 (see Addendum D). They wished to introduce evidence from a Florida case involving an assault with Mr. Murphy's and his ex-wife, G.M.

The trial court initially denied the states motion to admit 404(b) evidence based on the *Shickles* factors. *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988). The trial court

considered the following *Shickles* factors: strength of evidence, similarity, interval of time, need for the evidence, alternative proof, and potential jury hostility. Additionally, the trial court found there were some similarities, but there was "some pertinent differences as well" (Addendum D) As far as the interval of time goes, the trial court felt in 2010, that a significant amount of time had elapsed, which decreased the Defendant's "ability to rebut the allegations. . . ." Id. Fourth, the prosecution's need for the evidence was not substantial, and the state could use the prior bad acts to "bolster the credibility of their witness. In addition, there was a substantial amount of evidence the state could use to prove their case, without the 404(b) evidence. Id. Finally, the trial court found that the evidence would likely to jury hostility towards Mr. Murphy. Id.

In 2015, the prosecution renewed their motion to introduce the prior bad acts under 404(b). There were additional incidents that the prosecution wished to be admitted. The first incident allegedly happened in Kentucky in 2001 with a victim named A.R. (see Addendum E). In this incident, A.R states that Mr. Murphy was in her home drinking one night when she was woken up by Mr. Murphy who was on top of her holding his hand over her mouth, and threatened to kill her while grabbing her breast and genital area. Mr. Murphy denied the assault and was never found guilty of the allegations. (see Addendum E) R4 9-25

The second incident also occurred in Kentucky in 2003, with a person named A.K. R5 13-20. Mr. Murphy met A.K when she was a waitress, and had become good friends with her over a period of time. Id. One night, Mr. Murphy asked to take A.K for a ride in his truck. R5 19-21 And later, Mr. Murphy and A.K began drinking, and A.K says she woke and her shorts and underwear had been removed. R5 22. Furthermore, A.K alleges that Mr.

Murphy would not let her go home unless she performed oral sex on him. R5 23. A.K further alleges that Mr. Murphy vaginally raped her and burnt her neck with a cigarette lighter. But, charges were never brought against Mr. Murphy for the alleged assault. Id.

Lastly, there is a Utah case where the victim, M.M, claimed that Mr. Murphy paid her for messages and sexual favors. R4 41-44. One night, at a hotel, M.M claims Mr. Murphy and her were having sex, and she wanted it to stop because it began to hurt. R1 45-48. But, Mr. Murphy did not stop and held her down against her will. Id. Sometime later, there was another incident that M.M claims that she was at another hotel giving Mr. Murphy a massage when he got upset and started choking her. Mr. Murphy was charged in this incident and found not guilty of some of the charges. R5 45-48.

Traditionally, Utah courts have used the *Schickles* factors when weighting the probative value of evidence against the potential for unfair prejudice. However, the factors were reexamined after *State v. Labrum*, 318 P.3d 1151, (*Utah Ct. App* 2014) "[E]vidence of a person's past misconduct may plausibly be aimed at establishing motive or intent, but that same evidence may realistically be expected to convey a simultaneous inference that the person behaved improperly in the past and might be likely to do so again in the future. That's what makes many rule 404(b) questions so difficult." *Verde*, 296 P.3d 673, 681 (Utah 2012)

The trial court overturned its 2010 ruling, and allowed the 404(b) evidence because it believed the prosecution was attempting to introduce the 404(b) evidence for a non-character purpose, and to rebut any accusations of fabrication on part of T.W under the "doctrine of chances". (see Addendum E, trial courts memorandum decision)

In addition, the trial court based its 2015 ruling on another a landmark case, *State v.*

Verde. *Id.* In *Verde* the defendant was charged with sexually assaulting at twelve-year old boy. Prior to the case going to trial, the prosecution filed a motion in limine to introduce prior allegations of sexual misconduct, under 404(b). “The State contended that the testimony was admissible under rule 404(b) for the non-character purposes of demonstrating Verde's "knowledge, intent, plan, modus operandi and/ or absence of mistake or accident.” *Id.* Verde objected to evidence, but the trial court still allowed evidence of two witnesses to show intent, and to show a “pattern of behavior.”

At trial, the victim, N.H, testified that Verde and him were sitting on a couch and touched his genitals. Two additional witnesses also testified to similar incidents with Verde. At the trial, Verde took the stand on his own behalf and also attacked the credibility of N.H. The jury found Verde guilty and he appealed his conviction.

“In the court of appeals, Verde pressed his argument that the evidence of uncharged sexual misconduct should not have been admitted because it served no purpose other than to show that Verde's conduct conformed to a propensity to commit sexual crimes,” and the Court of Appeals affirmed the conviction and found that evidence was admissible to show intent and to rebut Verde’s theory of the case.” *State v. Verde*, 296 P.3d 673, 677 (Utah 2012). “Because Verde claimed that N.H. invented the alleged misconduct "after not being paid for catching a stray cat," the court held that prior bad acts evidence was admissible to rebut Verde's defense of fabrication.” Verde appealed his conviction to the Utah Supreme Court. *Id.*

The Utah Supreme Court remanded the case back to the district court to apply the four foundational requirements under the doctrine of chances. The four foundational

requirements are materiality, similarity, independence, and frequency. "Because the trial court is in a superior position to make an initial exercise of discretion to conduct the weighing called for under rules 404(b) and 403, we remand this case for a new trial." *State v. Verde*, 296 P.3d 673, 687 (Utah 2012).

Although the Utah Supreme Court in Verde found that the 404(b) evidence was admissible, under the "doctrine of chances" the Utah Supreme Court still requires a 403 analysis.

