Case No. 20170277-CA

In the Utah Court of Appeals

STATE OF UTAH,
Plaintiff/Appellee,

v.

STEVEN WILLIAMS,
Defendant/Appellant.

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Richard D. McKelvie, presiding
Defendant is incarcerated

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Other Sources

INTRODUCTION

Steven Williams was convicted of aggravated assault (domestic violence); four counts of domestic violence in the presence of a child; and interference with an arresting officer. R.383-85. Mr. Williams seeks reversal of those convictions because his trial counsel performed deficiently, and he was prejudiced by that deficient performance.

STATEMENT OF ISSUES

All of the issues raised on appeal involve claims of ineffective assistance of counsel. As these claims are raised for the first time on appeal, no statement of preservation is provided. *Cf.* Utah R. App. P. 24(a)(5)(B). Instead, each of these claims operate within an exception to this court's preservation requirement:

> Ineffective assistance of counsel is thought of as an exception to preservation because a claim for ineffective assistance does not mature until after counsel makes an error. Thus, while it is not a typical exception to preservation, it allows criminal defendants to attack their counsel's failure to effectively raise an issue below that would have resulted in a different outcome. Such a claim can be brought in a post-trial motion or on direct appeal.

State v. Johnson, 2017 UT 76, ¶ 23, 416 P.3d 443 (citation omitted). The standard of review applicable to all of these claims is as follows:

> An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. To prove ineffective assistance, [Defendant] must show (1) that counsel's performance was deficient, in that it fell below

> an objective standard of reasonable professional judgment and (2) that counsel's deficient performance was prejudicial-i.e., that it affected the outcome of the case.

State v. Christensen, 2014 UT App 166, 10, 331 P.3d 1128 (cleaned up).

1. Did defense counsel render ineffective assistance of counsel when they failed to object to expert witness testimony, which was considered by the jury in violation of the rules of evidence?

2. Did defense counsel render ineffective assistance of counsel when they failed to object to incomplete and erroneous jury instructions?

3. Did defense counsel render ineffective assistance of counsel by:

   a. Failing to object to inadmissible hearsay?

   b. Failing to object to inadmissible character evidence?

STATEMENT OF THE CASE

Procedural History and Disposition Below

A jury convicted Steve Williams of one count of Aggravated Assault, a second degree felony; four counts of Domestic Violence in the Presence of a Child, and one count of Interference with an Arresting Officer. R.383-85. The jury found Mr. Williams not guilty of Driving Under the Influence of Drugs/Alcohol. R.384.

Statement of Facts

On the evening of January 9, 2016, Steve Williams and Audrey Wallace were at home when Audrey saw a text on Steve's cell phone "from a girl that he had been hiding having a conversation with." R.546. Seeing the text made Audrey feel "[r]eally sad" and she confronted him about it. R.547. Steve asked for his phone back, to which Audrey refused and then Steve tried to get it from her. Audrey responded by throwing the phone at a fish tank in the house. R.549.

Wallace testified that after she threw the phone, Defendant "grabbed ahold of [her] arm and then he did, like, this weird twisting and then he shoved [her] down." R.550. The prosecutor asked Wallace whether this hurt her, but she said it "just kind of stunned" her. R.550. While Wallace was on the ground, Defendant "offered to pick [her] up," R.551, but Wallace declined and instead got up herself, grabbed Defendant's phone, and proceeded to the back deck to call the woman who had text messaged Defendant. R.552.

Shortly thereafter, Wallace made her way back inside. R.552. Although Wallace did not "know how," Defendant ended up in front of her. R.553-54. "[T]hen all of a sudden [she] felt something hit [her] in the back of [her] head and it kind of just stumbled [her] forward." R.554. She asked Defendant if he had just hit her, and he said nothing. R.554. Wallace claimed that whatever hit her left a

knot on the back of her head for a few days. R.554. No one was in the kitchen to observe Wallace being struck in the head. R.555.

Steve Williams' son, Sean Williams, was in another room and heard "[k]ind of like a slap to the face." R.620. He "ran to the kitchen to see what was going on." R.620. He found Defendant and Wallace in the kitchen, but he did not know who had slapped whom. R.620, 649. However, he later explained that he heard his father say "ow." R 665. He saw Williams "puffing out his chest" while walking toward Wallace and saying, "Do that again one more time." R.622, 623. Wallace responded by pushing Defendant away. R.623. When she would push him away, her hand "would slide up and [Defendant] would make, like, a choking noise." R.665. She also hit Defendant both with an open and a closed hand. R.650.

According to Wallace, Defendant had been provoking Wallace to hit him. R.555. Wallace responded, "I'm not hitting you, you piece of shit cheater."[1] R.555 (internal quotation marks omitted).

Defendant allegedly hit her in the jaw with a closed fist. R.556. Wallace "fe[lt] like it knocked [her] out." R.556. Sean Williams and daughter, Stephanie

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[1] While Wallace admitted using this language, she later maintained that she would never have threatened Defendant by saying, "I will show you, you motherfucker," because "[t]hat is an ugly word that . . . would never come out of [her] mouth." R.592 (emphasis added) (internal quotation marks omitted).

Williams, also testified that Defendant punched Wallace in the face.[2] R.624, 677. The next thing Wallace knew, Son was “trying to . . . grab [Williams] away from her” but Defendant "kind of shrugged him off." R.557. Wallace does not know if Defendant hit her again. R.558. Wallace said she "fe[lt] like" Son's friend, Trevor, was also there, but she could not say whether other children were present. R.558.

Wallace retreated downstairs because she "was embarrassed and shocked and just wanted to get away." R.558-59. She "didn't realize [her] face was all jacked up until one of the kids saw it and pointed it out." R.559. The police eventually responded, and Wallace's son-in-law took her to the hospital. R.560-61. She spent a few days in the hospital, during which time she underwent surgery to realign her jaw. R.563-65. She spent the following two months on a liquid diet, R.566, and explained that she will have ongoing issues with her jaw. R.568-69. The doctor who saw Wallace and developed her treatment plan testified that Wallace had fractures on both sides of her jaw. R.769, 770. The doctor also explained that it "takes a considerable amount of force" to cause the sorts of injuries sustained by her. R.773.

When asked if she remembered fighting back with Williams, she said she

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[2] Defendant's son claimed Defendant punched Wallace up to five times. R.625, 628. Defendant's daughter did not recall how many times Defendant hit Wallace; "a lot though." R.678.

tried to "block" Defendant, might have pushed him, but did not remember ever trying to choke Defendant or put her hands around his neck. R.569-70. She did not, however, foreclose the possibility that that "may have happened." R.570. On cross-examination, Wallace proclaimed at one time, "I've never touched him," yet she acknowledged that in 2015, she assaulted him, which led to the couple splitting up for a period of time. R.573.

Also during the course of cross-examination, Wallace indicated multiple times that she could not remember certain details leading up to and including the night of the incident: She did not recall who initiated contact after the two had broken up in 2015. R.574. She did not recall whether she text messaged the woman back who had text Defendant's phone. R.582. There was a brief amount of time, purportedly after Defendant hit her, that she could not "recall and things are hazy." R.593-94. She did not know where or how she was holding Defendant's phone when he asked for it back. R 586. She did not recall telling any of the responding police officers that she grabbed Defendant by the throat. R.597. Wallace nevertheless maintained, "I did nothing physically to him." R.588.

In the statement Son wrote for police immediately after this incident, he said that Wallace was punching and choking Defendant. R.638. He explained away the inconsistencies between his testimony at trial and his written statement by

saying on the night of the incident, he "was tired." R.638. Son further muddied the waters on cross-examination when he said his written statement was "not wrong," and that in the kitchen, Wallace was "pushing or choking or, you know, hitting [Defendant's] throat or whatever," and after Defendant said, "Do that one more time," "she did," and then "that's when" Defendant hit Wallace. R.653-54.

There was confusion in the testimony as to when Son was in the kitchen, when Wallace came back inside, and how much time elapsed, if any, between the "slap" the children heard and Defendant punching Wallace. See generally R 619-30 (Son's testimony); R 670-715 (daughter's testimony); R.789-91 (Friend's testimony).

In her statement to police, Daughter reported that her father had acted in self-defense. R.716. She also testified, without objection, that Defendant "has his own way of manipulating people." R.689. But she later affirmed that her statement to police represented "what [she] thought was going on at the time [she] wrote that" and that Defendant was not around when she gave her statement. R.716. Friend testified that at the beginning of the altercation between Defendant and Wallace, Wallace's hand was on Defendant's throat and also said that "some of her hand was kind of on his throat but then most of it wasn't." R.804. He also saw Wallace slap Defendant, followed by Defendant hitting Wallace, Wallace

attempting to hit Defendant again, and Defendant blocking the strike and hitting her again. R.805. Granddaughter further testified that she saw Wallace throw Defendant's phone, after which Defendant punched Wallace three times. R.820-21. But she did not see Son, Daughter, or Friend go into the kitchen where Wallace and Defendant were fighting. R 821. And during the fight, she plugged her ears so she could not hear some of what occurred. R.829.

Officer 1 testified, without objection, as to what he was told when he arrived on the scene. R.834-35. He also testified, again without objection, that Defendant "seriously hurt" Wallace and that she had "extensive injuries." R.835. During Officer 1's testimony, the jury was shown his body camera video, which included Defendant cursing at the officers in a string of profanities, unrelated to the facts of his altercation with Wallace. R.845-46. It also depicted Defendant invoking his right to an attorney. R.842, 844.

Officer 2 testified that she was on duty when Defendant came to the station to give a witness statement and be photographed. R.873-74. She recounted the report Defendant gave of Wallace choking him. R.874. Defendant told her that he had obtained medical records showing bruising on his larynx, scratch marks on his neck and behind his ears, tingling and numbness under one of his eyes, and bruising on his head. R 875. Officer 2 also testified that Wallace admitted to her

that she had grabbed Defendant by the throat. R.881-82. She also opined that Defendant's injuries were consistent with being choked. R.884.

