Case No. 20170277-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

STEVEN WILLIAMS,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for aggravated assault resulting in serious bodily injury, a second-degree felony; four counts of domestic violence in the presence of a child, all third-degree felonies; and interference with an arresting officer, a class B misdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Richard D. McKelvie presiding

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INTRODUCTION

Steven Williams and Victim lived together for two years, separated in 2015, then reconnected and started dating. After one date in 2016, Williams and his children joined Victim's family at her house to spend the night. Sometime during the following hours, Victim discovered that Williams was cheating on her and, after she confronted him, Williams got angry when his phone ended up in the fish tank. Matters escalated, until Williams struck Victim, knocking her to the ground. He then repeatedly hit her in the jaw with his fist, fracturing both sides of her jaw, shattering a small piece of bone beyond repair, breaking teeth, and severing a facial nerve. And he did it in front of four children ranging in age from 8 to 15.

Williams appealed his convictions for aggravated assault resulting in serious bodily injury and four counts of domestic violence in the presence of a child, arguing that his trial counsel was ineffective. First, he faults his counsel for not raising various objections to testimony from Victim's treating physician. He claims that counsel should have insisted on the State establishing on the record that the physician was qualified under rule 702, Utah Rules of Evidence, to testify as an expert. But he does not show that no reasonable counsel would have foregone an objection where reasonable counsel could have concluded without a motion that the witness met the requirements, that requiring further rule 702 foundation would add to the witness' credibility and persuasiveness, and that his testimony was potentially useful to the defense.

Williams faults counsel for not objecting when the State did not produce the physician's curriculum vitae before trial. But he does not show that it was not produced, and reasonable counsel could have chosen to proceed without it. Moreover, an objection would only garner a continuance, and he does not show that it is reasonably likely to have resulted in a more favorable outcome.

Williams argues that counsel should have objected that the physician improperly testified about the ultimate issue—whether Williams assaulted

Victim. But reasonable counsel could have decided not to object because the physician did not purport to offer expert testimony that Victim was assaulted. Rather, he simply repeated the Victim's report, made in the course of her diagnosis and treatment, that she was assaulted.

Finally, Williams argues that he was prejudiced because, he says, absent the physician's testimony, the evidence was insufficient to convict him. But he does not establish that any or all of the doctor's testimony would have been excluded had counsel objected. And he has not proved that any of the objections would have changed the evidentiary picture enough to make a more favorable outcome reasonably likely.

Second, Williams claims that his counsel should have objected to certain jury instructions. But he has not proved that counsel was ineffective for not doing so. The lesser-included-offense instruction for assault suffered no defect, and its wording did not prevent consideration or conviction of a class A misdemeanor. Further, this Court cannot presume prejudice, and submission of a class B misdemeanor assault instruction is not reasonably likely to have resulted in a more favorable outcome given the jury's determination that Victim suffered serious bodily injury.

Williams also claims that a defect in the self-defense instruction allowed it to apply to the greater offenses but not to the lesser offenses. His

failure to argue prejudice defeats his claim. In any event, he could not establish any reasonable likelihood of a more favorable outcome with a different self-defense instruction because he does not contest the jury's rejection of his self-defense claim on the greater offenses which rest on the same facts that applied to the lesser offenses, making a different outcome unlikely.

And Williams argues that counsel should have asked for a self-defense element in the instructions for both the greater and lesser-included offenses of domestic violence in the presence of a child. He does not argue prejudice, defeating his claim. Further, the jury's rejection of self-defense for one charge (aggravated assault) renders his claimed error harmless for the other charges. Further, the instruction for aggravated assault and assault both included the self-defense requirement and, between them, formed the predicate domestic violence offense necessary for all of the charges of domestic violence in the presence of a child. Thus, the jury necessarily considered self-defense in addressing the predicate offenses, and the instructions, as a whole, properly informed the jury as to self-defense.

Third, Williams argues that his counsel should have made a hearsay objection to an investigating officer's testimony about information gathered

at the crime scene. But reasonable counsel could have concluded that the testimony was not hearsay but was offered to explain the officer's conduct.

Finally, Williams argues that his counsel should have objected to or moved to strike as improper character evidence his daughter's description of him as manipulative. The witness said her written statement was inconsistent with her trial testimony because of Williams's manipulation. But reasonable counsel could conclude that it was more beneficial to the defense to get the helpful statement in and to shift to Ex-Wife the "manipulative" label.

STATEMENT OF THE ISSUES

Victim's treating physician testified for the State at trial. Williams's counsel sought the usual pre-trial discovery about the witness, including his curriculum vitae and reports, did not challenge the witness' qualifications to testify, and used the witness to try to support defense theories.

1. Has Williams proved that counsel were ineffective where:

A. they did not insist that the State lay foundation for expert testimony under rule 702;

B. they did not object to the testimony on the ground that they purportedly did not receive his curriculum vitae;

C. they did not object when the physician repeated Victim's statement that she was assaulted; and

D. he has not proved either that (1) the omitted objections were reasonably likely to have succeeded, or (2) any or all of the objections would have changed the evidentiary picture enough to make a more favorable outcome reasonably likely?

2A. Has Williams proved that counsel were ineffective for not objecting to the misdemeanor assault instruction where the instruction properly defined a class A misdemeanor and was not reasonably likely to have influenced the trial's outcome?

2B. Has Williams proved that counsel were ineffective for not objecting to a self-defense instruction for which he argues no prejudice and for which any error is harmless because all of the charges rest on the same facts and Williams concedes that the instruction properly applied to his aggravated assault conviction?

2C. Counsel submitted numerous related jury instructions involving domestic violence in the presence of a child that omitted reference to the State's burden to disprove self-defense. But that factor was included in the elements instruction for the required predicate offenses of domestic violence. Has Williams proved that counsel were ineffective for omitting the self-defense references in the related instructions?

3A. Has Williams proved that counsel were ineffective for not raising a hearsay objection to testimony that reasonable counsel could conclude was offered not for the truth but to explain the witness' conduct?

3B. Has Williams proved that counsel were ineffective for not objecting to his daughter's explanation that he "manipulated" what she put in her written statement where reasonable counsel could conclude that the defense could benefit more from getting the statement admitted and re-directing the "manipulative" label?

Standard of Review. "When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review and we must decide whether the defendant was deprived of the effective assistance of counsel as a matter of law." *State v. Parkinson*, 2018 UT App 62, ¶8, 427 P.3d 246 (cleaned up), *cert. denied*, 429 P.2d 462.

STATEMENT OF THE CASE

A. Summary of relevant facts.

The domestic violence – Victim's point of view

Within two months of meeting on a dating website, Defendant Steven Williams and Victim decided to live together, with Williams and his two children moving into the home Victim shared with her daughters and grandchildren. R533-35,909-10. Two years later, Williams and his children

moved out after Victim punched Williams for propositioning her eldest daughter. R535,573-74,611-12,617,910. Weeks later, in October 2015, the two were again dating and discussing marriage. R535-36,574.

About three months later, Williams took Victim home after going out to dinner, then retrieved his 12-year-old daughter D.D. so they could spend the night with Victim's family.[1] R540-43,575-76,643,669,797. Williams and Victim spent part of the next hour drinking mixed drinks and talking. R543-45,578,644,673-74,687-88,692-93,788,799-800. During that time, Williams's ex-wife [Ex-Wife] dropped off their 14-year-old son D.S. and his 15-year-old friend [Friend], who settled in to play a game with D.D. in the living room. R542-43,576-77,609,616-20,638,644,673,786-88,795. When Victim's 8-year-old granddaughter V.G.D. appeared in the kitchen, Williams took her back to her bedroom, leaving Victim and his phone in the kitchen. R546,816,1081.