> [E]ven if the past misconduct evidence in this case could plausibly be deemed to have been aimed at a legitimate purpose under rule 404(b), it would still fail under the balancing framework required under rule 403. Specifically, and for all the reasons detailed above, we conclude that any legitimate tendency the 404(b) evidence had to tell a narrative of Verde's specific intent was minimal at best. And we likewise conclude that any such legitimate purpose is far outweighed by the obvious, illegitimate one of suggesting action in conformity with bad character.
>
> *Id* at 681.

A. The trial court failed to undergo a thorough examination under rule 403 prior to admitting 404(b) evidence

In this case, the trial court failed to thoroughly examine the 404(b) evidence under rule 403 in its 2015 written memorandum. (see Addendum E) Although the *Shickles* factors were no longer binding legal precedent, the trial court errored because it failed to properly analyze the potential prejudice of the 404(b) evidence under 403. *Id.* Again, in the trial courts 2010 decision, the trial court had already found that the 404(b) evidence was too prejudicial to introduce. (see Addendum A)

However, the trial court, in its 2015 ruling, did briefly touch on the potential prejudice under rule 403, and why the *Shickles* factors were no longer being used as a basis for the

court's decision. In addition, the trial court improperly found that the *Shickles* factors were no longer relevant to analyzing 403 issues. "While weighing the evidence under this rule, courts may consider many factors, including some of those we identified in *Shickles*. "However, as we noted in *State v. Lucero*, 328 P.3d 841, 846-847 (Utah 2014) in the context of rule 404(b), the *Shickles* factors should not limit the considerations of a court when making a determination of evidence's admissibility under rule 403." *State v. Cuttler*, 367 P.3d 981, 987 (Utah 2015).

In making these difficult determinations, the trial court can use the *Shickles* factors as long as they adhere to the requirements of 403. "[R]ule 403 instructs courts to exclude evidence " if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id* at 987. "A rule 403 analysis of other acts evidence thus focuses on balancing the proper inferences against the improper inferences and " excluding the bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose. *State v. Labrum*, 318 P.3d 1151, 1158 (*Utah Ct. App.* 2014).

Based on *State v. Cuttler*, 367 P.3d 981, 987 (Utah 2015), higher courts have instructed trial courts that they must thoroughly evaluate and exclude evidence if one or more of the requirements of 403 are met. "It may very well be appropriate, for example, for a district court to consider the similarities between the crimes in assessing probative value. And it may also be appropriate for a district court to take stock of the need for the evidence or the efficacy of alternative proof before deciding whether evidence should be excluded

under rule 403 as cumulative or a waste of time. *Id* at 988.

In this case, the trial court errored because it failed to fully analyze each part of rule 403. (Addendum E) Moreover, the trial court should have analyzed all aspects of rule 403 as to whether the 404(b) evidence would mislead the jury, confuse the issues, delay, waste time, or needlessly admit cumulative evidence. Therefore, the trial court was required to fully scrutinize any 404(b) evidence. "Under the doctrine of chances, evidence offered to prove actus reus must not be admitted absent satisfaction of four foundational requirements, which should be considered within the context of a rule 403 balancing analysis." *State v. Labrum*, 318 P.3d 1151, 1159 (*Utah Ct. App.* 2014).

In examining and applying rule 403 to the present case, there were other valid grounds for the trial court to exclude the 404(b) evidence under rule 403. First, there is the the problem of misleading and confusing the the jury. Mr. Murphy was on trial solely for the allegations made by T.W, his wife. And, allowing the prosecution to introduce similar evidence to the current case would lead to the real possibility of misleading or confusing the jury to the facts and evidence presented. It is difficult and complex for a jury, that is not law trained, to completely discern why a particular piece of evidence is being introduced, and to the limit how the evidence should be used in deciding guilt or innocence.

The jury in this case heard days and days of 404(b) evidence. It is reasonable to conclude that the jury may be confused and misled to why the 404(b) evidence was being introduced. In addition, the jury heard evidence of multiple assaults presented by the prosecution, and it is easy for the jury to confuse the facts and evidence with the current case.

Therefore, the trial court never conducted a full analysis under 403. "And even if the

court finds both legitimate and improper purposes for such evidence, the court should still weigh the proper and improper uses of 404(b) evidence and exclude it under rule 403 where the terms of that rule so require." *State v. Verde*, 296 P.3d 673, 679 (Utah 2012). The convictions should be overturned and the case be remained back to the trial court to re-evaluate the 404(b) evidence under rule 403.

B. The trial court errored in admitting the 404(b) evidence because it was more prejudicial than probative.

In a more recent case, *State v. Thornton*, 391 P.3d 1016 (Utah 2017), the Utah Supreme Court addressed issues of 404(b). Thornton began living with a mother and her twelve-year old daughter. Thornton was dealing drugs and forcing B.Z's mother into prostitution. After a period of time, Thornton began flirting with and eventually ended up having sex with B.Z. Charges were eventually filed against Thornton for sexual assault. *Id.*

At trial, the prosecution wanted to introduce evidence of Thornton's drug dealing and forcing B.Z's mother into prostitution under 404(b). Thornton objected and "the district court concluded that the evidence of Thornton's drug dealing and involvement in B.Z.'s mother's prostitution was essential to provide a relevant narrative. It therefore held that the evidence served a legitimate non-character purpose under rule 404(b). And it also determined that the evidence was relevant and not unduly prejudicial." *Id.*

The case was later appealed to the Utah Court of Appeals, and was overturned because it "[w]as concerned that the district court had failed to recognize that the " jury's reaction to evidence of drug dealing could be markedly different than its reaction to evidence of a defendant pressuring a drug-addicted woman into prostitution." It feared that the prostitution

evidence " could also provide a jury with a greater temptation to draw an improper inference about Thornton's propensity to commit the charged sex crimes. And if the district court had analyzed the two pieces of evidence separately, the court of appeals thought it " might have determined" that the drug evidence was admissible even if the prostitution evidence was not." *Id.* (internal citations omitted)

The case was later appealed to the Utah Supreme Court, and the Utah Supreme Court overturned the Utah Court of Appeals because it found that the 404(b) evidence was not prejudicial. "The trial judge concluded that the probative value of the 404(b) evidence in this case was not substantially outweighed by any of the listed considerations. And we find no abuse of discretion in that determination." *Id* at 1022.