On behalf of Defendant, defense counsel called just two witnesses- Defendant's mother, who was not present at the time of the fight in question, see R.907, and Defendant's friend, also not present on the night of the incident, see R.942.

SUMMARY OF THE ARGUMENT

Defense counsel performed deficiently throughout the course of trial. Counsel should have objected to the testimony of the prosecution's expert witness, a person who had not been subjected to the threshold evidentiary foundational requirements of Rule 702. The expert, a doctor of dental surgery, improperly opined on the ultimate issue as to whether Mr. Williams had committed the crime of assault. The expert also failed to comply with the curriculum vitae requirement and, without foundation, he opined on topics like a biomechanical analysis concerning the injury or causation factors when his knowledge was limited to dental surgery.

The jury instructions failed to properly track the language of the corresponding statutes, which negatively impacted the jury's ability to consider applicable lesser included offenses. The erroneously worded self-defense

instruction also prejudiced Mr. Williams. The jury was unable to fully consider his theory of the case and apply defenses and instructions applicable to his position.

ARGUMENT

Point I. Testimony from the State's Expert Witness Should Have Been Excluded and Was Inadmissible

A key witness for the prosecution, David Stoker, D.D.S., was improperly allowed to testify as an expert witness without first being subject to the necessary threshold evidentiary foundational requirements either before or during trial. Utah R. Evid. 702. Prior counsel performed ineffectively in not limiting or objecting to Dr. Stoker's testimony and/or in not continuing the trial. *State v. Rothlisberger*, 2004 UT App 226, *aff'd* 2006 UT 49.

"If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Utah R. Evid. 701. Subsection (c) was applicable here. The State's witness, David Stoker, was not a lay witness as he opined about matters that required "scientific, technical, or other specialized knowledge; in other words, . . . [i]f that knowledge is not within the ken of the average bystander, then it is properly characterized as specialized knowledge." *State v. Rothlisberger*, 2006 UT 49, ¶ 34. He was not a lay witness (due to word

count limitations, facts or arguments from other sections of the brief are cross-referenced and incorporated into one another).

A. Defense Counsel Failed to Subject Dr. Stoker's Expert Opinion To Rule 702's Threshold Evidentiary Requirements

David Stoker's testimony was full of medical jargon, R 765-85, his opinion was technical and specialized and "an average bystander would [not] be able to provide the same testimony." *Id.* at ¶ 34. Counsel was ineffective in not excluding Stoker's testimony due to the lack of the necessary evidentiary threshold showings. As set forth in Rule 702:

> (a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
>
> (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony
>
> (1) are reliable,
>
> (2) are based upon sufficient facts or data, and
>
> (3) have been reliably applied to the facts.
>
> (c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Utah R. Evid. 702 (emphasis added).

In Mr. Williams' case, there was no threshold evidentiary showing in accordance with the above rule of evidence. Prior to trial, defense counsel did not move in limine to establish whether or not David Stoker, a dentist, could in fact show that the principles or methods that were underlying his testimony were reliable, based upon sufficient facts or data, **and** were reliably applied to the facts. *Id.* The same 702 threshold showing was similarly not shown during the trial itself, R 765-85; *see infra* Point I.B, nor did the State prove that the underlying principles or methods were generally accepted by the relevant expert community. Utah R. Evid. 702(c).

Rather than testing the expert knowledge of Dr. Stoker, a doctor of dental surgery ("DDS") on matters beyond the realm of his expertise (like a biomechanical analysis, laws of inertia, energy factors, etc), defense counsel simply let David Stoker opine to the jury about principles or methods surrounding the injury – without the expert witness threshold showing of reliability, without an expert witness showing of sufficient facts or data, and without an expert witness foundation for its reliable application to the facts at hand. *But see* Utah R. Evid. 702 (such requirements are prerequisites to expert witness testimony).

Expertise in dental surgery or facial reconstruction is different than the

expertise for a biomechanical analysis on the underlying injury and in Mr. Williams' case, David Stoker's testimony was not compliant with the threshold evidentiary basis for either type of expertise under Rule 702(b)(1), (2) or (3).

For instance, David Stoker received information from a radiologist in this case, but each doctor specializes in a field different from the other. And such a doctor is limited in what his or her opinion may be based on absent appropriate expert witness designation and compliance with the rules.

Case law is clear on such expert witness distinctions and designations. A professional who views an incident may testify as an ordinary witness because of a first-hand observation. *Pete v. Youngblood,* 2006 UT App 303. But if "the treating physician also offers an opinion as to the standard of care or whether that standard has been breached, the testimony is no longer simply factual. *Id.* at ¶ 14. In Steve Williams' case, David Stoker did not personally observe the incident at the house of Ms. Wallace and Mr. Williams. Dr. Stoker was not there and cannot be deemed a fact witness for what occurred before Audrey Wallace's arrival at the hospital. The threshold prerequisites were not satisfied, which was required before the jury considered his expert testimony as a whole.

B. Counsel Performed Ineffectively When They Failed to Object to Expert Witness Testimony on the Ultimate Issue

Just as the law prohibits a physician from opining about whether a standard of care has been breached, *Youngblood,* 2006 UT App 303, ¶ 14, the law similarly and consistently prohibits an expert from opining about whether the defendant may have committed a crime or had a defense for the involved offense.

> In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Utah R. Evid. 704(b) (Opinion on Ultimate Issue).

Contrary to the rule's prohibition against such influential expert witness testimony improperly impacting the jury, defense counsel performed ineffectively in allowing Dr. Stoker to state that Mr. Williams assaulted Ms. Wallace:

> Q (by the State:) And based on your interaction with her, what was your understanding of how she sustained her injury?
>
> A (by Dr. Stoker:) <u>That she was assaulted</u>, to my understanding, with closed fists by an assailant.
>
> . . .
>
> A (by Dr. Stoker:) Most likely there on the left posterior aspect of the mandible.
>
> Q (by the State:) And why is that?
>
> A (by Dr. Stoker:) It certainly is a much greater -- the fracture has greater displacement and it's -- we most commonly will see the point of impact in the left face as most assailants are right handed. So we often see the general point of impact on the right side -- on the patient's left side.

Q (by the State:) Okay. Now, based on your training and experience, how strong -- is the jaw bone a strong bone?

A (by Dr. Stoker:) Yeah, it is.

Q (by the State:) And what kind of force would it take to cause this to --
A. Blunt force trauma like this in an assault. It takes a considerable amount of force.

A (by Dr. Stoker:) Correct. That's what I noted, yes.

Q (by the defense:) And what's also indicated in there is that she reportedly discovered her boyfriend cheating on her; correct?

A. (by Dr. Stoker:) Correct. Yes.

Q (by the defense:) And subsequently, he assaulted her?

A (by Dr. Stoker:) Yes.

Q. And then it indicates as she became very angry?

A. Yes.

R 768, 771, 772, 773, 781 (emphasis added). Dr. Stoker inappropriately addressed the ultimate issue on whether there was an assault when those matters were for the trier of fact alone. *See Pete v. Youngblood,* 2006 UT App 303, ¶ 14 (citing *Thomas v. Consol. Rail Corp*., 169 F.R.D. 1, 2 (D. Mass. 1996) (requiring disclosure and an expert report where treating physician offered opinion on causation and prognosis). David Stoker opined repeatedly that this was an

"assault" without any offsetting counterbalancing open-mindedness about how self-defense may come into play. The doctor's testimony was inadmissible and counsel performed ineffectively and prejudicially in not excluding it (or eliciting it) under the plain language of Rule 702.

C. Defense Counsel Failed to Object to the Advance Notice Requirements for Expert Witness Testimony

State v. Rothlisberger, 2004 UT App 226, *aff'd* 2006 UT 49, holds that even if a witness is qualified to testify as an expert, the requisite advance notice still must conform with the statutory requirements:

> In addition to the plain language of rule 701 and the advisory committee's note to the 2000 amendments to the federal rule, policy considerations support our conclusion that testimony based on specialized knowledge may be admitted only under rule 702. There is a substantial body of law that has been developed to regulate the admissibility of expert testimony. Rule 702 has a built-in requirement that an expert witness be "qualified." Under State v. Rimmasch and its progeny, we have also required a certain level of reliability for novel expert evidence. Furthermore, our rules of civil procedure require parties to provide more extensive notice of expert witnesses than of lay witnesses. The Legislature has also imposed additional notice obligations with respect to expert witnesses in criminal cases. All of these rules illustrate the policy judgment that expert testimony should be treated differently than lay testimony.
>
> Yet the State's proposed rule would undermine the objectives of this policy judgment. If testimony based on specialized knowledge could be admitted through rule 701, or if, as discussed above, fact testimony were admissible regardless of whether it is based on specialized knowledge, litigants could effectively avoid all of these requirements by offering the testimony as lay testimony or by structuring their questioning to elicit only

> factual responses. Interpreting the rules of evidence to include such a broad loophole would frustrate the intent of the rules.

Rothlisberger, 2006 UT 49, ¶¶ 26-27 (footnotes omitted). Hence, even assuming, *arguendo*, David Stoker is/was qualified to testify as an expert witness, the State still failed to comply with the advance notice requirements and counsel performed ineffectively and prejudicially in not objecting to his testimony.

Utah Code Ann. § 77-17-13 sets out the advance notice requirements in unequivocal terms:

> 77-17-13. Expert testimony generally -- Notice requirements.
>
> (1)(a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or 10 days before the hearing.
>
> (b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:
>
> (i) a copy of the expert's report, if one exists; or
>
> (ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and
>
> (iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.

Id. (emphasis added).