A message appeared on Williams's phone, and Victim opened it to discover that Williams had been secretly conversing with another woman. R546,621,579-82. She confronted him when he returned and accused him of cheating. R546,584-85. He, in turn, got mad that she had read his text and

[1] Because some of the minor witnesses have the same initials, the State refers to them by initials representing their relationship to Williams and Victim, i.e., D.D. for Defendant's daughter, D.S. for Defendant's son, and V.G.D. for Victim's granddaughter.

demanded his phone back. R547,584. Victim refused to surrender it, he tried to grab it, and she tossed it away from him. R547-48,585-86,820. It accidentally landed in the fish tank, prompting Williams to grab and twist Victim's arm so that she pivoted around, then he shoved her to the floor. R548-50,583,586-89. Shocked, she refused his offer to help her up, got up herself, and noticed that V.G.D. was watching them. R550-52,590,820,825-26. Williams again returned V.G.D. to her room, and Victim went onto the back deck to try to contact the girl whose number she had taken from Williams's phone. R552-53,547,582-83.

Victim found the door locked when she tried to return to the kitchen, and D.S. had to let her in. R552-53. She walked past Williams on her way through the room and felt something hit her hard in the back of the head, causing her to stumble forward. R553-55. She turned and accused him of hitting her. R554. He responded by taunting her, repeatedly urging her to hit him. *Id.* She refused, calling him a "cheater[,]" at which point Williams "just popped" her in the jaw with his closed right fist. R555-56,820. She hit the ground and blacked out briefly. R557,593,677. When she came to, Williams was on top of her, and she saw D.S. over Williams's shoulder with his arms around Williams as he tried to pull Williams off her. R557,594. Williams

threw D.S. backwards and continued to hit Victim before stopping to demand that the children get their things so they could leave. R557-58,654,792-93.

The domestic violence – minor witnesses' points of view

While the children played a game in the living room, they heard a loud slap and raised voices coming from the kitchen, with Victim calling Williams a cheater. R619-20,646-48,652,698,700-01. All three children ran to the kitchen as they heard Victim refuse Williams's help in getting up. R620,674,697-98,789,802. They watched the heated argument before Victim went outside and D.D. returned to the living room. R647-49,674-76,696,705-08. But D.S. noticed that the door had locked, so he unlocked the door and stayed "so nothing [else] would happen." R649,663,675-76,789-90.

D.D. returned to see D.S. let Victim back in and the arguing between Victim and Williams continue. R649. Williams was mad and started "aggressing" on Victim, walking up to her, "puffing out his chest[,]" "flaring out his arms" as he walked, and claiming his innocence. R621-22,649-50,653,664. The children watched Williams advanced on Victim, who put her hand to his chest and pushed him away. R622-23,664-66,674,700,790. Williams started egging Victim on, advancing as he raised his voice and taunting her to "Hit me" and "Do that again one more time[.]" R622-23,664,680,706-07,719,791,813. D.S. had not seen Victim hit Williams, but

Williams kept telling her to "Do it again." R623-24,664,680,791. Williams kept walking toward Victim who kept trying to push him away, pushing on and hitting his chest with her open hand. R624,650,680,704-05,805-06. Her hands slid up toward Williams's throat, but none of the children saw Victim choke Williams or saw Williams struggle to breathe. R637,651,665,680-81,813. When, in response to Williams's taunting, Victim hit him, the group saw Williams cock his arm and shoulder back and drive his fist "[f]ull force" into Victim's jaw. R624-25,664,710-11,791, 820,825. He hit her again, and she fell. R625-26,791,821,827.

D.D. started yelling for Williams to stop. R681. V.G.D. had joined the group and started yelling and crying. R793-94,820-22. Friend struggled to hold V.G.D. in the hallway but could still see the events in the kitchen. R626-27,712-13,793-94. Williams had followed Victim to the ground, knelt over her, and continued to hit her in the face. R626-28,678,713,791-92,821,827. D.S. sprang forward, bear-hugging Williams to get him off of Victim, but Williams threw him off and continued hitting Victim's face. R627,678-79,714,792-93. When he stopped, he told the kids to get their things so they could leave. R628,654,681,715,792-93.

D.S. thought it would be safer to go to a nearby friend's house, but D.D. would not leave. R628-29. D.S. and Friend left on foot but got only a block or

two away when Williams came after them in his truck and ordered them to get in. R630-32,654,682-83,794-95,807-08. All three kids said that after leaving Victim's house, Williams told them that he had acted in self-defense. R634-37,659,685,795-96. Both D.S. and D.D. noticed that Williams had "scratches and blood all over" his right hand. R636,685.

The injuries

Victim's injuries required specialized medical attention. R767. Emergency room doctors took x-rays of the injuries which revealed the need for a subspecialist. R766-69. So, they contacted Dr. David Stoker, an oral and maxillofacial surgeon, who took over Victim's care and treatment. *Id.* As is his normal practice when developing a treatment plan for new patients needing immediate help, he asked her how she sustained her injuries. R767-68. Victim stated that she had been "assaulted" "with closed fists[.]" R768,781.

His review of Victim and the x-rays revealed that both sides of her jaw were fractured, with the primary point of impact on the left rear of her jaw. R769-71. The jaw was "grossly displaced" and had lacerated the tissue inside the mouth above the fracture, a small piece of bone had shattered and was beyond repair, and a facial nerve was irreparably severed. R564-65,568,597-99,770-73. He operated the same day, removing broken teeth and wiring

Victim's jaw shut during the surgery in order to position the bones. R564,598-99,774-75. He described the surgery as "fairly difficult" due to the degree of displacement on her left side. R776-77. He initially inserted four metal plates but ultimately operated twice more due to infections and replaced two plates with a single bar. R598-99,774-78. He explained that the jaw would never be like it had been, she would always have problems with her bite, and she would suffer permanent numbness of the left side of her lip, chin, and part of her gums. R602-05,778. When pressed by defense counsel, he acknowledged that it may be "possible" that the severed nerve could regenerate itself but that it was "exquisitely unlikely" that it would do so. R782-83. He also explained that her continuing problems with certain foods was due to "the nature of the long-term effect of the injury[.]" R784. A year after the initial surgery, Victim remained numb, and he put her chances of further recovery at "essentially none[.]" R784-85.

The arrest

After gathering information at the crime scene, Officer Joshua Haskell located Williams at his mother's house about an hour after Williams arrived home. R867-68. The officer began by asking Williams for his side of what had happened that night without identifying the event. R838,854. Williams first claimed that he had been home all night. R838,853-54. The officer then

arrested him, and he resisted. R637,839-46. It took two officers to effect the arrest, and Williams verbally abused the officers on the drive to the jail. R847-48. Once *Mirandized*, he denied doing anything and claimed he had been "struck several times by a woman" and had left to protect himself and his children. R844,855,864.

The written statements

After Williams's arrest, D.S. called his mother Ex-Wife, who picked up all three kids and took them to her house. R637-38,688,796,814,927. Ex-Wife immediately notified the police that the children were witnesses and was given the choice of having them draft written statements or endure live interviews. R857-58. The kids wrote statements that same night. R638-39,688-89,716,803,858-59.