Moreover, one of the reasons that the Utah Supreme Court found that the evidence was not prejudicial had to do with the type of 404(b) evidence being introduced. "The risk of prejudice was somewhat mitigated by the fact that Thornton's prior acts were distinct from the crime he was charged with." *Id.* Thus, because the prior bad acts were different from the crimes he was charged, the risk of prejudice was mitigated.

Now turning to the current case, Mr. Murphy asserts that the 404(b) evidence was too prejudicial, and hindered his ability to receive a fair trial. Because the Utah Supreme Court reasoned, in *Thornton*, that the prejudice was mitigated based on the fact that the 404(b) evidence was different in nature than the case at trial. In the current case, because the 404(b) evidence was similar to charges, which increased the likelihood that there was a prejudicial effect upon the jury.

> Thus, when prior misconduct evidence is presented under rule 404(b), the court should carefully consider whether it is genuinely being offered for a proper, non-character purpose, or whether it might actually be aimed at sustaining an improper inference of action in conformity with a person's bad character. And even if the evidence may sustain both proper and improper inferences under rule 404(b), the court should balance the two against each other under rule 403, excluding the bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose. Such weighing is essential to preserve the integrity of rule 404(b). Without it, evidence of past misconduct could routinely be allowed to sustain an inference of action in conformity with bad character—so long as the proponent of the evidence could proffer a plausible companion inference that does not contravene the rule.

State v. Verde, 296 P.3d 673, 678 (Utah 2012).

Since the evidence of the prior bad acts was allowed at trial, the jury heard insurmountable evidence about Mr. Murphy, most of which was negative and never convicted of. The trial took a total of six (6) days, and of those six days, almost two days involved 404(b) evidence. In a way, Mr. Murphy was on trial for all of his prior bad acts. After hearing days and days of testimony about Mr. Murphy's past, it was utterly impossible for the Mr. Murphy to receive a fair trial.

Just like in the *Thornton* case, the Utah Supreme Court found that because the 404(b) was NOT similar to the current charges, there was less chance of prejudice. In this case, there was even more of a possibility of prejudice because the 404(b) evidence was similar in nature to the current charges, and should never have been admitted.

But, the trial court did not thoroughly explain why it found the 404(b) evidence to be more probative than prejudicial in the 2015 decision, which was contradicting to the courts 2010 ruling.

Consequently, the trial court erred in allowing the evidence of prior bad acts under

404(b). Furthermore, the probative value in admitting the prior incidents in Utah and Kentucky was substantially outweighed by the overwhelming danger of unfair prejudice that resulted in an unfair and prejudicial trial.

Again, the trial court in its 2010 decision initially denied the admission of any 404(b) evidence because in balancing the *Shickles* factors, the trial court found that there was the danger of unfair prejudice. (see Addendum A, trial court denying admission of 404(b) evidence, 2010) *State v. Labrum*, 318 P.3d 1151, (*Utah Ct. App.* 2014).

Therefore, the trial court erred in allowing the 404(b) evidence because the evidence was more prejudicial than probative, which prevented Mr. Murphy from receiving a fair trial.

II. THE PROSECUTOR'S IMPROPER AND PREJUDICAL REMARKS, DURING CLOSING ARGUMENTS, PREJUDICED MR. MURPHY'S RIGHT TO A FAIR TRIAL

"[T]he prosecution's responsibility is that of a minister of justice and not simply that of an advocate," and therefore "the conduct of the prosecutor at closing argument is appropriately circumscribed by the concern for the right of a defendant to a fair and impartial trial." *State v. Todd,* 173 P.3d 170 (Utah Ct. App. 2007). (alterations omitted) (internal quotation marks omitted). "To determine whether a prosecutor's remarks are so objectionable as to merit reversal," the remarks must "call to the attention of the jurors matters which they would not be justified in considering in determining their verdict." *State v. Campos,* 309 P.3d 1160 (Utah Ct. App. 2013) (internal quotation marks omitted).

In this case, the prosecutor's comments improperly implied that Mr. Murphy was

acting in conformity with his character. The prosecutor concluded his final closing argument comment by stating:

> What are the odds, folks? What are the odds that these four women would accuse the defendant of similar violent assaults involving a sexual component, alcohol, strangulation suffocation, or an injury on a neck? What are the odds? (R6 127-128)

Trial counsel objected to the comments, which preserved the issue. (R6 127:9) The prosecutor's remarks were not justified, and the jury should not be thinking about "what are the odds" in deciding whether or not Mr. Murphy was guilty or innocent.

The trial court allowed the 404(b) evidence to be used, but the prior bad acts may not be used to show propensity to commit a crime. "We reject this as a ground for admitting evidence of past misconduct in this case, as the evidence presented at trial did not legitimately establish a "plan" but was instead effectively aimed at demonstrating mere propensity to act in conformity with bad character. *State v. Verde*, 296 P.3d 673, 681 (Utah 2012).

It is clear from the prosecutor's closing rebuttal, that he was using the prior acts to demonstrate to the jury that Mr. Murphy acted in conformity with his character, and that he has a propensity to commit these types of crimes.