In Mr. Williams' case, David Stoker's curriculum vitae was not provided, which appears consistent with his one word de-emphasized trial use of his "dental" background, R 766, as opposed to the more specialized medical background of traditional surgeons. In addition to the lack of Stoker's curriculum vitae, there was no rule 702 compliance in the record for his testimonial "expertise" in causation or prognosis or biomechanical analysis. *See supra* Point I.A. The notice obligations with respect to expert witnesses in his criminal case were not adhered to and counsel performed deficiently and prejudicially in allowing the jury to consider David Stoker's testimony.

A loophole does not apply here, as the long-standing authority of both the statute, Utah Code Ann. § 77-17-13 (the underlying law was enacted in 1953 [about 65 years ago] with the 1999 amendment still in place for 19 years when Mr. Williams' trial was held in 2018), and case law, *see e.g., State v. Rimmasch,* 775 P.2d 388 (Utah 1989) (at the time of Mr. Williams' trial, approximately 29 years had passed since the 1989 *Rimmasch* ruling); *see Rothlisberger*, 2004 UT App 226, *aff'd* 2006 UT 49 (at the time of Mr. Williams' trial, *Rothlisberger* was in place as appellate authority for 14 years [via the court of appeals opinion] and/or for 12 years [via the Utah Supreme Court ruling]). The indented *Rothlisberger* quote above, the rules of evidence, statutory authority, and case law all make clear

that expert witness testimony is treated differently than lay witness testimony. Defense counsel performed ineffectively by not objecting to David Stoker's expert witness' trial testimony.

In *Rothlisberger,* during a drug distribution case, the State called a police chief to testify about whether a quantity of methamphetamine constituted personal use versus a distributable amount. The opinion first found that the police chief was an expert witness. Then, in response to the defense argument "that the State's failure to give [the defendant] thirty-days notice of that testimony warrants reversal, we [this Court] agree." 2004 UT 226, ¶ 11. When expert witness testimony is improperly admitted, the remedy is a new trial (which occurred in *Rothlisberger* and should similarly occur in Mr. Williams' case).

D. An Issue Raised through Ineffective Assistance of Counsel May Remedy Prior Counsel's Deficient Performance

The concept of waiver, like invited error, may explain trial counsel's performance below, yet it does not justify nor excuse counsel's failure to protect Mr. Williams' best interests. *Compare State v. Ekstrom*, 2013 UT App 271, ¶ 8 n.4 (an issue may be precluded on appeal under the invited error or plain error doctrine, yet IAC allows relief for the underlying attorney error). Prior counsel could have and should have performed differently here, *see supra* Point I.A - I.C,

with a motion in limine available to meet the threshold evidentiary requirements of Rule 702 for David Stoker and/or similar objections invoked during trial to Dr. Stoker's testimony and/or a motion to continue the trial to better address or counter such expert witness claims. Ineffective assistance of counsel is one of the few avenues of relief for a defendant when waiver or lack of preservation could otherwise impact an issue at hand:

> Ineffective assistance of counsel is thought of as an exception to preservation because a claim for ineffective assistance does not mature until after counsel makes an error. Thus, while it is not a typical exception to preservation, it allows criminal defendants to attack their counsel's failure to effectively raise an issue below that would have resulted in a different outcome. Such a claim can be brought in a post-trial motion or on direct appeal.

State v. Johnson, 2017 UT 76, 23, 416 P.3d 443; *accord* Utah Code Ann. § 78B-9-104(1)(d) (IAC may not be waived, as a remedy in a post conviction proceeding may be based on whether "the petitioner had ineffective assistance of counsel in violation of the [Constitution]"); Utah State Bar Ethics Advisory Opinion Number 13-04 (issued September 30, 2013) (a plea agreement cannot require the client to waive ineffective assistance of counsel). Errors by prior counsel, even those involving waiver, mature or may be subsequently addressed via a claim based on ineffective assistance of counsel.

The technical and distinctive nature of expert witness testimony – which

does not comply with the notice requirements and the legal prerequisites – rendered inadmissible such noncompliant expert testimony. Such circumstances existed in Mr. Williams' case. He should receive a new trial.

E. Absent Dr. Stoker's Expert Witness Testimony, the Evidence was Insufficient to Establish the Charged Offenses

Though the burden of establishing insufficient evidence "is high," "it is not impossible." *State v. Gonzales,* 2000 UT App 136, ¶ 10, 2 P.3d 954 (citations omitted). "Every element of the crime charged must be proven beyond a reasonable doubt." *Id.* (citation omitted). Thus, this Court "will not make speculative leaps across gaps in the evidence." *Id.* (citations omitted). Nor will this Court affirm "the jury's verdict in a criminal case" if it concludes "as a matter of law that the evidence was insufficient to warrant conviction." *Id.* (citations omitted).

The *In re Besendorfer,* 568 P.2d 742 (Utah 1977), opinion demonstrates that evidence may be insufficient for an aggravated assault conviction when injuries do not accord the statute (i.e. injuries do not cause permanent disfigurement or loss or the impairment of limbs or organs). There, a fight began after the defendant threw a snowball at the Wallace that hit him in the face:

> Bill [the defendant] struck and kicked him Kory [the victim]; specifically Bill kicked him three or four times mostly on the upper legs and struck him

> several times in the face with his fist.... Kory testified the fight lasted 30 seconds, and he was adamant that he had never struck Bill.... The only evidence concerning the extent of Kory's injuries was his response to a question as to whether he had received any medical attention as a consequence of the fight. He stated: Yes, I had a tooth repaired capped. I had to go to the doctor's office for the bruises and that's about it. Defendant contends the record does not reveal any evidence to support finding of "serious bodily injury" a necessary element of aggravated assault. With this we agree.

Besendorfer, 568 P.2d at 743; *id.* ("There was testimony as to Bill's vigorous attack, and the witnesses expressed particular concern over the kicking").

Despite the lower court verdict of guilty beyond a reasonable doubt, the appellate court reversed.

> Reviewing the evidence in the light most favorable to the state, it shows no proof that Kory's injuries created a substantial risk of death; that he sustained serious permanent disfigurement, or that he had a serious protracted loss or impairment of a function of any of his members or organs. Thus, there was no evidence Kory sustained serious bodily injury, and the court's finding defendant committed an aggravated assault cannot be sustained.

Besendorfer, 568 P.2d at 744; Id. ("The precise nature and extent of the injuries to Kory's teeth is not revealed in the record").

Despite the fact that victim in the Besendorfer had his tooth repaired or capped (which suggested "permanent disfigurement" of a tooth that was then cosmetically altered to look the same as, or better than, the tooth before the fight), the court held as a matter of law, "there was no evidence that the victim sustained

serious bodily injury. . .” *Id*.

In Mr. Williams’ case, not only did David Stoker opine improperly on the ultimate issue, *see supra* Point I.B (opining that an assault had occurred), Dr. Stoker additionally opined about the permanent nature of Ms. Wallace’s injury, together with expert witness testimony about other aspects of her injury. *See* Point I.A - D. Absent David Stoker’s testimony, the evidence was insufficient to establish the legally distinct differences between bodily injury, substantial bodily injury, and serious bodily injury. *See* Utah Code Ann. § 76-1-601; *State v. Ekstrom*, 2013 UT App 271, 271, ¶ 16 (“These different categories of injury are not subject to analysis using ordinary meaning. Rather, the Utah Legislature has assigned each a technical legal meaning that requires further explanation”) (citation omitted). Dr. Stoker’s testimony impacted the jury’s verdicts on all the counts and counsel performed deficiently in not excluding his expert witness opinions.

II. Defense Counsel Performed Deficiently and Prejudicially By Failing To Object To The Improperly Worded Jury Instructions

A “[t]rial court has a duty to instruct the jury on the law

applicable to the facts of the case." *State v.Potter*, 627 P.2d 75, 78 (Utah 1981). A conviction must be reversed where "a substantial likelihood exists that the instruction ... when considered together, confused and misled the jury in its deliberation on the principal issues of the case to the detriment of the defendant." *Id*. at 80.

"To succeed on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the defendant was prejudiced thereby." State v. Martinez, 2015 UT App 193, 30, 357 P.3d 27, 33 (citation omitted). Prior counsel performed ineffectively here in not fulfilling his duty to clearly and accurately instruct the jury on the law.

A. Counsel Performed Ineffectively in Failing to Object to the Jury Instructions

The statutory elements of assault, which counsel was bound to follow, were as follows:

> (1) Assault is:
> (a) an attempt, with unlawful force or violence, to do bodily injury to another; or
> (b) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.
> (2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:
   (a) the person causes substantial bodily injury to another; or
   (b) the victim is pregnant and the person has knowledge of the pregnancy.
(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

Utah Code Ann. § 76-5-102.

Jury Instruction 28 was an improper recitation of the above statute, as it inappropriately extracted the statutory elements. Instruction 28 read:

> You cannot convict [Defendant] of the lesser included offense of Assault, domestic violence, unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:
> 1. That on or about January 10, 2016, in Salt Lake County, Utah;
> 2. STEVEN WILLIAMS;
> 3. Intentionally, knowingly, or recklessly;
> 4. Committed an act, with unlawful force or violence, ~~that caused bodily injury to another; and~~;
> 4. That resulted in substantial bodily injury to another; and,
> 5. Mr. Williams was a cohabitant of [Victim]; and,
> 6. Mr. Williams was not acting in self-defense.

R. 348 (the "strike-through" interlineation of the jury instruction [for a class A assault instruction] was added to indicate what clause had been improperly included) (a copy of Instruction 28 is attached in the Addenda; the two paragraph 4's were an overlooked typo in the jury instructions, as the elements should have

been numbered 1, 2, 3, 4, 5, 6, 7, not 1, 2, 3, 4, 4, 5, 6).