D.S. wrote that Victim called Williams a cheater, that she choked and punched Williams, and that Williams hit her after she hit him. R652-53,638-39,664. At trial, he explained that the written statement was "not wrong" but that he did not include the fact that Williams was "aggressing" on Victim, taunting her to hit him "again" and invading her space until she hit him. R621-23,652-54. He explained that by "choke" he meant that Victim pressed on Williams's chest and her hands slid up to his throat while he was "aggressing" on her. R638-39,652-53. But, like the other kids, he never saw

Williams backed against the wall with Victim's hands around his neck, nor did he see Williams struggle to breathe. R637,680-81,719. He excused the statement's imprecise wording because he wrote it at 1:30 a.m., he had not gotten any sleep, and he was "still putting things together" at the time and organizing what was in his head. R638-39,653,664-65.

D.D. wrote her statement at 3 a.m. R689. It stated that she heard Victim "flipped" when she saw the phone message and yelled that Williams was a "cheater" while she slapped and punched him. R702-03;Def. Exh. 4. Williams used self-defense, blocking Victim's punch and hitting her in the jaw three times. R715-16;Def. Exh. 4. At trial, she said that Williams hit Victim first, followed her when she fell to the floor and continued hitting her in the face. R676-79,711,713. She explained that she used "self-defense" in her statement because Williams "manipulated me into writing it." R689,719. When asked how, she said only that he "has his own way of manipulating people." *Id.*

Friend wrote his statement at 4:30 a.m. while he was "really tired" and was bothered by having seen something "no kid wants to see." R812-14. The statement reflected that Friend saw Victim's hands on Williams's throat as she hit him. R804. He explained at trial that he did not mean that she actually choked him but that her hands were "kind of on his throat but then most of it wasn't" and that they were there for maybe five seconds. R804. She was

pushing him away, and she slapped him with her open hand. R804-06. Williams stood his ground, and when she swung again, he explained, Williams blocked the swing and started hitting her. R805-06. Like the others, Friend never saw Williams pinned against a wall or appear to be unable to breathe when Victim's hands were near his throat. R637,680-81,719,813.

B. Summary of proceedings and disposition of the court.

Williams went to trial on one count of aggravated assault (domestic violence), a second-degree felony [Count 1]; four counts of commission of domestic violence in the presence of a child, all third-degree felonies [Counts 2-5]; driving under the influence (DUI), a class A misdemeanor; and interference with an arresting officer, a class B misdemeanor. R240-43. The jury was also instructed on the lesser-included-offense of assault and the lesser-included-offenses of commission of domestic violence in the presence of a child. R347,353-57. The instructions directed the jury that it could consider the greater offenses of domestic violence in the presence of a child only if it found Williams had committed felony aggravated assault. R763-64,339,348-51,358. Similarly, it could consider the lesser-included-offenses of domestic violence in the presence of a child only if it found Williams had not committed the greater offenses. R763-64,347,353-57.

Williams did not testify at trial but through cross examination and two defense witnesses maintained that from the very beginning he had claimed that he acted in self-defense. His questioning focused largely on establishing that Victim was not simply sad but was angry that night and that, per her history, her anger led her to physically attack him. R997-99. His mother testified that when Williams and his kids moved out of Victim's house the first time, it was because Victim got angry, attacked Williams, and gave him a black eye and a bruised cheek. R909-15. When Williams again started seeing Victim, his mother was against it, worried that Victim would attack him again. R916-17,920. When Williams returned with the kids this time, he confirmed her fear. R920,931-33.

The defense also emphasized the children's written statements, noting that they corroborated Williams's version of the events, including his claims of self-defense, as well as what Williams's mother said the children told her the night he was arrested. R925-27,935-36. Counsel attempted to establish that the children's contrary trial testimony was the result of the fact that they had lived with Ex-Wife since the night of Williams's arrest and she had manipulated their testimony in order to get custody, although the children denied as much. R610,642,716-17,810-12,824,908-9. In support, defense counsel offered a statement D.S. wrote about an unrelated matter in 2015 in

which D.S. claimed that Ex-Wife had given him bribes and rewards to get him "to attack" Williams by lying and filing false police reports. R640-41;Def. Exh. 3. D.S. denied actually making any false reports, and on re-direct, explained that when he wrote the 2015 letter, he was living with Ex-Wife, and Williams dictated the letter for D.S. to write so that Williams could get custody of D.S. and D.D. R639-41,661-62.

Williams also gave police a formal statement after his arrest in this case. R872-73,933. In it, he claimed that he acted in self-defense after Victim assaulted him with a phone, punched him, pinned him against a wall, and strangled him. R873-74,882. He showed an officer redness on his neck by his left ear, a scratch on his abdomen, and records from a V.A. hospital saying he had bruising on his larynx, scratch marks on his neck and behind his ear, tingling and numbness under one eye, and bruising on his head. R874-75; St. Exh. 22-27. Williams also had abrasions on his knuckles and fingers, mostly on his right hand, which he attributed to his construction work. R884-85; St. Exh. 13-15. Both his children disagreed, noting the scratches and blood were on his right hand after leaving Victim's house. R636,685.

Following a two-day trial and a short deliberation, a jury rejected the lesser-included offenses, acquitted Williams of DUI, and convicted him of all other charges. R377-80;383-85. The judge sentenced him to the statutory

periods of commitment for each of his six convictions, running the third-degree felonies and class B misdemeanor concurrent to each other but consecutive to the second-degree felony. R405-07. Williams timely appealed. R405-08.

SUMMARY OF ARGUMENT

Issue I. Williams claims his counsel were ineffective for not making various objections regarding Dr. Stoker's testimony. But he does not prove a single instance of deficient performance, let alone multiple instances. And he has not established any prejudice.

First, he faults counsel for not requiring that the State lay foundation for Dr. Stoker's testimony under rule 702. While counsel could have done so, Williams does not show that all reasonable counsel would have done so. Reasonable counsel could have concluded based on pre-trial discovery that the doctor's testimony met the rule's requirements without a motion. Counsel may also have determined that additional foundation would have increased the witness' credibility and persuasiveness. And counsel may have decided to use his testimony to support parts of the defense by establishing that (1) Victim told the doctor that she got "very angry" at Williams that night, (2) improvement in Victim's condition was still possible, though unlikely, and (3) even permanent numbness would not prevent Victim from using her

mouth for normal activities. Thus, on this record, Williams cannot establish that his counsel performed deficiently by not requiring a formal rule 702 showing.

Second, Williams claims his counsel should have required the State to provide the doctor's curriculum vitae. But he has not proved that it was not provided or that no reasonable counsel would have proceeded without it. Neither does he show that the resulting statutory continuance to get it would have resulted in a more favorable outcome.

Third, Williams claims that his counsel should have objected that Dr. Stoker opined on the ultimate issue: whether he assaulted Victim. But the doctor simply reported what Victim told him during treatment. Because he did not offer a medical opinion that the injuries resulted from an illegal assault, a competent attorney could decide not to object.

Williams also does not demonstrate prejudice for his claims. He argues that he was prejudiced by his counsel's silence because without the doctor's testimony there would have been insufficient evidence to prove the bodily injury element for each charged crime. But he has not proved either (1) a reasonable likelihood that any or all of the doctor's testimony would have been excluded; or (2) that excluding his testimony would have changed the evidentiary picture enough to make a more favorable outcome reasonably

likely. Williams does not show that the physician could not have met rule 702 requirements had counsel raised an objection. Even if the State did not turn over the doctor's curriculum vitae, which he does not prove, the remedy would have been a continuance absent proof that the State acted in bad faith. Williams makes no effort to adduce such proof. And assuming exclusion of the doctor's references to assault, Williams does not show how that exclusion would make a more favorable outcome reasonably likely.