In *State v. Wright*, 304 P.3d 887(Utah Ct. App. 2013), *cert. denied*, this Court analyzed a similar comment not unlike the one examined here and endorsed the fair play doctrine. In *Wright* the prosecutor responded to the argument that the victim in a sexual abuse case had a motive to fabricate by telling the jury that she 'just want [ed the

defendant] to stop hurting her" and that 'you [the jury] have the power to make that stop."

This Court held that "the prosecutor's final statement — 'You have the power to make [the abuse] stop.' — is beyond the scope of a fair reply." *Id. at* 41 (alterations in original). "Such a statement appeals to the jurors' emotions by contending that the jury has a duty to protect the alleged victim — to become her partisan — which diverts their attention from their legal duty to impartially apply the law to the facts in order to determine if [the defendant] had committed the crimes of aggravated sexual abuse of a child for which he was on trial." *Id.*

The prosecutor's remark in this case similarly appealed to the jurors' emotions and diverted their attention from their legal duty, which was to examine the facts and evidence presented, and not make decision based on emotion. Again, the prosecutor was implying to the jury that Mr. Murphy had a propensity to commit these types of crimes.

> "[E]xcluding the bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose. Such weighing is essential to preserve the integrity of rule 404(b). Without it, evidence of past misconduct could routinely be allowed to sustain an inference of action in conformity with bad character."
>
> *State v. Verde*, 296 P.3d 673, 678 (Utah 2012).

The prosecutor's statement about "what are the odds" constitutes reversible error and the matter of Mr. Murphy should likewise be reversed and remanded for a new trial. This Court has indicated that it will reverse a verdict based on prosecutorial misconduct if "there is a reasonable likelihood that, in [the misconduct's] absence, there would have

been a more favorable result." *State v. Cummins*, 839 P.2d 848, 852 (Utah Ct. App. 1992) (internal quotation marks omitted).

"In determining whether the jury was probably influenced by the inappropriate comments, we consider the strength of the evidence supporting a defendant's guilt and the strength of the conflicting evidence." *State v. Campos*, 309 P.3d 1160,1174 (Utah Ct. App. 2013). In cases "with less compelling proof," this Court has noted that "there is a greater likelihood that [jurors] will be improperly influenced through remarks of counsel." *State v. Troy*, 688 P.2d 483, 486 (Utah 1984). One federal circuit court analyzed the circumstance as follows:

> It is particularly disturbing that the comments were made during the rebuttal phase of closing argument" when "[d]efense counsel was left with no opportunity to rebut the allegations and the jury heard the remark immediately before deliberation.
>
> *United States v. Holmes*, 413 F.3d 770, 776 (8th Cir. 2005).

As the Eighth Circuit explained, the "potential for prejudice is great during closing arguments, especially when the defense has no opportunity for rebuttal." *Id.* "Counsel for both sides have considerable latitude in their arguments to the jury...." However, a prosecutor " exceed[s] the bounds of propriety" when he or she " unfairly appeals to the sympathies," " passions and prejudices of the jury. *State v. Campos*, 309 P.3d 1160,1174 (Utah Ct. App. 2013)(internal citations omitted).

There is a reasonable likelihood that Mr. Murphy would have been acquitted if the prosecutor had not made the improper comments during his closing argument. Thus, the prosecutor "unfairly appealed to the sympathies and passions of the jury. *Id.*

The prosecutor was using the 404(b) evidence to appeal to the passions of the jury and show what a bad man Mr. Murphy was. "To determine whether a prosecutor's remarks are " so objectionable as to merit a reversal," we must determine whether the remarks " call to

the attention of the jurors matters which they would not be justified in considering in determining their verdict." *Id.* It was completely inappropriate for the prosecutor to propose that to the jury that they should convict Mr. Murphy, on the current charges with T.W, based on the prior bad acts under 404(b).

Therefore, in this case there is a reasonable likelihood of a different outcome had the prosecutor not made inflammatory statements during his closing arguments, and the convictions should be overturned and remained back to the district court.

III. THE TRIAL COURT ERRORED IN DENYING MR. MURPHY'S MOTION FOR A MISTRIAL

Both the United States Constitution and the Utah Constitution guarantee an accused the right to a fair and impartial jury. See U.S. Const. amend. VI; Utah Const. *State v. Wach*, 24 P.3d 948 (Utah 2001).

Trial counsel made a motion for for a mistrial after T.W's illicit testimony. Prior to going to trial, the trial court permitted the prosecution to introduce 404(b) evidence about Mr. Murphy. However, there was one incident that the trial court did not allow to be used, which pertained to Mr. Murphy's ex-wife shooting him five (5) times. Nonetheless, the trial court did not allow this evidence under 404(b) because it was not similar in nature to the current charges, and was too prejudicial.

On the second day of trial, the victim was under direct examination by the prosecutor, and during this course of questioning, the prosecution was attempting to establish that the victim did not know Mr. Murphy's ex-wife. But, the prosecution

solicited an answer or response from the victim that was clearly not allowed to be introduced to the jury. The following exchange was between the prosecutor and T.W during trial:

> ***Prosecutor****: "[W]ere you aware of any general allegations that she had made against this defendant?"*
>
> ***T.W****: "That they had filed for divorce"*
>
> ***Prosecutor****: "Well, I am talking about like a criminal accusation; were you aware that she had accused him of any crimes?"*
>
> ***T.W****: "I understand she shot him five times."*
>
> R2 118-119

Trial counsel immediately objected to T.W's statement, and the jury was excused. After the jury was removed, trial counsel made a motion on the record for a mistrial, which preserved the issued for appeal. Trial counsel argued that any mention of Mr. Murphy being shot by his ex-wife was excluded because it was too prejudicial, and there was no way to erase the incident out of the minds of the jury, and the only way to ensure that Mr. Murphy had a fair trial was grant a mistrial. Id.