Mr. Williams' elements instruction, however, should not have required the jury to find that he both "caused bodily injury to another" AND that his act "resulted in substantial bodily injury to another."[3] "Caused bodily injury to another" is an appropriate element for Assault, a class B misdemeanor, while an act that caused "substantial bodily injury to another" is an appropriate element for Assault, a class A misdemeanor. If the legislature had intended for either or both clauses to satisfy a single legal hybrid classification for Assault, it would not have set forth separate definitions for the class A circumstances or otherwise distinguished itself by definition from the class B circumstances. Counsel performed deficiently in not objecting to an assault definition that incorrectly intertwined the definitional provisions for both a class A and a class B in a sole

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[3] An alternative elements instruction (for a class B assault instruction) may have stated:

1. That on or about January 10, 2016, in Salt Lake County, Utah;
2. STEVEN WILLIAMS;
3. Intentionally, knowingly, or recklessly;
4. Committed an act, with unlawful force or violence, that caused bodily injury to another; and;
~~4. That resulted in substantial bodily injury to another; and,~~
5. Mr. Williams was a cohabitant of [Victim]; and,
6. Mr. Williams was not acting in self-defense.

lesser included option.

Moreover, the class A language in Instruction 28, "resulted in substantial bodily injury to another," R 348 (emphasis added), is additionally incorrect because the statute reads, "cause[d] substantial bodily injury to another." Utah Code Ann. § 76-5-102(3)(a) (emphasis added). The legal differences in the words, "resulted" versus "caused" are significant, particularly in the context of an assault allegation. Substantial bodily injury may be the result - but not the cause - of an incident. Or there may be a "caused" injury or a "resulting" injury. A jury deliberation on one meaning may have led to a different verdict than if it had been instructed on the other meaning.

Here, unlike the statutory requirement that burdened the prosecution with proving that he "cause[d] substantial bodily injury to another," Utah Code Ann. § 76-5-102(3)(a), under Instruction 28 the State only had to show that the act "resulted in substantial bodily injury to another[.]" R 348. The instruction was flawed. The causation language in Instruction 28 was internally inconsistent with the end result or the causation requirement. Counsel performed ineffectively in allowing such terminology to be left uncorrected in the instruction. Its lack of conformity with the plain language of the statute was obvious and prejudicial.

Due to the inclusion of an element applicable to a class A definition of assault (but not for a class B assault) and/or due to the inclusion of an element applicable to a class B definition of assault (but not for a class A assault), no proper instruction for either a class A or a class B existed for the jury to consider. The lesser included instruction for assault, as either a class A or a class B misdemeanor, was not a viable option for the jury to consider. If the jury had wanted to acquit Mr. Williams of the greater charge and to instead impose the lesser included option, the class A and the class B definitions of assault were illegally defined in Instruction 28. By the very definition(s) and essentially duplicative "cause" and "result" language, together with the dual "bodily injury" and "substantial bodily injury" language in the instructions, as a matter of law the lesser included option could not be selected.

Given the different definitions applicable to "bodily injury" and "substantial bodily injury," not to mention the governing authority which stresses that "[t]hese different categories of injury are not subject to analysis using ordinary meaning," *see State v. Ekstrom*, 2013 UT App 271, ¶ 16, the jury needed a single legally appropriate elements instruction and not two intermeshed conflicting instructions on Assault, a class A misdemeanor and/or Assault, a class B misdemeanor.

The Utah Legislature has also created three classifications of bodily

> injury. It has defined "bodily injury" as "physical pain, illness, or any impairment of physical condition," *id*. § 76-1-601(3); "substantial bodily injury" as "bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ," *id*. § 76-1-601(12); and "serious bodily injury" as "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death," *id*. § 76-1-601(11). These different categories of injury are not subject to analysis using ordinary meaning. Rather, the Utah Legislature has assigned each a technical legal meaning that requires further explanation. Indeed, the Utah appellate courts have been asked repeatedly to clarify the injuries that fall within each classification.7 While a "bodily injury" constitutes the lowest tier in the injury scale, *see* Utah Code Ann. § 76-1-601(3), the term is used as part of the definition for both "substantial bodily injury," which itself is categorized, in part, as "bodily injury, not amounting to serious bodily injury," *id*. § 76-1-601(12), and "serious bodily injury," *id*. § 76-1-601(11).

State v. Ekstrom, 2013 UT App 271, ¶ 16 (citations omitted and footnote renumbered).[4] Counsel performed ineffectively in allowing such a flawed lesser

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[4] *See, e.g., State v. Smith*, 909 P.2d 236, 239, 244 (Utah 1995) (noting that victim of a sexual assault suffered substantial bodily injury when she was still bleeding two hours after the assault occurred and required surgery); *State v. Bloomfield*, 2003 UT App 3, ¶¶ 4, 17–18, 63 P.3d 110 (holding that victim suffered serious bodily injury when he had tennis shoe marks and "multiple bruises, scrapes, and contusions" on his head and face and lost consciousness and remained unconscious for several hours after being kicked and stomped in the head); *State v. Boone*, 820 P.2d 930, 937 (Utah Ct. App. 1991) (concluding that a reasonable jury could have found that victim suffered bodily injury when, after being hit in the mouth and face, he tasted blood in his mouth, his "lips were swollen, and there was a pinkish color around his teeth, making it evident that he had been bleeding"); *see also In re D.K.*, 2006 UT App 461, ¶¶ 9–11, 153

included instruction to be submitted to the jury. 2013 UT App 271, ¶ 15 ("trial counsel's performance may be deficient if counsel fails to object or otherwise act to remove the ambiguity of two jury instructions where, although individually correct as a matter of law, the jury instructions used together, with no explanation or clarification as to their applicability[,] created the potential for confusion and could have misled the jury.") (citation omitted).

B. Counsel Performed Ineffectively in Failing to Object to the Self-Defense Instruction

The definition for self-defense was improperly narrow, as Instruction 25 limited self-defense to situations "necessary to prevent death or serious bodily injury." R 343. For self-defense, the jury was told:

> You have heard evidence in this case that the defendant is claiming self-defense. Regarding self-defense, you are instructed that a person is justified in using force likely to cause serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person.
>
> A person is not justified in using force in self-defense if:
>
> 1. He initially provokes the use of force against him with the intent

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P.3d 736 (collecting cases addressing the various levels of injury).

State v. Ekstrom, 2013 UT App 271, ¶ 16 n 7 (the above text, which was footnoted here as note 4 in Mr. Williams' brief, was excerpted from footnote 7 of the Ekstrom opinion.

to use force in self-defense as an excuse to inflict bodily harm upon the other person; or

2. He was the initial aggressor; or

3. He was engaged in a combat by agreement, unless he or she withdraws from the encounter and effectively communicates to the other person the intent to withdraw and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

The reasonableness of a belief that a person is justified in using force in self-defense is an objective standard and must be determined from the viewpoint of a reasonable person acting under the then existing circumstances. That is, only to the extent necessary to defend oneself or a third person from the imminent use of unlawful force.

In determining imminence or reasonableness of acts claimed to be in self-defense, you may consider any of, but are not limited to, the following factors:

a) the nature of the danger;
b) the immediacy of the danger;
c) the probability that the unlawful force would result in death or serious bodily injury;
d) the other's prior violent acts or violent propensities; and any patterns of abuse or violence in the parties' relationship

R 343 (emphasis added).

Contrary to the justified circumstances listed under Instruction 25, the statutory justified circumstances have a broader application than *only* situations involving death or serious bodily injury. Self-defense also applies to other circumstances: “A person is justified in threatening or using force against another

when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force." Utah Code Ann. 76-2-402(1)(a). Under the above statutory definition, there is no "death or serious bodily injury" requirement necessary for self-defense to apply to the lesser included offense of a class A assault or a class B assault. Utah Code Ann. 76-2-402(1)(a) and (4)(a).

By narrowly defining the application of self-defense to situations only involving "death or serious bodily injury," Instruction 25, which cross-referenced Instructions 21, 25a, 28 as well as being impactful on the other accompanying instructions (e.g. Commission of Domestic Violence in the Presence of a Child, Counts 2-5, and the lesser included versions), set forth an improper statutory definition that the jury had to follow, yet couldn't apply if it had wanted to. Specifically, the jury could not apply self-defense to the lesser included offense of Assault, see Instruction 28, R 347, nor to the lesser included offenses of Commission of Domestic Violence in the Presence of a Child. See Instructions 34, 35, 36, 37, 38; R 353, 354, 355, 356, 357.

C. Counsel's Failure To Include A Lawful And Properly Worded Instruction Impacted the Jury's Consideration of the Lesser Included Instructions

In multiple instructions to the jury, the trial court told the jury that a lesser

included offense of a charge need not be decided either before or after the primary charge from the Information, but that both the greater and lesser offense should be considered. For example:

> Count 1 charges Mr. Williams with Aggravated Assault. Assault is a lesser included offense of that charge. As you deliberate, you must determine whether Mr. Williams is guilty of Aggravated Assault, Assault, or not guilty of either offense. The law does not require you to make these determinations in any particular order. However, you cannot find Mr. Williams guilty of both Aggravated Assault and Assault. In other words, you can only return one verdict on count 1: guilty of Aggravated Assault, guilty of Assault, or not guilty of either offense.