Issue II. Williams faults counsel for not objecting to several jury instructions. But Williams does not establish any flaw in the instructions or show that they had any effect on the outcome of his trial.

He claims that the instruction for the lesser-included-offense of assault combines the elements for both class A and class B misdemeanors and misstates an element for the class A misdemeanor. But the instruction merely requires that the jury first determine that an assault occurred by finding the requisite "bodily injury" and then requires that the jury determine whether that bodily injury is "substantial," thereby elevating the misdemeanor to a class A. And there can be neither deficient performance nor prejudice from instructing the jury that it must find that Williams's fist striking Victim's face "resulted in" rather than "caused" her injury.

Finally, there is no authority for Williams's claim that prejudice be presumed under these circumstances. And he does not affirmatively prove prejudice. The jury was not prevented from considering the class A misdemeanor. Moreover, the jury evaluated the severity of Victim's injury pursuant to a proper, unchallenged definitional instruction and found that she suffered serious bodily injury, making it unlikely that an instruction on class B misdemeanor assault would have led to a different evaluation of the injury and, hence, a more favorable outcome.

Williams also claims that the language of the self-defense instruction, while appropriate to his five felony convictions, omitted language that would allow it to be applied to the five lesser-included-offenses of assault and domestic violence in the presence of a child. But he cannot establish any reasonable likelihood of a more favorable outcome with a different self-defense instruction because the jury's rejection of his self-defense claim on the greater offenses involved the same facts at issue regarding the lesser-included offenses.

Finally, none of the elements instructions for the greater and lesser offenses of domestic violence in the presence of a child expressly requires that the jury consider Williams's self-defense claim. Williams argues that his counsel were ineffective for not objecting to the instructions and requiring

that the self-defense element be added to each. The absence of any prejudice argument defeats his claim.

In any event, he cannot establish prejudice. First, because the charges and the self-defense claim were based on the same facts, rejection of self-defense for one charge makes any omission of self-defense in any other charge harmless.

Second, the instructions, as a whole, required that the jury properly address the self-defense issue, defeating Williams's ineffectiveness claim. Domestic violence in the presence of a child requires that the jury find Williams committed a predicate offense of domestic violence. In this case, that was either aggravated assault or assault, both of which directed that the jury consider Williams's self-defense claim. Thus, the instructions properly directed the jury to consider and reject the self-defense claim in deciding the predicate offense of domestic violence before considering whether that act occurred in the presence of a child. Nothing more was required.

Issue III.A. Williams claims that his counsel were ineffective for not raising a hearsay objection to testimony from Officer Haskell that almost everyone at the crime scene told him the same thing about how the incident occurred and how Victim got injured. But reasonable counsel could conclude that a hearsay objection was not appropriate because the information was not

offered for the truth. The officer testified that the information came from his "assisting officers" and that the information and the severity of Victim's injuries prompted him to track down Williams.

Regardless, an objection would not have changed the evidentiary picture enough to make a more favorable outcome reasonably likely. The report from assisting officers said nothing about the children's trial testimony and could not, therefore, vouch for or refine that testimony, as Williams claims. And the officer's brief comment is unlikely to have altered the jury's perception of the discrepancies between the testimony and written statements of the four minors which had already been thoroughly examined and which factored prominently in the parties' closing arguments.

Issue III.B. Finally, Williams argues that his counsel should have objected to D.D.'s description of Williams as manipulative. Contrary to her trial testimony, D.D.'s written statement included the phrase, "He was using self-defen[s]e." She explained that Williams manipulated her into writing it. But counsel's silence was in keeping with their strategy, which Williams does not show was unreasonable. Their self-defense theory relied heavily on persuading the jury of the veracity of the children's written statements which corroborated Williams's self-defense claim. Counsel stressed that Williams was in jail when D.D. wrote hers and that any manipulation came from Ex-

Wife's continuing influence so she could get custody of the children. Counsel offered additional evidence to reinforce Ex-Wife's manipulation. Further, the rules allowed D.D. to explain the discrepancy between her written statement and her testimony. An objection would risk exclusion of the written statement. Reasonable counsel could conclude that, on the whole, the defense was better served by not objecting to D.D.'s testimony.

ARGUMENT

I.

Williams has not proven that no competent attorney could decide not to object to testimony from Victim's facial surgeon; neither has he shown prejudice.

Williams argues that his trial counsel were ineffective because they did not object to some or all of Victim's facial surgeon's testimony. First, he faults counsel for not objecting that the State had not met the foundational requirements for expert testimony under rule 702, Utah Rules of Evidence. Aplt.Br. 11-14. Second, he complains that counsel should have objected that the State did not provide the surgeon's curriculum vitae prior to trial as required by section 77-17-13, Utah Code Ann. *Id.* at 17-20. Third, he argues that when the surgeon explained that Victim told him she was assaulted, defense counsel should have objected that the surgeon had opined about the ultimate issue. *Id.* at 14-17. Finally, he argues that he was prejudiced because

without the surgeon's testimony, the evidence was insufficient to establish the bodily injury element for each of the charged crimes. *Id.* at 22-24.

To prevail, Williams must prove two elements: (1) deficient performance and (2) prejudice. *State v. Parkinson*, 2018 UT App 62, ¶9, 427 P.3d 246 (cleaned up), *cert. denied*, 429 P.2d 462. To prove deficient performance, Williams must prove that no reasonable attorney would have done what his counsel did. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). This Court's review of counsel's performance must be highly deferential because unlike this Court, counsel "observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Id.* There are "countless ways to provide effective assistance in any given case" and even "the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689.

These principles distill to this: a defendant claiming deficient performance must prove that "no competent attorney" would have proceeded as his counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011).

To prove prejudice, Williams must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A

reasonable probability is one "sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (cleaned up). Rather, "[c]ounsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* (cleaned up). Proof of prejudice must be based on a "demonstrable reality and not a speculative matter." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (cleaned up).

Williams has not proved deficient performance. Because the claim is one of ineffective assistance, the focus is not on the merits of the potential challenges to the surgeon's testimony. Neither is the focus on whether counsel *could* have challenged the testimony. Rather, the issue is whether, on this record, all competent defense attorneys would have challenged the testimony's admissibility under 702, the State's compliance with the statutory notice provision for expert testimony, or the witness' reference to Victim's use of the term "assault." The answer is no. *See Strickland*, 466 U.S. at 690. *See also Parkinson*, 2018 UT App 62, ¶8 (appellate court views the substantive issue in an ineffective assistance claim through the lens of counsel's performance).

And had counsel raised the indicated objections, Williams does not show that any of the testimony would have been excluded or if it was, that it would have changed the evidentiary picture enough to make a more favorable outcome reasonably likely.