On the other hand, the prosecutor argued that he was not looking for the answer that T.W gave in her testimony, and the improper statement did not negativity influence the jury. Moreover, the prosecutions claimed that a curative instruction could remedy any bias or prejudice that may have been caused by the testimony. Id.

After reviewing the record, the trial court found the testimony given by T.W, about Mr. Murphy being shot, was prejudicial. Next, the trial found that it was not going to

declare a “flat-out mistrial.” R2 138:15-18. Further, the trial court reasoned that a curative jury instruction, and not allowing Mr. Murphy’s ex-wife to testify at all at trial would be enough to fix any prejudice caused by the illicit statement. In addition, the trial court admonished the prosecution for failing to properly prepare the T.W, in regard to her testimony, to ensure she did not bring up the shooting. Id.

The trial court stated, “but as I think about it, I cannot see how those statements with a curative instruction do not-- Mr. Murphy is not prejudice if I tell them to disregard it; that there will be no evidence concerning G.M.[Mr. Murphy’s ex-wife] and leave it at that, and move ahead.” R2. 138:21-25.

The trial court found that the testimony was prejudicial and a curative instruction, along with no testimony from the ex-wife, was enough to overcome any prejudicial effect of the illicit testimony. Subsequently, the curative instruction to the jury was to disregard any statements made by the victim, regarding Mr. Murphy’s ex-wife. Id. Thus, the question for this Court is whether or not the curative instruction was enough to overcome the prejudice made by the illicit statement.

Trial courts do not grant mistrials unless the defendant can show that they did not get a fair trial. “In exercising its discretion, and "[i]n view of the practical necessity of avoiding mistrials and getting litigation finished, the trial court should not grant a mistrial except where the circumstances are such as to reasonably indicate ... that a fair trial cannot be had" and that a mistrial is necessary to avoid injustice.” *State v. Butterfield*, 27 P.3d 1133,1147 (Utah 2001).

In *State v. Wach*, 24 P.3d 948 (Utah 2001), the defendant was charged with

kidnapping and assault. During the trial, the victim made a statement about her having to wear a “security alarm around her neck”, referring that she was scared of the defendant [Wach]. This statement was not allowed under 404(b) according to the trial court ruling. The court found that the statement was not solicited by the prosecutor. Wach was later convicted and appealed. On appeal, Wach argued that if the improper remark had not been revealed to the jury, "there is a substantial likelihood that the jury would have returned a verdict more favorable to [him] on the aggravated kidnaping charge. Id.

The Utah Supreme Court found that because the statement was not solicited by the prosecutor and it was an off-hand remark, it was not inflammatory enough to prevent Wach from getting a fair trial. Also, the Court noted that most of the evidence was uncontested against Wach, and the statement made by the victim was isolated. Consequently, the Utah Supreme Court found that the trial court did not abuse its discretion in denying the motion for a mistrial. “Therefore, Bobbie's isolated remark about when she wore a security alarm did not render Wach's trial so unfair that the trial court was "plainly wrong" in denying Wach's motion for a mistrial.” *Id* at 958.

“Unless the record clearly shows that the trial court's decision "is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial, we will not find that the court's decision was an abuse of discretion." *State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997).

The facts of *State v. Wach* are similar to the facts in the present case. However, in the current case the prosecutor was much more responsible for soliciting the improper statement from T.W. Even the trial court admonished the prosecutor about not properly

prepping his witness so that there wasn't any testimony regarding Mr. Murphy being shot. R2 36-47.

Moreover, the improper statement was much more inflammatory than the statement in the *Wasch* case. Testimony about a wife shooting her husband would not only stay in the juror's mind, but also make the jurors wonder why Mr. Murphy was shot.

It is possible for a curative instruction to fix prejudice from improper evidence being admitted at trial. "[C]urative instructions are a settled and necessary feature of our judicial process and one of the most important tools by which a court may remedy errors at trial." *State v. Harmon*, 956 P.2d 262, 271-72 (Utah 1998). However, there a statements that are so inflammatory, and prejudicial, that a curative instruction cannot remedy. Mr. Murphy was on trial for raping and abusing his current wife, and when the jury hears testimony about his prior wife shooting him five times, it is impossible for a jury to disregard it, which resulted in the statement being unfairly used against him.

The jury continued to have questions about the improper statement even after the curative instruction was given. A juror asked the trial court the following on the record:

> ***Juror****: The ex-wife. Can we know her name?*
>
> ***The Cour****t: I told you're her name in my instruction.*
>
> ***Juror****: We can remember her name. We just can't remember anything else?*
>
> ***The Court****: No. You don't even need to remember her name. You don't even need to consider anything about G.A.O [ex-wife] Okay?*

(R2 203:15-25)

The above exchange between a juror and the trial court happened hours after the

curative instruction was given. Clearly, the jury was still thinking about what T.W had said in her testimony. Trial counsel even renewed the motion for a mistrial, which was again denied by the trial court. Id at 204-206. The fact that the jury continued to ask questions about the illicit statement and curative instruction, exhibits that the jury was immensely effected by T.W said regarding the shooting.

There is a “reasonable likelihood” that the improper statement influenced the jury and prevented Mr. Murphy from receiving a fair trial. The trial court found the statement was prejudicial and that the prosecution should have been more cautious in questioning the victim to ensure that that shooting was not introduced. Furthermore, the statement was so incendiary that the curative instruction was unable to remedy the damage that had already occurred. Therefore, the trial court errored in denying the motion for a mistrial, and the case should be remanded for a new trial.