See R 346 (emphasis added); *accord* R 354 (identical language including, "The law does not require you to make these determinations in any particular order," was repeated for Instructions 35, 36, 37 & 38; R 354-57; the lesser included offenses for Counts 2-5, Commission of Domestic Violence in the Presence of a Child). Such an instruction, which did "not require you [the jury] to make these determinations in any particular order," was an instruction that the jury was expected to follow, yet it could not do so. *Accord State v. Shumway*, 2002 UT 124, ¶5, 63 P.3d 94. ("the trial court is not to mandate a specific order of deliberation to the jury concerning lesser included offenses; rather, such an instruction should be given by way of suggestion and recommendation"); *Shumway*, 2002 UT 124, at ¶ 6 (emphasis added) ("the jury should have been allowed to

consider [lesser included offenses] *even if they determined* that all the elements of murder had been proved"); *id*. (citation omitted) ("[I]t was theoretically possible that the jury could have found that every necessary element for murder had been satisfied and yet that manslaughter was the crime committed if the jury found that the killing was committed under the [application of the law and facts for the lesser included offense]"); *compare State v. Sellers*, 2011 UT App 38, ¶21 ("The fact that other evidence tended to negate the [lesser included offense application] . . . does not render the defense inapplicable once the minimal showing required to justify the instruction has been made; rather that decision is for the jury").

Because the instructions allowed the jury to decide a lesser offense before the greater charge (or visa-versa), the lesser offense instruction had to be properly worded and in line with the corresponding statute. It wasn't. The lesser included instruction on Assault, as either a class B or a class A misdemeanor, misstated the plain language of the assault statute. While assault was a listed option, the flawed and improperly worded elements made it a legally unavailable option as a lesser included classification.

"The general rule is that an accurate instruction upon the basic elements of an offense is essential, [and] failure to provide such an instruction is reversible error that can never be considered harmless." State v. Pearson, 1999 Ut App 220, 12, 985

P.2d 919. Parties are "entitled to a presentation of the case to the jury under instructions that clearly, concisely and accurately state the issues and the law applicable thereto so that the jury will understand its duties." Nielsen v. Pioneer Valley Hosp., 830 P.2d 270, 274-75 (Utah 1992).

D. On Appeal, Since We Cannot Say How a Jury Might Have Decided An Issue If They Had Been Properly Instructed, A New Trial Is Necessary

Appellate opinions have acknowledged the difficulty in knowing how the erroneously worded instruction may have affected the jury's fact-finding determinations. *Cf. United States v. Wacker*, 72 F.3d 1453, 1464-65 (10th Cir. 1995) (while the "evidence . . . was sufficient to support a conviction for use of a firearm under our then-existing standard . . . we cannot say how a jury might decide this issue if properly instructed under the law as defined by [the recent supreme court decision]"); *United States v. Spring*, 80 F.3d 1450, 1465 (10th Cir. 1996) (despite "[t]he government argu[ment that] the evidence 'carrying' the weapon. . . ," the appellate opinion acknowledged, "we cannot say how a jury might decide this issue if properly instructed under the law as defined by [the recently issued supreme court decision on the definition of use or carry]"); *Rosemond v. United States*, 572 U.S. 65, 86 n.2 (2014) ("even if the jury could have found that Rosemond himself fired the gun," "a conviction based on a general verdict is subject to challenge if the jury

was instructed on alternative theories of guilt and may have relied on an invalid one" (internal quotation marks omitted)).

Similarly, in this case, it is impossible to do anything but speculate as to whether the jury would have opted to convict Defendant of the lesser-included offense if it had been properly instructed on its elements. The choice was not a choice if the lesser included instruction could not have been lawfully selected. Reversal is therefore warranted.

> III. Defense counsel performed deficiently when they failed to object to erroneous jury instructions regarding commission of domestic violence in the presence of a child.

The template for a Model Utah Jury Instructions ("MUJI") lists, as part of an elements instruction, the inclusion of a potential defense, which the prosecution must prove does not apply. For example, MUJI CR301 "Elements" instruction states:

> (DEFENDANT'S NAME) is charged [in Count ___] with committing (CRIME) [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:
>
> 1. (DEFENDANT'S NAME);
>
> 2. ELEMENT ONE . . .;
>
> 3. ELEMENT TWO . . .;

4. [That the defense of _____ does not apply.]

See MUJI 2d CR301; *accord* MUJI 2d CR501 ("As a general rule, if the evidence supports an affirmative defense, the State "has the burden to prove beyond a reasonable doubt" that the defense does not apply). *State v. Knoll*, 712 P.2d 211, 214-15 (Utah 1985); *State v. Low*, 2008 UT 58, 45, 192 P.3d 867 (stating that murder instruction was in error "because it lacked the necessary element that the State show the absence of the affirmative defense[]."); *State v. Swenson*, 838 P.2d 1136, 1138 (Utah 1992) (stating that "a long line of Utah cases imposes on the prosecution the burden to disprove the existence of affirmative defenses beyond a reasonable doubt.")

Consistent with the above MUJI elements instruction, the Aggravated Assault elements instruction required the State to prove that "[t]he defendant did not act in self-defense."

> The defendant, Steven Williams, is charged in Count 1 with Aggravated Assault, domestic violence, on or about January 10, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:
>
> 1. The defendant, Steven Williams,
>
> 2. Acting knowingly, intentionally, or recklessly,
>
> 3. Committed an act, with unlawful force or violence, that caused bodily injury to Audrey Wallace or created a substantial risk of bodily injury to

Audrey Wallace;

4. Using other means or force likely to produce death or serious bodily injury;

5. Which resulted in serious bodily injury to Audrey Wallace; and

6. The defendant and Audrey Wallace are cohabitants; and

7. The defendant did not act in self-defense.

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

R 339 (emphasis added). The State's burden to disprove that Mr. William had acted in self-defense was a clearly stated element (#7) in the Aggravated Assault elements instruction. With juries bound to follow the law in the instructions, the message received was that the prosecution must prove that "the defendant did not act in self-defense." R 339, 347.

However, inconsistent with the above MUJI elements instruction and conflicting with both the Aggravated Assault elements instruction, R 339, and the Assault elements instruction, R 347 (the Aggravated Assault and the Assault elements instructions both required the prosecution to prove that "Mr. Williams was not acting in self-defense"), the instructions for Commission of Domestic Violence

in the Presence of a Child inexplicably and erroneously omitted the requirement that "Mr. Williams was not acting in self-defense."

The now different message for jury instructions 29, 30, 31, 32, 34, see R 348-351; 353-357 (which corresponded to Counts 2, 3, 4, and 5 and the lesser included offenses for Counts 2, 3, 4, and 5) was that the State did *not* have to prove that Mr. Williams was not acting in self-defense. As recognized by the trial court, the State, and the defense - all of whom had already included the self-defense element in the Aggravated Assault and the Assault elements instructions, see R 339, 347, defense counsel performed ineffectively by then excluding the identical self-defense element in the instructions for Commission of Domestic Violence in the Presence of a Child.

> The defendant, STEVEN WILLIAMS, is charged in Count 2 of the Information with Commission of Domestic Violence in the Presence of a Child, alleged to have occurred on or about January 10, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:
>
> 1. That on or about January 10, 2016, in Salt Lake County, Utah;
>
> 2. STEVEN WILLIAMS;
>
> 3. Did one of the following:
>
> a. Intentionally caused serious bodily injury to a cohabitant; or,
> b. Intentionally, knowingly, or recklessly used other means or force likely to produce death or serious bodily injury against a cohabitant;

4. In the presence of a child, "S.W." (male).

> After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find Mr. Williams GUILTY. On the other hand, if you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find Mr. Williams NOT GUILTY

R 348 (the elements section of Counts 2, 3, 4, and 5 were identical [i.e. the elements instruction did not require the prosecution to disprove that Mr. Williams had acted in self-defense], although the name for the child listed in Counts 2, 3, 4, and 5 were different).

Noteworthy in this case is its uniqueness because the jury was instructed that lack of self-defense was an element in two of the charges (aggravated assault and assault) but not others (domestic violence in the presence of a child). An improper way for the jury to reconcile this inconsistency would be to conclude that self-defense did not apply to the charges of domestic violence in the presence of a child, which is not an accurate statement of the law. See Utah Code Ann. § 76-2-402 (setting out Utah's self-defense law and its application to instances when a person is justified in using force); id. § 76-5-109.1 (setting out Utah's domestic violence in the presence of a child law and including among the elements the use of force); *see supra* Point II & III.

Jury Instruction 29 through Jury Instruction 32 set out the elements of the

crime of Domestic Violence in the Presence of a Child. R.348-51. But none of these instructions included as an element that Defendant did not act in self-defense. In contrast, the elements instructions for both Aggravated Assault and the lesser included offense of Assault included lack of self- defense as an element. R.339, 347.

Given the conflicting nature of the assault instructions and the domestic violence in the presence of a child instructions, defense counsel should have objected in order to maintain the consistency of the involved wording. *See State v. Hutchings*, 2012 UT 50, 23, 285 P.3d 1183 ("although neither instruction was incorrect as a matter of law, using them together with no explanation or clarification as to their applicability created the potential for confusion and could have misled the jury."). Counsel performed ineffectively in failing to do so.

Point IV. Counsel Performed Ineffectively by Not Objecting to a Number of Evidentiary Matters

A. Defense counsel failed to object to hearsay evidence.

The first officer at trial testified without objection that he was told by almost everyone on scene that the reason why the incident took place "was [Audrey Wallace] had discovered that the suspect in this case was cheating on her and she found out. She said that she found out and confronted him about it and I think even text the other girl and that's what made him upset, and that's the reason why the

incident took place." R.834. When asked how Ms. Wallace got injured, the Officer then went on to testify, still with no objection, that he "was told that he-I believe this is verbatim too, 'cold-cock punched her in the face.'" R.835. These statements are textbook hearsay, as they were "statement[s] that: (1) the declarant does not make while testifying at the current trial or asserted in the statement." Utah R. Evid. 801. And they fit within no exception to the rule against hearsay. *See generally id.* Utah Rule of Evid. 803, 804. Such statements were therefore inadmissible. *See id.* Utah Rule of Evid. 802.