A. Reasonable counsel could conclude not to file a rule 702 motion.

Williams has not proved that all competent counsel would have insisted on a hearing to determine whether the State could show that the facial surgeon's testimony met rule 702's threshold for admissibility.[2]

Expert testimony as addressed in rule 702 "is opinion or fact testimony based on scientific, technical, or other specialized knowledge." *State v. Rothlisberger*, 2006 UT 49, ¶¶11, 34, 147 P.3d 1176. Among other things, expert testimony will not be admitted unless it is shown that the witness is "qualified as an expert by knowledge, skill, experience, training, or education" and the principles and methods underlying the testimony meet a "threshold showing" that they are "reliable," "based upon sufficient facts or data," and "have been reliably applied to the facts." Utah R. Evid. 702.

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[2] Williams also contends that Dr. Stoker cannot be viewed as "a fact witness for what occurred before [Victim's] arrival at the hospital." Aplt.Br. 14. But the doctor did not testify as a fact witness for events that occurred before he met with Victim. *See* subsection I.C., *infra* (establishing that the doctor referenced Victim's explanation for how the injury occurred when gathering information for diagnosis and treatment).

Williams says that his counsel should have objected to the treating surgeon's testimony because the State did not lay this foundation before the surgeon testified. Aplt.Br. 12-14. He argues that his counsel permitted Dr. Stoker to testify about "matters beyond the realm of his expertise[,]" touching on radiology and biomechanical analysis without requiring that he show that the principles or methods underlying those fields were reliable and were reliably applied to the facts or data in this case. *Id.* at 13-14. Similarly, he criticizes counsel for permitting the doctor to testify in the area of his expertise—dental surgery or facial reconstruction—without a showing that the principles or methods underlying his expertise were reliable and were reliably applied to the facts or data in this case. *Id.*

But the issue is not whether counsel had an available rule 702 objection. It's whether, on this record, all competent defense attorneys would have challenged the testimony's compliance with rule 702. Williams has not attempted to meet that burden.

Nor can he establish on this record that all reasonable counsel would have concluded that the requirements of rule 702(b) were not or could not be met in this case. Instead, the foundation laid at trial for the doctor's testimony, together with defense counsel's pre-trial request for extra-record information about the doctor, his testing, and his anticipated testimony, strongly suggest

that defense counsel had sufficient information to decide to forego a rule 702(b) objection to the surgeon's testimony.

Specifically, the foundation laid at trial established that the doctor completed both a doctor/dental surgery degree and a residency in oral and maxillofacial surgery before 2009, became board certified as a surgeon and had a community practice at his own local private clinic, and at the time of trial had also been working a rotation schedule taking calls at multiple trauma centers around the valley handling general, oral, and maxillofacial surgery, including traumatic facial injuries stemming from a variety of causes that included assaults. R766-67. Reasonable counsel could determine from this foundation that a challenge to the facial surgeon's qualifications to give expert opinions in the areas of general, oral and maxillofacial surgery would have been unlikely to succeed.

Further, the record suggests that defense counsel had access to extra-record information that would have further informed them about a rule 702 objection. They sought before trial all "reports or results of scientific tests," the curriculum vitae and qualifications of all experts, written reports prepared by any witness, and "any tests or other specialized data" on which experts relied. R44-47. Counsel never complained that the State did not comply with the requests, the State provided defense counsel with a cd and

a hardcopy of Victim's medical records five months before trial, and defense counsel referred at trial to Dr. Stoker's multiple "reports" as well as other medical reports generated in Victim's treatment. R129-30,779-81.

Thus, defense counsel had access to a wealth of record and non-record information about Dr. Stoker, his qualifications, and his specific handling of this case that would permit counsel to determine to forego a rule 702 objection. In addition, the doctor explained that the goal of his surgery is to return patients to their normal functioning. R779. Reasonable counsel could conclude that the doctor's years of education and expertise would necessarily permit him to understand sufficient aspects of other scientific areas—like interpreting radiologic images or understanding the biomechanical workings of a jaw—to permit him to know what "normal" is, to judge why something is no longer "normal," and to create and implement a treatment and surgical plan to return it to "normal[.]"

Further, the foundation at trial established that the doctor had worked in a number of different hospitals in this area for a number of years. R766-67. It may well have been that one or more of Williams's counsel or his defense team had prior experience with the doctor in some capacity, further informing a decision concerning whether to require an express rule 702(b) showing.

Moreover, reasonable counsel could well choose not to force the State to lay further rule 702(b) foundation because parading further detail about the facial surgeon's experience and training would only have added to his persuasiveness.

And counsel may have weighed into a calculus of whether to object to the surgeon's testimony his potential usefulness to the defense. The first observation defense counsel made in both opening and closing, and repeatedly revisited, was that Victim assaulted Williams. R522-23,997-1011. And counsel stressed evidence establishing that when Victim got angry at Williams in the past, she attacked him. *Id.* Counsel urged the jury to find that she was an "angry woman" the night of the charged assault, that she "turn[ed] her anger into a physical assault," and that Williams had to defend himself. *Id.* In contrast to the State's evidence that Victim was sad but not angry (R589,622,1005-06), Dr. Stoker's report established that Victim professed to have gotten "very angry" at Williams that night. R781.

And like counsel below, reasonable counsel could use the opportunity to mitigate the more damaging aspects of the surgeon's testimony. For example, counsel elicited that Victim suffered no other injuries, that improvement in Victim's condition was still possible, that the severed nerve could possibly but not likely regenerate, and that even if Victim suffered

permanent numbness, it did not prevent her from using her mouth normally. R779-85;894;1008-09.

For these reasons, Williams has not proved that no reasonable counsel would have foregone a rule 702 objection. On this record, the presumption of reasonable representation remains unrebutted, and his claim fails. *See Strickland*, 466 U.S. at 687-89.

B. Williams cannot show that no curriculum vitae was provided, that all competent counsel would have sought one, or that an objection could have resulted in exclusion of the testimony.

Williams claims that his counsel were ineffective because they did not object when they did not receive Dr. Stoker's curriculum vitae before trial. Aplt.Br. 17-20. This, he says, prejudicially "allow[ed] the jury to consider" the doctor's testimony, he argues. *Id.* at 19. His claim fails for two reasons.

First, he offers no record support for his bald assertion that the doctor's "curriculum vitae was not provided[.]" *Id.* In fact, the record shows that counsel likely received it. They clearly knew they were entitled to a copy of both his curriculum vitae and his written reports because they asked for both in their written discovery request. R44-47. They received a timely response to the request, and nothing in the record demonstrates that the response was in any way deficient. *See* subsection I.A., *supra*. This reasonably suggests either that counsel received the curriculum vitae or, if not, recognized as much but

decided not to pursue it, perhaps because they chose to use the doctor's testimony to further the defense. *See id.* This defeats Williams's claim.

Second, Williams has not proved that the surgeon's testimony would have been excluded even if the State did not turn over the curriculum vitae. Exclusion would have been the remedy only if the trial court found the State deliberately withheld it in "bad faith." Utah Code Ann. §77-17-13(4) (LexisNexis 2018) (in Add. A). Williams has not alleged bad faith, let alone proven it on this record. So, counsel could at most have secured a continuance. *Id.* And Williams has not argued that a continuance would have given the defense a strategic advantage so critical that all competent counsel would have taken steps to secure one.

C. Reasonable counsel could conclude that the surgeon did not testify about the ultimate issue of assault, requiring no objection.

Finally, Williams contends that Dr. Stoker opined on the ultimate issue in this case—whether Williams assaulted Victim—and argues that counsel should have objected. Aplt.Br. 14-17. But Williams mischaracterizes the testimony so that an admissible statement Victim made in the course of her medical treatment appears to be an inadmissible comment on the ultimate issue.