IV. THE AGGRAVATED KIDNAPPING CHARGE SHOULD MERGE WITH AGGRAVTED SEXUAL ASSAULT.

When crimes are so related, as to elements and facts, they can merge into one count. *State v. Finlayson*, 994 P.2d 1243, 1246 (Utah 2000). In this case, trial counsel filed a motion to merge aggravated assault with kidnapping. However, trial counsel should have argued that the aggravated kidnapping should have merged with the aggravated sexual assault. The the trial court denied the motion to merge.

> We have held " that, in some factual scenarios, crimes may be so related that they must merge" even where merger is not required by the constitution or by statute. " Where two crimes are defined narrowly enough that proof of one does not constitute proof of the other, but broadly enough that both may arise from the same facts," we

> have said that " merger may be appropriate." Id. The most common application of this premise has been in cases involving sexual assault and kidnapping.
>
> *State v. Finlayson*, 994 P.2d 1243 (Utah 2000); *Met v. State*, 388 P.3d 447 (Utah 2016).

Trial counsel preserved the merger issue, in part, by filing a motion to merge counts. However, because the issue was not reserved in full, the Court should review this issue under plain error, and ineffective assistance of counsel.

The statute that governs merger is Utah Code § 76-1-402(1)

> (1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

This statue explains that when a defendant commits multiple crimes, during single criminal episode, that the defendant shall only be punished for separate distinct criminal acts.

Further, in *State v. Finlayson*, 994 P.2d 1243 (Utah 2000), the Court reviewed a similar issue as to whether the kidnapping charge should have merged into sexual assault. In the *Finlayson* case, the defendant met a foreign exchange student at college and convinced her to come back to his apartment to study. While studying at the apartment, the defendant grabbed the victim and took her forcefully into his bedroom and held her down while he raped her. The victim made several attempts to escape and the defendant handcuffed her. Later, after the assault, the defendant made the victim wait while he got dressed and drove her back to her home. The defendant was later charged with aggravated

kidnapping and sexual assault and he appealed the conviction on the merger issue.

The Utah Supreme Court held in the *Finlayson* case that the kidnapping charged should have merged into the sexual assault. "By definition, every rape and forcible sodomy is committed against the will of the victim and therefore involves a necessary detention, which is, of course, required by the kidnaping statutes." *State v. Finlayson*, 994 P.2d 1243, 1248 (Utah 2000).

Furthermore, the Court reasoned that there must be a clear distinction between the rape and the kidnapping for it to be separate crime. Moreover, the Court cited *State v. Couch*, 635 P.2d 89, 92 (Utah 1981), as example of where the kidnapping was distinct and separate from sexual assault to merit an independent charge. "[D]efendant's actions in *Couch*, in forcibly removing the victim a substantial distance to an isolated area, was a detention of independent significance and not a detention incidental to the sexual assault and affirmed the kidnaping conviction." *Id*. The Court held that the defendant's actions in *Couch*, in forcibly removing the victim a substantial distance to an isolated area, was a detention of independent significance and not a detention incidental to the sexual assault and affirmed the kidnaping conviction.

The Court utilized a test to determine if the kidnapping merges with other crimes:

> [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnaping the resulting movement or confinement:
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
> (b) Must not be of the kind inherent in the nature of the other crime; and
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.[
> *Finlayson*, 362 P.3d 926, 941 (Utah Ct. App. 2014)

The Utah Supreme Court in *Finlayson* found that the kidnapping charge should have merged into the sexual assault charged

> [F]inlayson's detention of the victim up to the time of the rape and sodomy was incidental to the assault, rather than having an independent significance. See Couch, 635 P.2d at 93. His carrying the victim into the bedroom, handcuffing her, and physically preventing her escape while the sex crimes were in progress constituted a detention that was "slight, inconsequential and merely incidental to the other crime[s]." Defendant's acts to that point, apart from the rape and forcible sodomy, had no independent significance sufficient to support a separate conviction for aggravated kidnaping.
>
> *Id.* at 940

In applying the same reasoning and law to the present case, the appellant was charged and convicted of aggravated sexual assault, aggravated kidnapping, and aggravated assault. The facts of this case indicate that Mr. Murphy's movements of the victim were inconsequential and incidental to the sexual assault. At no time did Mr. Murphy ever force T.W to leave the residence, and any of the movements of T.W were within the home and were directly related to the alleged sexual assault.

The fight between Mr. Murphy and his wife started outside and moved inside the home, and this where the prosecution argues that because Mr. Murphy prevented T.W from leaving the home, a kidnapping occurred. According to the wife's version of events, Mr. Murphy moved her around the house, going up stairs and down stairs, during the physical and sexual assault, which did prevent her from leaving the house, but were merely incidental to the sexual assault.

However, according to the facts, as soon as the sexual assault had stopped, T.W was able to get her car keys and leave. R2 49-50. This fact establishes that the detention was

only incidental to the sexual assault. This is similar to the facts in *Finlayson* case. Hence, there should be the same reasoning in this case that the aggravated kidnapping should merge with the aggravated sexual assault because the kidnapping was "merely incidental" *Id* at 940.

Therefore, based on legal precedence and the facts and evidence, the aggravated kidnapping charge should have merged with the aggravated sexual assault, and this case should be remanded back the trial court for Mr. Murphy to be re-sentenced on the charges.

V. FAILURE TO CALL ANY WITNESSES—INCLUDING EXPERT WITNESSES—WAS INEFECTIVE ASSISTANCE OF COUNSEL

Ineffective assistance of counsel claims are examined under the sixth and fourteenth amendments guaranteeing defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984).