Problematic here is that other testimony from different witnesses were disjointed, contradictory, and hard to pin down. By allowing such an influential witness like an officer to restate and refine that earlier testimony, defense counsel effectively removed the strongest evidence in Mr. Williams' favor- the doubts created by each of the witnesses with firsthand knowledge of the events of that evening. In this way, defense counsel's failure to object to the first officer's hearsay testimony prejudiced Steve Williams.

B. Defense counsel failed to object to improper character evidence.

During Steve Williams' daughter's testimony, she described her father as manipulative. R.689, 719. Defense counsel made no attempt to object to this

testimony or otherwise strike it from the record. See R.689, 719. After failing to object, defense counsel's only handling of this testimony was an open-ended question on cross-examination regarding whether Daughter's mother had ever used the word "manipulated" to describe Defendant's behavior-a particularly ineffective approach, seeing as Daughter simply answered, "No." R.720. By not objecting to the improper statements, such mud-slinging went unchallenged and tainted the jury.

The rule against character evidence is clear. "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait." Utah R. Evid. 404(a)(1). "Manipulative" is a character trait. *See State v. Epling*, 2011 UT App 229, 14, 262 P.3d 440 (in a sentencing context, when explaining that the sentencing judge considered the defendant's character, mentioning that the defendant was "manipulative"); *In re C.J.F.T. v. J.W.*, No. 981093-CA, 1999 WL 33244660, at *3 (Utah Ct. App. Feb. 11, 1999) (describing "the abusive and manipulative character of" the father in an adoption proceeding). The manipulative terminology was further suggested to show that he had her falsely reporting that he had acted in self-defense, R.689, 719, when his trial defense had been consistent.

A large part of the defense theory was Steve Williams' consistency in his version of events. As defense counsel explained during closing argument, "His statements to everybody from the beginning was that this was self-defense. That's what he said to the kids. He explained it to his mom in a little more detail. R.1002. Yet before defense counsel was able to present this argument to the jury, it had been undermined by the character evidence Daughter testified to. Another critical aspect of the defense was that the statements written at the time of the incident should be believed over the contradictory testimony given at trial. See R.1003. But, again, allowing Daughter to testify that Defendant "has his own way of manipulating people" undercut this argument. R.689.

Said another way, there was no conceivable tactical basis for counsel to allow this evidence. *Cf. State v. Clark*, 2004 UT 25, 6, 89 P.3d 162 (explaining that to succeed on a claim of ineffective assistance of counsel, a defendant must persuade the court that there was no conceivable tactical basis for trial counsel's actions). Furthermore, the very factors that demonstrate why allowing this character evidence was problematic also demonstrate the prejudice to Mr. Williams.

CONCLUSION

Steve Williams' convictions stem from defense counsel's deficient and prejudicial performance. By not objecting to integral testimony and by allowing the jury to be erroneously instructed on the law, the prior attorney rendered ineffective assistance of counsel. His convictions should be reversed.

SUBMITTED this 6th day of December, 2018.

/s/ Ron Fujino
RON FUJINO
Attorney for Mr. Williams

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2018, a true copy of the foregoing BRIEF OF APPELLANT was served by the method indicated below, to the following:

Clerk of Court Utah Court of Appeals 450 S. State Street, 5th Floor Salt Lake City, Utah 84114	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile (x) Electronic Transmittal
Sean D. Reyes Utah Attorney General 160 East 300 South, 6th Floor P.O. Box 140854 Salt Lake City, UT 84114-0854 Telephone: (801) 366-0180	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile (x) Electronic Transmittal

/s/ Ron Fujino

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the foregoing brief complies with the type-volume limitation set forth in rule 24(g) of the Utah Rules of Appellate Procedure, requiring principal briefs to contain no more than 14,000 words or 30 pages. The brief, exclusive of cover page, table of contents, table of authorities, certificates of counsel, and addendum, contains 10,690 words

This brief also complies with rule 21(g) of the Utah Rules of Appellate Procedure, as it does not contain other than public information and records.

/s/ Ron Fujino

ADDENDUM

JURY INSTRUCTIONS (CLOSING)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	JURY INSTRUCTIONS TO BE GIVEN AT CLOSE OF EVIDENCE
Plaintiff,	:	
		Case No. 161900557
vs.	:	
STEVEN WILLIAMS,	:	Judge Richard D. McKelvie
Defendant.	:	

The jury is hereby charged with the law that applies to this case in the following instructions, numbered (1) through (50), inclusive.

Dated this 20 day of January, 2017.

Richard D. McKelvie
DISTRICT COURT JUDGE

INSTRUCTION NO. 1

Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The prosecutor will go first, then the defense. Because the prosecution has the burden of proof, the prosecutor may give a rebuttal.

Finally, you will go to the jury room to discuss and decide the case.

INSTRUCTION NO. 2

You have two main duties as jurors.

The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine.

The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction.

Perform your duty fairly. Do not let bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

INSTRUCTION NO. 3

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

INSTRUCTION NO. 4

During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.

However,

- if I sustained an objection,
- if I did not accept evidence offered by one side or the other, or
- if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

INSTRUCTION NO. 5

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

INSTRUCTION NO. 6

You must base your decision only on the evidence that you saw and heard here in court. Evidence includes:

- what the witnesses said while they were testifying under oath;
- any exhibits admitted into evidence; and
- any facts to which the parties have stipulated, that is to say, facts to which they have agreed.

Nothing else is evidence. The lawyer's statements and arguments are not evidence. Their objections are not evidence. My legal rulings and comments, if any, are not evidence. In reaching a verdict, consider all the evidence as I have defined it here, and nothing else. You may also draw all reasonable inferences from that evidence.

INSTRUCTION NO. 7

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he/she looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that he/she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

Before you can find the defendant guilty of any charge, there must be enough evidence–direct, circumstantial, or some of both–to convince you of the defendant's guilt beyond a reasonable doubt. It is up to you to decide.

INSTRUCTION NO. 8

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony.

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?
- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?
- Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important. You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

INSTRUCTION NO. 9

There are two types of witnesses: fact witnesses and expert witnesses. Usually a fact witness can testify only about facts that he/she can see, hear, touch, taste or smell. An expert witness has scientific, technical or other special knowledge that allows the witness to give an opinion. An expert's knowledge can come from training, education, experience or skill. Experts can testify about facts if they have personal knowledge of those facts, and they can give their opinions in their area of expertise.

You may have to weigh one expert's opinion against another's. In weighing the opinions of experts, you may look at their qualifications, the reasoning process the experts used, and the overall credibility of their testimony. You may also look at things like bias, consistency, and reputation.

Use your common sense in evaluating all witnesses, including expert witnesses. You do not have to accept an expert's opinion. You may accept it all, reject it all, or accept part and reject part. Give it whatever weight you think it deserves.

INSTRUCTION NO. 10

You have heard the testimony of a law enforcement officer. The fact that a witness is employed in law enforcement does not mean that his or her testimony deserves more or less consideration than that of any other witness. It is up to you to give any witness's testimony whatever weight you think it deserves.

INSTRUCTION NO. 11

Age of Witness

You have heard testimony of a young witness. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. The critical consideration is not the witness's age, but whether the witness understands the difference between what is true and what is not true, and understands the duty to tell the truth.

INSTRUCTION NO. 12

The defendant testified at trial. Another instruction mentions some things for you to think about in weighing testimony. Consider those same things in weighing the defendant's testimony. Don't reject the defendant's testimony merely because he or she is accused of a crime.

INSTRUCTION NO. 12

A person accused of a crime may choose whether or not to testify. In this case the defendant chose not to testify. Do not hold that choice against the defendant. Do not try to guess why the defendant chose not to testify. Do not consider it in your deliberations. Decide the case only on the basis of the evidence. The defendant does not have to prove that he or she is not guilty. The prosecution must prove the defendant's guilt beyond a reasonable doubt.

INSTRUCTION NO. 13

Remember, the fact that the defendant is charged with a crime is not evidence of guilt. The law presumes that the defendant is not guilty of the crimes charged. This presumption persists unless the prosecution's evidence convinces you beyond a reasonable doubt that the defendant is guilty.

INSTRUCTION NO. 14

As I instructed you before, proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If the evidence leaves you firmly convinced that the defendant is guilty of the crime charged, you must find the defendant "guilty." On the other hand, if there is a real possibility that he/she is not guilty, you must give the defendant the benefit of the doubt and return a verdict of "not guilty."

INSTRUCTION NO. 15

A person cannot be found guilty of a criminal offense unless that person's conduct is prohibited by law, and at the time the conduct occurred, the defendant demonstrated a particular mental state specified by law.

"Conduct" can mean both an "act" or the failure to act when the law requires a person to act. An "act" is a voluntary movement of the body and it can include speech.

As to the "mental state" requirement, the prosecution must prove that at the time the defendant acted, he/she did so with a particular mental state as to each element of the crime. For each offense, the law defines what kind of mental state the defendant had to have, if any. For some crimes the defendant must have acted "intentionally" or "knowingly." For other crimes it is enough that the defendant acted "recklessly," with "criminal negligence," or with some other specified mental state.

INSTRUCTION NO. 16

The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state.

Ordinarily, there is no way that a defendant's mental state can be proved directly, because no one can tell what another person is thinking.

A defendant's mental state can be proved indirectly from the surrounding facts and circumstances. This includes things like what the defendant said, what the defendant did, and any other evidence that shows what was in the defendant's mind.

INSTRUCTION NO. 17

A defendant's "mental state" is not the same as "motive." Motive is why a person does something. Motive is not an element of the crimes charged in this case. As a result, the prosecutor does not have to prove why the defendant acted (or failed to act).

However, a motive or lack of motive may help you determine if the defendant did what he/she is charged with doing. It may also help you determine what his/her mental state was at the time.