Williams takes the relevant references out of context, placing remarks that occur over the course of 5 pages into a single block quote. *Id.* at 15-16. But the testimony he omits establishes that the surgeon was merely reporting what Victim said to him—she was assaulted—in response to the doctor's efforts to obtain information necessary to her diagnosis and treatment. As such, it was admissible at trial. *See* Utah R. Evid. 803(4)(A) & (B) (a statement is admissible as non-hearsay if it "is made for—and is reasonably pertinent to – medical diagnosis or treatment;" and "describes medical history; past or present symptoms or sensations; their inception; or their general cause"). *See also Lemmon v. Denver & R.G.W.R. Co*, 341 P.2d 215, 218 (Utah 1959) (treating physician can testify to the patient's statements about symptoms and history; an expert may discuss information relied on in forming an opinion).

Placed back in context, the remarks were explained the first time they occurred. On direct examination, the prosecutor established that when Dr. Stoker responded to the call from the hospital, he met with Victim.

> Q (prosecutor). And did you ask her about how she sustained her injuries?
>
> A. I do. I will generally will [sic] ask the patient how they sustained the injury. The mechanism of injury is often of some importance to us to help as we formulate a treatment plan for the patient to know what injuries we might be looking for.
>
> Q. And based on your interaction with her, what was your understanding of how she sustained her injury?

A. That she was assaulted, to my understanding, with closed fists by an assailant.

Q. And why did knowing that—why was that important for you in diagnosing her?

A. The mechanism of injury can be important given the type of fractures and the number of fractures that we will look for.

R767-68 (in Add. B). Thus, the term "assaulted" came from Victim's report given in the course of medical assessment and treatment. Such a use is entirely appropriate. *See Lemmon*, 341 P.2d at 218. Moreover, the reference did not tie the assault to Williams.

Other references to variations of "assault" occurred thereafter (*see* Add. B). Dr. Stoker explained that in cases "like an assault[,]" a blow is delivered "sideways" with enough force that it could break a jaw in two places. R770. Still later, the prosecutor asked the doctor where the "primary point of impact" occurred based on what Victim said and what he learned from his own assessment. R770-71. The doctor believed the point of impact was the back left part of Victim's jaw because that's where the "greater displacement" is and, as most "assailants" are right handed, the impact will commonly occur on the patient's left side. R771. And later, when the prosecutor asked "what kind of force" it would take to cause the damage Victim suffered, the doctor responded, "Blunt force trauma like this in an assault. It takes a considerable

amount of force." R773. Read in light of the initial explanation, each of these remarks simply uses a form of "assault" as originally used by Victim: as a colloquial substitute for "hit."

Defense counsel understood this use and reinforced it on cross-examination for the jury's benefit. Counsel produced a copy of Dr. Stoker's report that was generated "in the course of [Victim's] treatment" and asked him specific questions about its contents. R780-81 (Add. B).

> Q (defense counsel). …So do you find the section where—of your report that—I believe it's entitled "History of Present Illness"?
>
> A. Yes, Ma'am. I see it here.
>
> Q. And that's what you are talking about when you talk about the information that you received from [Victim] about how her injury occurred; am I correct about that?
>
> A. Correct. And to a degree there's oftentimes overlap. With the admitting physicians, we use their reports as well.
>
> Q. Okay. And one of the things that she indicated is that she's not clear if she lost consciousness or not; correct?
>
> A. Correct. That's what I noted, yes.
>
> Q. And what's also indicated in there is that she reportedly discovered her boyfriend cheating on her; correct?
>
> A. Correct. Yes.
>
> Q. And subsequently, he assaulted her?
>
> A. Yes.

Id.

Thus, viewed in context, the doctor's use of "assault" to describe the blow that inflicted Victim's injuries was not a medical or legal opinion but simply a recognition of Victim's use of that term to describe the source of her injuries so he could conduct an assessment and formulate a treatment plan. As such, it was admissible under rule 803(4), Utah Rules of Evidence. *See State v. Schreuder*, 726 P.2d 1215, 1222-24 (Utah 1986)(psychiatrist's testimony about patient's statements of his history "came well within" rule 803(4)). The terminology was not argued by either party to mean anything else. Thus, reasonable counsel could conclude that no objection was necessary.

D. Williams has not proved prejudice.

Williams argues that his counsel's silence in the face of Dr. Stoker's testimony was prejudicial because "[a]bsent David Stoker's testimony, the evidence was insufficient" to support his convictions because the jury would be unable to distinguish "between bodily injury, substantial bodily injury, and serious bodily injury." Aplt.Br. 22-24.

The proper test, however, is whether there is a reasonable likelihood of a more favorable outcome for Williams had his counsel raised the issues he has identified. *See State v. Cantarero,* 2018 UT App 204, ¶13; *Parkinson*, 2018 UT App 62, ¶¶9, 12. To prove that, Williams must prove both (1) a reasonable probability that an objection would have succeeded, and (2) that the

successful objection would have changed the evidentiary picture enough to make a more favorable outcome reasonably likely. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Williams has not met this burden.

First, Williams has not proved a reasonable likelihood that Dr. Stoker could not have been qualified as an expert had defense counsel required on-the-record proof of compliance with rule 702(b). *See Salt Lake City v. San Juan*, 2015 UT App 157, 353 P.3d 623 (prejudice not established for counsel's alleged failure to object to admitting officer's alleged expert testimony where defendant did not show a reasonable likelihood that officer would not have qualified as expert). In fact, the record evidence is to the contrary. *See* subsection I.A., *supra.*

Second, had counsel objected to the doctor's references to assaultive behavior, only those references would have been excluded. Not only is that testimony irrelevant to the prejudice Williams claims, but its absence is not reasonably likely to have produced a more favorable outcome for Williams in light of the remainder of the doctor's testimony that would remain before the jury.

Finally, as previously stated, had counsel informed the trial court that it had not been given the doctor's curriculum vitae, counsel would have received a continuance to obtain the document. *See* subsection I.B., *supra*. He

does not show that a continuance would have led to information that would have altered the admissibility of the doctor's testimony.

Accordingly, Williams has not shown that any objection to Dr. Stoker's testimony would have succeeded in excluding any of his testimony. Even if it had, it is unlikely to have changed the evidentiary picture. Victim testified about her injuries, the extensive treatment they required, and the lasting effects as of trial. This evidence, together with the jury instruction detailing the bodily injury definitions, would have permitted the jury to differentiate between the types of bodily injury, making a more favorable outcome unlikely absent the doctor's testimony. R340. Thus, Williams's ineffectiveness claims as to the doctor's testimony fail. *See Parkinson*, 2018 UT App 62, ¶9 (failure to prove prejudice defeats an ineffective assistance claim).

II.

The claimed instructional errors did not constitute deficient performance, and none were reasonably likely to have affected the trial's outcome.

Williams argues that his trial counsel were ineffective because they did not object to several jury instructions. He first faults the lack of an objection to both an allegedly flawed instruction for the lesser-included-offense of assault and to a narrow self-defense instruction. Aplt.Br. 24-37. He says that the result of the former is that the jury was unable to consider the lesser-included-offense of assault, while the result of the latter was that the jury

could not apply his self-defense claim to any of the lesser-included-offenses. *Id.* at 29-31,33.