> Under *Strickland*, the defendant bears the heavy burden of satisfying both of the following prongs: " 'First, the defendant must show that counsel's performance was deficient.' " " Second, the defendant must show that the deficient performance prejudiced the [outcome of his case]." Although in hindsight it may be easy for us to second guess counsel's actions, we must appreciate that an attorney's job is to act quickly, under pressure, with the best information available, and that there is a wide " range of legitimate decisions regarding how best to represent a criminal defendant." Thus, as a reviewing court, we must "indulge in a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance," and that " under the circumstances, the challenged action might be considered sound trial strategy."

_quoting *Id.* at 687, 694-95) (quotations in original; citations omitted).

Under the first prong, the defendant must establish that counsel's performance was deficient. "[I]n order to meet the first part of this test a defendant must "identify the acts

or omissions" which, under the circumstances, "show that counsel's representation fell below an objective standard of reasonableness." *State v. Templin*, 805 P.2d 182, 186 (Utah 1990).

In this case, both the victim and Mr. Murphy have completely different accounts on what happened on the night of May 31, 2009. The victim says she was physically and sexual abused, and Mr. Murphy says that his wife was intoxicated, upset and tried to cut him with a knife, and completely fabricated the sexual assault. At trial, the state called nineteen (19) witnesses when putting on their case. Trial counsel called only one witnesses, Mr. Murphy. The state called six (6) witnesses under 404(b) A.M, M.M, A.R, R.B A.K, and R.K. (please refer to day four and five of the trial record). In addition, the state called four expert witnesses, Dr. Mark Firth that testified about T.W injuries; Beth Fitzgerald, that testified about choking and strangulation; Dr. Grey, who testified about knife wounds; and Dr. Hancock, who testified about T.W's memory and inconsistent statements. R1 182, R3 80, R6 34. This list does not contain the numerous fact witnesses the state called as well.

Here, the failure of trial counsel to call any other witnesses to rebut the state's expert witnesses was clearly infective assistance of counsel. The jury listened to six (6) days of trial testimony and almost all of the testimony was for the prosecution.

One of Mr. Murphy's main arguments is that he was fending off his wife who was attacking him with knife. R5 136-137. During his testimony he explained how received multiple cuts on his chest and any bruising T.W received were defensive in nature. R5 138-139. Trial counsel should have called an expert to testify regarding the knife wounds and T. W's mental state. However, the state called Dr. Grey to rebut Mr. Murphy's testimony

on how the cuts were made on his chest. R6 34. Dr. Grey testified that the cuts on Mr. Murphy's chest could not have been made in the manner in which Mr. Murphy claims.

Moreover, Mr. Murphy had retained Sue Bryner, a choking and strangulation expert. Shortly before trial, Ms. Bryner passed away R3 128:2-25, R3 134:18. Although, trial counsel was able to submit Ms. Bryner's report and question the State's expert regarding the report. Id. However, submitting a report is not the same and as effective as calling an expert to testify at trial. Trial counsel should have retained another expert prior to going to trial.

Under the *Strickland* test, Mr. Murphy can establish that trial counsel's decision not to call any witnesses, including experts, was deficient. If there were additional witnesses to corroborate Mr. Murphy's side of the case, then there was a reasonable likelihood of a different outcome. Therefore, the case should be remanded back to the trial court for a new trial.

VI. THE CONVICTIONS SHOULD BE OVERTURNED BASED ON INSUFFICENT EVIDENCE

"A conviction not based on substantial, reliable evidence cannot stand." *State v. Robbins*, 210 P.3d 288 (Utah 2009) (citation omitted). When reviewing the sufficiency of the evidence on appeal, this Court will "view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." *State v. Rowley,* 198 P.3d 109 (Utah Ct. App. 2008)(quotation omitted). "Viewing the evidence under this standard," this Court will reverse if it concludes "the evidence is sufficiently

inconclusive or inherently improbable that reasonable minds must have entertained reasonable doubt." *Id*. (quotation omitted)

In the present case, T.W testimony is not credible. There are numerous inconsistencies in T.W's testimony along with the fact she was highly intoxicated on the night of ther altercation, and she has history of mental instability. Additionally, T.W's account of events on the night of the alleged assault are implausible based on the facts and evidence presented in court. Trial counsel filed a motion to arrest judgment, which preserved the issue for appeal.

In *State v.Robbins*, 210 P.3d 288 (Utah Ct. App. 2009), the defendant was charged with sexually assaulting his two daughters. A child welfare case was opened and the daughters were interviewed and an investigation was initiated. During the course of the interviews, the daughters discussed being physically and sexually abused by their father. At trial, the jury found Robbins guilty of abuse involving the daughter, and not guilty of the allegations with the other daughter

A motion to arrest judgment was filed and the trial court recognized there were serious credibility issues with the daughter's testimony. Nonetheless, the trial court denied the motion for arrested judgment. Later, Robbins appealed his case based on insufficiency of the evidence and the Utah Court of Appeals upheld the convictions. Robbins again appealed case to the Utah Supreme Court.

The Utah Supreme Court found, "[b]ased on the trial judge's stated concerns and the clear record of inconsistencies in Taylor's testimony, and in light of the clarification of

our inherent improbability standard that we announce today, we reverse the court of appeals and remand with instructions for the trial court to enter an acquittal. *Id* at 296.

> "[N]otwithstanding the presumptions in favor of the jury's decision this Court still has the right to review the sufficiency of the evidence to support the verdict. Though the court must ordinarily accept the jury's determination of witness credibility, when the witness's testimony is inherently improbable, the court may choose to disregard it."
>
> *Id* at 294. (internal citation omitted)

In *Robbins*, the Utah Supreme Court overturned the jury verdicts because the conviction was based on the sole testimony of the defendant's daughter, and her testimony was filled with inconsistences.