INSTRUCTION NO. 18

Definition of "Intentionally," "Knowingly," and "Recklessly"

A person acts "intentionally" when it is his or her conscious objective to engage in certain conduct.

A person acts "knowingly" when the person is aware of the nature of his or her conduct, or is aware of the particular circumstances surrounding his or her conduct.

A person acts "recklessly" with respect to circumstances surrounding his or her conduct, or the result of his or her conduct, when they are aware of, but consciously disregard, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

INSTRUCTION NO. 19

Unless these instructions give a definition, you should give all words their usual and ordinary meanings.

INSTRUCTION NO. 20

Charge Summary

You are instructed that the defendant~~, Jared Burton~~, Steven Williams is charged by the Information, which has been duly filed, with

Count I: Aggravated Assault (Domestic Violence)

Count II: Commission of Domestic Violence in the Presence of a Child

Count III: Commission of Domestic Violence in the Presence of a Child

Count IV: Commission of Domestic Violence in the Presence of a Child

Count V: Commission of Domestic Violence in the Presence of a Child

Count VI: Driving Under the Influence of Alcohol and/or Drugs

Count VII: Interference with Arresting Officer

The charging document (known as the Information) alleges that the defendant committed the offense in Salt Lake County, Utah on or about: January 10, 2016.

INSTRUCTION NO. 21

Aggravated Assault (Domestic Violence)

The defendant, Steven Williams, is charged in Count 1 with Aggravated Assault, domestic violence, on or about January 10, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. The defendant, Steven Williams,
2. Acting knowingly, intentionally, or recklessly,
3. Committed an act, with unlawful force or violence, that caused bodily injury to Audrey Wallace or created a substantial risk of bodily injury to Audrey Wallace;
4. Using other means or force likely to produce death or serious bodily injury;
5. Which resulted in serious bodily injury to Audrey Wallace; and
6. The defendant and Audrey Wallace are cohabitants; and
7. The defendant did not act in self-defense.

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

INSTRUCTION NO. 22

Bodily Injury Definitions

Under Utah law, "bodily injury" means physical pain, illness, or any impairment of physical condition.

"Substantial bodily injury" means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.

"Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protacted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

INSTRUCTION NO. 23

Cohabitant Definition

Under Utah law, "cohabitant" means an emancipated person or a person who is 16 years of age or older who:

a. is or was a spouse of the other party;

b. is or was living as if a spouse of the other party;

c. is related by blood or marriage to the other party;

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

e. is the biological parent of the other party's unborn child; or

f. resides or has resided in the same residence as the other party.

INSTRUCTION NO. 24

Domestic Violence Definition

"Domestic violence" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another.

INSTRUCTION NO. 25

Self Defense

You have heard evidence in this case that the defendant is claiming self-defense. Regarding self-defense, you are instructed that a person is justified in using force likely to cause serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person.

A person is not justified in using force in self-defense if:

1. He initially provokes the use of force against him with the intent to use force in self-defense as an excuse to inflict bodily harm upon the other person; or

2. He was the initial aggressor; or

3. He was engaged in a combat by agreement, unless he or she withdraws from the encounter and effectively communicates to the other person the intent to withdraw and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

The reasonableness of a belief that a person is justified in using force in self-defense is an objective standard and must be determined from the viewpoint of a reasonable person acting under the then existing circumstances. That is, only to the extent necessary to defend oneself or a third person from the imminent use of unlawful force.

In determining imminence or reasonableness of acts claimed to be in self-defense, you may consider any of, but are not limited to, the following factors:

a) the nature of the danger;

b) the immediacy of the danger;

c) the probability that the unlawful force would result in death or serious bodily injury;

d) the other's prior violent acts or violent propensities; and
any patterns of abuse or violence in the parties' relationship.

INSTRUCTION NO 25 a

You are instructed that the Defendant has raised the affirmative defense of self-defense in this case. The laws of Utah do not require a defendant to establish self-defense by a preponderance or greater weight of the evidence. Once the issue of self-defense is raised, whether by the prosecution's witnesses or those of the defense, the prosecution has the burden to prove beyond a reasonable doubt that the act was not done in self-defense. The defendant has no particular burden of proof but is entitled to be found not guilty if there is any basis in the evidence from either side sufficient to create a reasonable doubt as to whether he acted in self-defense.

INSTRUCTION NO. 26

No Duty to Retreat

A person does not have a duty to retreat from force or threatened force in a place where that person has lawfully entered or remained.

INSTRUCTION NO. 27

Lesser Included Offense of Assault

Count 1 charges Mr. Williams with Aggravated Assault. Assault is a lesser included offense of that charge. As you deliberate, you must determine whether Mr. Williams is guilty of Aggravated Assault, guilty of Assault, or not guilty of either offense. The law does not require you to make these determinations in any particular order. However, you cannot find Mr. Williams guilty of both Aggravated Assault and Assault. In other words, you can only return one verdict on count 1: guilty of Aggravated Assault, guilty of Assault, or not guilty of either offense.

The elements for Aggravated Assault are set forth in Instruction 21.

The elements for the lesser included offense of Assault are set forth in Instruction 28.

INSTRUCTION NO. 28

Elements of Lesser Included Offense of Assault, Domestic Violence

You cannot convict Mr. Williams of the lesser included offense of Assault, domestic violence, unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That on or about January 10, 2016, in Salt Lake County, Utah;
2. STEVEN WILLIAMS;
3. Intentionally, knowingly, or recklessly;
4. Committed an act, with unlawful force or violence, that caused bodily injury to another; and,
4. That resulted in substantial bodily injury to another; and,
5. Mr. Williams was a cohabitant of AUDREY WALLACE; and,
6. Mr. Williams was not acting in self-defense.

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

INSTRUCTION NO. 29

COUNT 2: Commission of Domestic Violence in the Presence of a Child

The defendant, STEVEN WILLIAMS, is charged in Count 2 of the Information with Commission of Domestic Violence in the Presence of a Child, alleged to have occurred on or about January 10, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That on or about January 10, 2016, in Salt Lake County, Utah;
2. STEVEN WILLIAMS;
3. Did one of the following:
    a. Intentionally caused serious bodily injury to a cohabitant; or,
    b. Intentionally, knowingly, or recklessly used other means or force likely to produce death or serious bodily injury against a cohabitant;
4. In the presence of a child, "S.W." (male).

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

INSTRUCTION NO. 30

COUNT 3: Commission of Domestic Violence in the Presence of a Child

The defendant, STEVEN WILLIAMS, is charged in Count 3 of the Information with Commission of Domestic Violence in the Presence of a Child, alleged to have occurred on or about January 10, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That on or about January 10, 2016, in Salt Lake County, Utah;
2. STEVEN WILLIAMS;
3. Did one of the following:
    a. Intentionally caused serious bodily injury to a cohabitant; or,
    b. Intentionally, knowingly, or recklessly used other means or force likely to produce death or serious bodily injury against a cohabitant;
4. In the presence of a child, "S.W." (female).

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

INSTRUCTION NO. 31

COUNT 4: Commission of Domestic Violence in the Presence of a Child

The defendant, STEVEN WILLIAMS, is charged in Count 4 of the Information with Commission of Domestic Violence in the Presence of a Child, alleged to have occurred on or about January 10, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That on or about January 10, 2016, in Salt Lake County, Utah;
2. STEVEN WILLIAMS;
3. Did one of the following:
    a. Intentionally caused serious bodily injury to a cohabitant; or,
    b. Intentionally, knowingly, or recklessly used other means or force likely to produce death or serious bodily injury against a cohabitant;
4. In the presence of a child, "T.J."

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

INSTRUCTION NO. 32

COUNT 5: Commission of Domestic Violence in the Presence of a Child

The defendant, STEVEN WILLIAMS, is charged in Count 5 of the Information with Commission of Domestic Violence in the Presence of a Child, alleged to have occurred on or about January 10, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That on or about January 10, 2016, in Salt Lake County, Utah;
2. STEVEN WILLIAMS;
3. Did one of the following:
    a. Intentionally caused serious bodily injury to a cohabitant; or,
    b. Intentionally, knowingly, or recklessly used other means or force likely to produce death or serious bodily injury against a cohabitant;
4. In the presence of a child, "A.M."

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

INSTRUCTION NO. 33

Definition of "in the presence of a child," "child," and "present"

"In the presence of a child" means in the physical presence of a child or, having knowledge that a child is present and may hear or see an act of domestic violence.

"Child" means a human being who is under the age of 18 years old.

"Present" means being in view or at hand.

INSTRUCTION NO. 34

Elements of Lesser Included Offense of Commission of

Domestic Violence in the Presence of a Child

You cannot convict Mr. Williams of the lesser included offense of Commission of Domestic Violence in the Presence of a Child unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That on or about January 10, 2016, in Salt Lake County, Utah;
2. STEVEN WILLIAMS;
3. Committed an act of domestic violence;
4. In the presence of a child.

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

INSTRUCTION NO. 35

Lesser Included Offense of Commission of

Domestic Violence in the Presence of a Child

Count 2 charges Mr. Williams with Commission of Domestic Violence in the Presence of a Child. There is a lesser included offense of that charge. As you deliberate, you must determine whether Mr. Williams is guilty of Commission of Domestic Violence in the Presence of a Child as charged in Count 2, guilty of the lesser includes offense of Commission of Domestic Violence in the Presence of a Child, or not guilty of either offense. The law does not require you to make these determinations in any particular order. However, you cannot find Mr. Williams guilty of both Commission of Domestic Violence in the Presence of a Child as charged in Count 2 and the lesser included offense of Commission of Domestic Violence in the Presence of a Child. In other words, you can only return one verdict on Count 2: guilty of Commission of Domestic Violence in the Presence of a Child as charged, guilty of the lesser included offense of Commission of Domestic Violence in the Presence of a Child, or not guilty of either offense.