He then argues that his counsel should have objected to the elements instructions for the multiple counts of domestic violence in the presence of a child. *Id.* at 37-42. He maintains that the instructions misstate the law because they do not include a requirement that the jury find he did not act in self-defense. *Id.*

Again, Williams must prove both elements of *Strickland*. *Strickland*, 466 U.S. at 687-88, 697; *State v. McHugh*, 2011 UT App 62, ¶4, 250 P.3d 1006. Jury instructions that correctly state the law require no objection. *State v. Lee*, 2014 UT App 4, ¶22, 318 P.3d 1164. This Court views the instructions "'in their entirety'" to determine whether they "'fairly instruct the jury on the law applicable to the case.'" *State v. Painter*, 2014 UT App 272, ¶6, 339 P.3d 107 (quoting *State v. Maestas*, 2012 UT 46, ¶148, 299 P.3d 892 (cleaned up)).

And "even when a jury instruction is erroneous, the error may nevertheless be harmless[.]" *See State v. Hutchings*, 2012 UT 50, ¶¶24-28, 285 P.3d 1183. Proof of prejudice "must be a demonstrable reality," not mere speculation. *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993). Errors that have an "isolated" or "trivial effect" on the verdict are not prejudicial. *Strickland*, 466 U.S. at 695-96. Even erroneous affirmative-defense instructions can be

harmless given the evidence. *See State v. Starks*, 627 P.2d 88, 91-92 (Utah 1981) (error in self-defense instruction was harmless under facts); *Lee*, 2014 UT App 4, ¶¶28-33 (error in imperfect self-defense instruction was harmless under facts).

Here, Williams's claims fail because he cannot establish deficient performance where the instructions as a whole properly instruct the jury, he urges this Court to presume prejudice where no presumption is available, and he does not otherwise establish prejudice.

A. The misdemeanor assault instruction proffered by defense counsel allowed the jury to consider the lesser offense, and any error did not affect the trial's outcome.

The trial judge used defense counsel's proposed jury instruction detailing the lesser-included-offense of "assault, domestic violence." R289,347. That instruction required, in relevant part, proof that Williams

> 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….

R347 (Jury Instr. 28) (in Add. C).

Williams claims that this instruction suffers from two problems. First, he asserts that the first of the above elements pertains to class B misdemeanor assault while the second pertains to class A misdemeanor assault. Aplt.Br. 24-28. The extra element, he argues, effectively combines the elements for a class

A and a class B misdemeanor into a single instruction, robbing him of a "proper instruction" as to either class of misdemeanor. *Id.* at 28-29. Second, he explains, the element for the class A misdemeanor is misstated, using the term "resulted in" instead of the statutory term "caused." *Id.* at 28. The result of these errors, he claims, was to prevent the jury "as a matter of law" from convicting him of the lesser-included-offense of assault. *Id.* at 29.

Williams does not claim that a class A misdemeanor instruction was inappropriate or that he was entitled to a class B misdemeanor instruction. *See State v. Wilkinson*, 2017 UT App 204, ¶26, 407 P.3d 1045 (rejecting assertion that counsel is deficient by not requesting every lesser included offense available). He argues only that neither was properly defined in the instruction.

But the instruction permitted the jury to convict Williams of class A misdemeanor assault. Assault is statutorily defined as "an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another." Utah Code Ann. §76-5-102(1)(b) (LexisNexis 2018) (in Add. A). This is what the first #4 element required: commission of "an act, with unlawful force or violence, that caused bodily injury to another[.]" R347. If that was all the jury was required to find, it could convict him of a class B misdemeanor. Utah Code Ann. §76-5-102(1)(2). But

the instruction required that the jury find more. The very next requirement was that the bodily injury be "substantial." R347. An assault is a class A misdemeanor if the bodily injury caused by the assault is "substantial bodily injury[.]" Utah Code Ann. §76-5-102(3)(a). Thus, a finding by the jury of all of the listed elements would support a conviction for class A misdemeanor assault.

Further, use of the phrase "resulted in substantial bodily injury" instead of the statutory language of "causes substantial bodily injury" is a difference without a meaning. The charged act was Williams striking Victim's face with his fist. Whether his use of his fist "caused" the injury or "resulted in" the injury is a matter of semantics; Williams could have suffered no prejudice from the substitution of one term for the other under these facts.

Williams further argues that this Court should presume prejudice from the misdemeanor instruction because an error in instructing on the "basic elements" of the lesser-included-offense of assault can never be harmless. *Id.* at 35-36. Even if the instruction was erroneous, this argument would fail as it has been conclusively rejected in Utah. *See State v. Garcia*, 2017 UT 53, ¶¶34-48, 424 P.3d 171 (rejecting claim that prejudice may be assumed for ineffectiveness claim based on erroneous instruction on lesser-included offense which was submitted by defense counsel); *Parkinson*, 2018 UT App

62, ¶¶10-11 ("Prejudice is not shown automatically nor is it presumed in jury instruction errors attributable to counsel's deficient performance")(cleaned up). A defendant's burden to establish a "reasonable probability that the jury would have returned a more favorable verdict…if properly instructed" is well-settled. *See, e.g., Lee*, 2014 UT App 4, ¶¶26-33 (requiring affirmative showing of prejudice in addition to proof of deficient performance for not objecting to erroneous instruction).

Thus, Williams must affirmatively prove prejudice and he cannot. He claims prejudice because the allegedly improper instruction rendered the lesser-included-offense of assault a "legally unavailable option" which "as a matter of law" the jury could not consider. Aplt.Br. 29, 35-37. But, as explained, the jury was not prevented from considering and convicting him of a class A misdemeanor. *See Wilkinson*, 2017 UT App 204, ¶30 (recognizing jury could have convicted defendant of lesser offense despite fact the instruction improperly stated the crime's elements and "would have been incapable of supporting a conviction"). Further, had the jury found that the State had proved nothing more than the elements of class B misdemeanor, the instruction as written would have required an acquittal, to Williams's benefit.

And Williams cannot show that an instruction for class B misdemeanor assault is reasonably likely to have resulted in a more favorable outcome. The jury was properly instructed as to the bodily injury definitions, evaluated Victim's injury, and determined that she had suffered serious bodily injury. R339-40,383. There is no reasonable likelihood that submission of an instruction on Class B misdemeanor assault would have prompted any different evaluation of Victim's injury, making a more favorable outcome improbable.

Because the instruction, as written, permitted the jury to consider the lesser-included-offense of class A misdemeanor assault and Williams cannot show a reasonable likelihood of a more favorable outcome had counsel objected to the instruction, his claim fails. *See Wilkinson*, 2017 UT App 204, ¶¶29-31, & n.4 (defense counsel's submission of erroneous lesser-included-offense elements instruction was not prejudicial where it had no effect on the trial's outcome).

B. Williams's failure to make a prejudice argument defeats his challenge to the self-defense instruction; regardless, any error in the instruction is necessarily harmless.

Williams also argues that his trial counsel should have objected to the self-defense instruction given to the jury. Aplt.Br. 31-33. That instruction provides, in part, "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." R343 (Jury Instr. 25, in Add. C),903. Williams does not fault this language and concedes that this provision is appropriate for the five felony charges. Aplt.Br. 32-33. *See* Utah Code Ann. §76-2-402(1)(b) (LexisNexis 2016) (in Add. A).