"Accordingly, when considering a motion to arrest judgment, a trial judge may reevaluate the jury's determination of testimony credibility in cases " where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt. *Id* at 294-295.

Furthermore, the *Robbins* case does not break significant ground. It merely affirms, in the limited and very rare situation, where a criminal conviction rests entirely on the inconsistent and contradictory testimony of one witness where there is no evidence that corroborates that testimony. "[N]otwithstanding the presumptions in favor of the jury's decision this Court still has the right to review the sufficiency of the evidence to support the verdict. Though the court must ordinarily accept the jury's determination of witness credibility, when the witness's testimony is inherently improbable, the court may choose to disregard it." *State v. Robbins*, 2009 UT 23, 210 P.3d 288, 294 (2009) (internal citation

omitted)

In the current case, there are similar issues as in *Robbins* case. Both cases have serious witness credibility issues. “Substantial inconsistencies in a sole witness's testimony, though not directed at the core offense, can create a situation where the prosecution cannot be said to have proven the defendant's guilt beyond a reasonable doubt, particularly as here where other significant factors in the case suggest a lack of credibility.” *State v. Robbins*, 210 P.3d 288, 293 (2009).

The numerous inconsistencies along with the fact that T.W had been consuming a lot of alcohol and the night of the alleged assault. The first main inconsistently has to do with where in the house T.W says she was choked. Under cross examination, at trial, T.W stated that she was choked in the hallway, which was different from her prior testimony where she said she was choked in the family room. R2 89-90.

Next, T. W changed her story regarding when and how she passed out. Under direct examination, T.W stated that she passed out because Mr. Murphy’s penis was in her mouth and she couldn’t breathe. R2 94-95. At trial is the first time in T.W’s story that she ever mentioned on how she passed out the second time. *Id.* At the preliminary hearing, T.W testified that Mr. Murphy choked her then she passed out and awoke in the pink bedroom. R2 94:14-22. T.W’s prior testimony was that she was held against the wall and choked two times. This is a prime example of how T.W’s testimony was not consistent, and regularly changed. R2 95. Additionally, T.W even admits she may have passed out because she was drunk. R2 95:1-5.

After the alleged assault by Mr. Murphy, T.W says she left and went to a friend's house and stayed the night. R2 96-97. The next morning, T.W went back to her house and took a shower, got dressed and went to work. R2 97. If T.W had been severely abused and assaulted, then it is unreasonable to conclude that she would go back to the house where Mr. Murphy was. After leaving the house, T.W had an opportunity to contact law enforcement, but instead she went to a friend's house to stay the night. Id at 97-99.

There are other inconsistencies in T.W's story including the fact that T.W's hair was not wet. T.W was allegedly thrown in a bath tub and shortly after went to her friend's house who testified that her hair was not wet. Id at 100-103.

Moreover, during the initial interview with the police, T.W never revealed anything about being sexually assaulted, or forced to perform oral sex, choking, nipples being pinched or any other type of sexual abuse. R2 102-103. (see Addendum I) What is more, T.W doesn't even mention anything about her own drinking to the police even though she now admits she has a problem with alcohol. R5 102:23.

Trial counsel questioned T.W about her inconsistent statements and T.W was unable to explain them away. T.W just told the jury that she was doing her best to remember. (see Addendum J) Furthermore, the prosecution was very concerned about the inconsistencies in T.W's story, and her lack of memory. Consequently, the prosecution called an expert witness, Dr. Hancock, to testify and explain why T.W's testimony may be inconsistent, and why her memory maybe fuzzy. R1 164:8-15. It's troubling that a jury convicted Mr. Murphy based on the uncorroborated testimony of someone who was drunk and continuously changing their story.

Additionally, T.W went to see her doctor shortly after the alleged assault, Dr. Firth. T.W also claimed that Mr. Murphy physically assaulted her by punching and slapping her, and allegedly put his knees on her chest. R3 34-37. However, when Dr. Firth examined T.W he found only superficial bruising and complaints of soreness, which can easily be explained by Mr. Murphy's version of events. R3 15-16. If T.W had gone through such a violent encounter there should have been more physical signs of trauma on her body.

Mr. Murphy's convictions are this case are based solely on the uncorroborated testimony of a highly intoxicated T.W, that changed her testimony on multiple occasions. Just as in the *Robbins* case, the Court found that because there were serious credibility issues with a main witness, the convictions were overturned.

Therefore, there was not sufficient evidence to convict Mr. Murphy. "In a criminal case, where the burden of proof is beyond a reasonable doubt, the trial court may afford less deference to inherently improbable, inconsistent, uncorroborated witness testimony than in a civil case where the plaintiff must only establish its claim by a preponderance of the evidence. " *State v. Robbins*, 210 P.3d 288, 294 (2009). Mr. Murphy requests that the case be remanded and the convictions be overturned.

CONCLUSION

For all or any of the argument submitted above, Mr. Murphy respectfully requests

that his convictions be reversed and the case remanded back to the district court for a new and separate trial.

RESPECTFULLY SUBMITTED this___ day of October , 2017.

_____
MICHAEL C. MCGINNIS
Attorney for Mr. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of October, 2017, I have caused eight true and

correct copies, one containing original signature, of the foregoing BRIEF OF APPELLANT to be filed with the Clerk of the Utah Court of Appeals and two additional copies to be mailed first class to the following:

Utah Attorney General's Office
Appeals Division
Attorney of the Appellee
160 East 300 South, Sixth Floor
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Salt Lake City, Utah 84114

_____
Michael C. McGinnis
Attorney for Appellant

I mailed/delivered the above number of copies to the Utah Court of Appeals and Utah Attorney General's Office, Appeals Division, as indicated above on this ____ day of October, 2017.

_____