The elements for Commission of Domestic Violence in the Presence of a Child are set forth in Instruction 32.

The elements for the lesser included offense of Commission of Domestic Violence in the Presence of a Child are set forth in Instruction 34.

INSTRUCTION NO. 36

Lesser Included Offense of Commission of

Domestic Violence in the Presence of a Child

Count 3 charges Mr. Williams with Commission of Domestic Violence in the Presence of a Child. There is a lesser included offense of that charge. As you deliberate, you must determine whether Mr. Williams is guilty of Commission of Domestic Violence in the Presence of a Child as charged in Count 3, guilty of the lesser includes offense of Commission of Domestic Violence in the Presence of a Child, or not guilty of either offense. The law does not require you to make these determinations in any particular order. However, you cannot find Mr. Williams guilty of both Commission of Domestic Violence in the Presence of a Child as charged in Count 3 and the lesser included offense of Commission of Domestic Violence in the Presence of a Child. In other words, you can only return one verdict on Count 3: guilty of Commission of Domestic Violence in the Presence of a Child as charged, guilty of the lesser included offense of Commission of Domestic Violence in the Presence of a Child, or not guilty of either offense.

The elements for Commission of Domestic Violence in the Presence of a Child are set forth in Instruction 32.

The elements for the lesser offense of Commission of Domestic Violence in the Presence of a Child are set forth in Instruction 34.

INSTRUCTION NO. 37

Lesser Included Offense of Commission of

Domestic Violence in the Presence of a Child

Count 4 charges Mr. Williams with Commission of Domestic Violence in the Presence of a Child. There is a lesser included offense of that charge. As you deliberate, you must determine whether Mr. Williams is guilty of Commission of Domestic Violence in the Presence of a Child as charged in Count 4, guilty of the lesser includes offense of Commission of Domestic Violence in the Presence of a Child, or not guilty of either offense. The law does not require you to make these determinations in any particular order. However, you cannot find Mr. Williams guilty of both Commission of Domestic Violence in the Presence of a Child as charged in Count 4 and the lesser included offense of Commission of Domestic Violence in the Presence of a Child. In other words, you can only return one verdict on Count 4: guilty of Commission of Domestic Violence in the Presence of a Child as charged, guilty of the lesser included offense of Commission of Domestic Violence in the Presence of a Child, or not guilty of either offense.

The elements for Commission of Domestic Violence in the Presence of a Child are set forth in Instruction 32.

The elements for the lesser offense of Commission of Domestic Violence in the Presence of a Child are set forth in Instruction 34.

INSTRUCTION NO. 38

Lesser Included Offense of Commission of

Domestic Violence in the Presence of a Child

Count 5 charges Mr. Williams with Commission of Domestic Violence in the Presence of a Child. There is a lesser included offense of that charge. As you deliberate, you must determine whether Mr. Williams is guilty of Commission of Domestic Violence in the Presence of a Child as charged in Count 5, guilty of the lesser includes offense of Commission of Domestic Violence in the Presence of a Child, or not guilty of either offense. The law does not require you to make these determinations in any particular order. However, you cannot find Mr. Williams guilty of both Commission of Domestic Violence in the Presence of a Child as charged in Count 5 and the lesser included offense of Commission of Domestic Violence in the Presence of a Child. In other words, you can only return one verdict on Count 5: guilty of Commission of Domestic Violence in the Presence of a Child as charged, guilty of the lesser included offense of Commission of Domestic Violence in the Presence of a Child, or not guilty of either offense.

The elements for Commission of Domestic Violence in the Presence of a Child are set forth in Instruction 32.

The elements for the lesser offense of Commission of Domestic Violence in the Presence of a Child are set forth in Instruction 34.

INSTRUCTION NO. 38a

Assault is a Predicate Offense

If, after considering all the evidence, you find Mr. Williams not guilty of Count 1: Aggravated Assault, domestic violence, you may not find him guilty of, as charged, Counts 2 through 5, Commission of Domestic Violence in the Presence of a Child.

If, after considering all the evidence, you find Mr. Williams not guilty of both Count 1: Aggravated Assault, domestic violence, AND the lesser included offense of Assault, domestic violence, you may not find him guilty of the lesser included offense of Counts 2 though 5, Domestic Violence in the Presence of a Child.

INSTRUCTION NO. 39

COUNT 6: Driving Under the Influence of Alcohol and/or Drugs

The defendant, STEVEN WILLIAMS, is charged in Count 5 of the Information with Driving Under the Influence of Alcohol and/or Drugs, alleged to have occurred on or about January 10, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That on or about January 10, 2016, in Salt Lake County, Utah;
2. STEVEN WILLIAMS;
3. Operated or was in actual physical control of a vehicle;
4. When he was under the influence of alcohol, any drug, or the combined influence of alcohol and any drug;
5. To a degree that renders him incapable of safely operating a vehicle;
6. Had a passenger under 16 years of age in the vehicle at the time of the offense.

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

INSTRUCTION NO. 46

Definition of "Actual Physical Control"

In order to find the defendant guilty of being in actual physical control of a vehicle while under the influence of alcohol, you must be convinced beyond a reasonable doubt that he was in actual physical control of a motor vehicle. "Actual physical control" means the defendant was in a circumstance in which he was either exercising or was in a position to exercise "bodily restraint of, directing influence of, domination or regulation over a vehicle."

Relevant factors in determining whether or not a person is in actual physical control of a vehicle include, but are not limited to, the following:

1. Whether or not the defendant was in the driver's seat of the vehicle;
2. Whether or not the keys were in the ignition;
3. Whether or not the engine was running;
4. Whether or not the defendant was the sole occupant of the vehicle;
5. How the vehicle got to where it was found, or, in other words, who drove the vehicle to its location;
6. The defendant's apparent ability to start and move the vehicle;
7. Whether the defendant was asleep or awake when discovered; and
8. The position of the vehicle.

Therefore, in determining whether or not the defendant was in actual physical control of a vehicle on the date in question, you must look to the totality of the circumstances, taking into account the foregoing factors and all other relevant evidence. A person who is in a vehicle in any other posture than as a passenger or a passive occupant, regardless of the mechanical condition of the vehicle and regardless of the placement of the vehicle, may be found to be in actual physical control of the vehicle. On the other hand, if you determine that the defendant was neither driving nor in actual physical control of a vehicle on the date in question, you must find him NOT GUILTY.

INSTRUCTION NO. 41

"Under the Influence" – Factors

In determining whether Mr. Williams was under the influence of alcohol and/or any drug to a degree that rendered him incapable of safely operating a vehicle, relevant factors include, but are not limited to, the following:

- The defendant's driving pattern, if any
- The defendant's physical appearance
- The smell of alcohol on the defendant, if any
- The defendant's coordination
- The defendant's judgment
- The defendant's actions before or after driving
- Whether the defendant took field sobriety tests and, if so, his performance on them

INSTRUCTION NO. 42

COUNT 7: Interference with Arresting Officer

The defendant, STEVEN WILLIAMS, is charged in Count 7 of the Information with Interference with an Arresting Officer, alleged to have occurred on or about January 10, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That on or about January 10, 2016, in Salt Lake County, Utah;
2. STEVEN WILLIAMS;
3. Had knowledge, or by the exercise of reasonable care should have had knowledge;
4. That a peace officer was seeking to lawfully arrest or detain him; and
5. Intentionally, knowingly, or recklessly;
6. Interfered with the arrest or detention by:
   a. using force or any weapon;
   b. refusing to perform any act required by lawful order which was necessary to effect the arrest or detention, made by a peace officer involved in the arrest or detention; or
   c. refusing to refrain from performing any act that would impede the arrest or detention.

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

INSTRUCTION NO. 43

Flight from Scene

Evidence was introduced at trial that the defendant may have fled or attempted to flee from the crime scene. This evidence alone is not enough to establish guilt. However, if you believe that evidence you may consider it along with the rest of the evidence in reaching a verdict. It's up to you to decide how much weight to give that evidence.

Keep in mind that there may be reasons for flight that could be fully consistent with innocence. Even if you choose to infer from the evidence that the defendant had a "guilty conscience," that does not necessarily mean he is guilty of the crime charged.

INSTRUCTION NO. 44

Separate Consideration of Multiple Crimes.

Mr. Williams has been charged with more than one crime. It is your duty to consider each charge separately. For each crime charged, consider all of the evidence related to that charge. Decide whether the prosecution has presented proof beyond a reasonable doubt that Mr. Williams is guilty of that particular crime.

INSTRUCTION NO. 45

In making your decision, do not consider what punishment could result from a verdict of guilty. Your duty is to decide if the defendant is guilty beyond a reasonable doubt. Punishment is not relevant to whether the defendant is guilty or not guilty.

INSTRUCTION NO. 46

You may take the following things with you when you go into the jury room to discuss the case: (a) all exhibits admitted into evidence; (b) your notes, if any; (c) your copy of these instructions; and (d) the verdict form.

INSTRUCTION NO. 47

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty." In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.

INSTRUCTION NO. 48

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson's duties are (a) to keep order and allow everyone a chance to speak; (b) to represent the jury in any communications you make; and (c) to sign the verdict form and bring it back into the courtroom. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form on behalf of the entire jury.

For each offense, the verdict form will have two blanks—one for "guilty" and the other for "not guilty." The foreperson will fill in the appropriate blank to reflect the jury's unanimous decision. In filling out the form, the foreperson needs to make sure that only one blank is marked for each charge.

INSTRUCTION NO. 49

If you think you need more information or a clarification, write a note and give it to the bailiff. I will review it with the lawyers. We will answer your question whenever appropriate. However, these instructions should contain all the information you need to reach a verdict based upon the evidence.

INSTRUCTION NO. 50

When you have reached a verdict, the foreperson should date and sign the verdict form, and then notify the bailiff that you have reached a decision.