But he argues that the instruction prejudicially narrows the application of the affirmative defense by omitting any reference to the language in subsection (1)(a) of the self-defense statute: "threatening or using force against another" when he "reasonably believes that force or a threat of force is necessary to defend the person" against the "imminent use of unlawful force." Aplt.Br. 32-33. *See* Utah Code Ann. §76-2-402(1)(a). In other words, he claims that the instruction, as written, applies to the felony offenses with which he was charged because they involve "death or serious bodily injury" but not to any of the lesser-included offenses on which the jury was instructed. Aplt.Br. 32-33. Williams argues that this prevented the jury from considering his self-defense claim for the lesser-included offenses and rendered his counsel's performance deficient. *Id.*

Although Williams carries the burden of affirmatively establishing both elements of his ineffective assistance claim, he has not argued how the

challenged self-defense instruction prejudiced him. *Strickland*, 466 U.S. at 687-88, 697; *McHugh*, 2011 UT App 62, ¶4 ("defendant must show *both* deficient performance *and* prejudice" to establish an ineffectiveness claim) (citation omitted) (emphasis added). He claims that the jury "could not apply self-defense" to several charges, but he does not assert that, had counsel objected and a different instruction been given, there is a reasonable likelihood that the jury would have acquitted him of those charges. *See Strickland*, 466 U.S. at 687. His claim fails for this reason alone. *Coleman ex rel. Schefski v. Stevens*, 2000 UT 98, ¶7, 17 P.3d 1122 (defendant's "[f]ailure to provide any analysis or legal authority" on the issue of prejudice "constitutes inadequate briefing" that this Court cannot and will not review); *State v. Smith*, 2012 UT App 338, ¶18, 291 P.3d 869 (refusing to conduct review for ineffective assistance absent an argument on either requirement).

Williams could not meet his burden in any event. The jury found that the State had disproved self-defense when it convicted him of aggravated assault and the remaining greater offenses, and Williams does not contest the self-defense instruction's application to those offenses. R339,343,348-51,383-85. All of the lesser-included offenses are based on the same facts. Because the jury rejected self-defense on the greater offenses on the same facts that

applied to the lesser, omitting language from the instruction for offenses not involving death or serious bodily injury did not harm Williams.

C. Omitting lack of self-defense as an element of the domestic violence in the presence of a child charges was neither deficient nor prejudicial because the instructions as a whole correctly instructed the jury on self-defense.[3]

In a related claim, Williams argues that his counsel were ineffective for not objecting to jury instructions 29-32 (R348-51) and 34 (R353), which address the elements of the four counts of domestic violence in the presence of a child as both greater and lesser offenses.[4] Aplt.Br. 37-42. He maintains that because he claimed self-defense at trial, the elements instructions for all of the charged crimes must expressly tell the jury that before it can convict on any one of them, it must find beyond a reasonable doubt that he did not act in self-defense. *Id.* at 39-42. And because the elements instructions for aggravated assault and assault include this directive while the remaining offenses do not, he argues, the jury received inconsistent messages that allowed it "to conclude that self-defense did not apply" to the domestic

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[3] This argument responds to Point III of Williams's brief. Aplt.Br. 37-42.

[4] Williams appears to intend to include all of the lesser-included-offense counts involving domestic violence in the presence of a child. Aplt.Br. 40. Those instructions span instructions 34 through 38, but only instruction 34 sets out the elements. R353-57 (in Add. C).

violence charges. *Id.* at 40-41. He argues that counsel should have objected to these instructions so as "to maintain the consistency of the … wording." *Id.* at 42.

As before, Williams's challenge fails because he makes no attempt to meet his burden of proving prejudice. *See Lee*, 2014 UT App 4, ¶¶22-25 (requiring proof of prejudice for counsel's deficient performance in not objecting to instruction improperly stating burden of proving imperfect self-defense); *Smith*, 2012 UT App 338, ¶18.

In any event, he cannot do so. First, because self-defense was based on the same facts for all of the charges, the jury's rejection of it for one charge would render harmless any omission of it in any other charge.

Second, Williams cannot establish that his counsel's performance was constitutionally ineffective because the jury instructions, taken as a whole, adequately and appropriately addressed self-defense in relation to all of the charged offenses. *See State v. Ojeda*, 2015 UT App 124, 350 P.3d 640 (jury instructions are to be considered as a whole); *Lee*, 2014 UT App 4, ¶¶26-33 (no deficiency so long as the instructions as a whole constitute "a correct statement of the law").

Williams was charged with aggravated assault and four counts of domestic violence in the presence of a child. Aggravated assault was the

predicate offense for all four of the other counts—it was the act of domestic violence that was alleged to have been committed in the presence of the children. Thus, the jury was instructed that it must find that Williams committed aggravated assault in order to find him guilty of committing any of the other four offenses. R358 (Jury Instr. 38a in Add. C). And as instructed, the jury had to find that Williams did not act in self-defense when he committed the aggravated assault. R339. So, when the jury used aggravated assault as the predicate act of domestic violence for the greater offenses of domestic violence in the presence of a child, it had already considered and rejected Williams's self-defense claim.

Similarly, Williams was charged with the lesser-included-offense of assault together with four lesser-included-offenses of domestic violence in the presence of a child. Assault was the predicate offense for all four of the lesser domestic violence offenses. Thus, the jury was instructed that it could only convict of the lesser-included offenses if it found he did not commit the greater offenses. R354-357 (Jury Instr. 35-38). And the jury had to find that he did not act in self-defense when he committed assault. R347. So, had the jury used assault as the predicate act of domestic violence for the lesser domestic violence offenses, it would have already considered and rejected Williams's self-defense claim.

Thus, including lack of self-defense as an element in the greater and lesser charges of domestic violence in the presence of a child would be redundant: the jury only had to reject self-defense once. *See, e.g., Ojeda*, 2015 UT App 124, ¶6 (no ineffective assistance for not objecting to absence of a redundant element from an instruction). Williams therefore establishes neither deficient performance nor prejudice, and his claim fails. *See Painter*, 2014 UT App 272, ¶¶4-12 (absence of self-defense as element of aggravated assault instruction neither deficient nor prejudicial where other instructions properly stated the law); *Lee*, 2014 UT App 4, ¶¶22-25 (rejecting ineffectiveness claim that murder instruction not containing "element" that jury must find lack of self-defense led jury to convict without self-defense determination).

III.

Williams has not proven that no competent attorney could decide not to object to testimony from either the investigating officer or Williams's daughter.

Williams makes two final ineffective assistance claims. First, he argues that his trial counsel should have made a hearsay objection to testimony from an investigating officer that explained what he discovered at the crime scene concerning Victim's injuries. Aplt.Br. 42-43. But reasonable counsel could conclude that a hearsay objection was inappropriate because the officer's

testimony was non-hearsay evidence admitted to explain the officer's conduct.

Second, Williams claims his trial counsel should have objected to or moved to strike his daughter's testimony that he "manipulated" her to get her to write in her pre-trial statement that he acted in self-defense. *Id.* at 43-45. He argues that the testimony was inadmissible character evidence and that there was no conceivable tactical basis for counsel not to object. *Id.* at 45. But reasonable counsel could conclude that it was more beneficial to the defense to get D.D.'s written statement in and shift the "manipulation" label to Ex-Wife than to object.

A. Williams has not proved that no reasonable counsel could have concluded that the officer's testimony was offered for purposes other than showing that the statements were true; any potential impact was miniscule.

Williams has not proved that all reasonable counsel would have made a hearsay objection to certain testimony from Officer Joshua Haskell. *See Premo*, 562 U.S. at 124.

Williams objects to the following emphasized statements:

> Q (by prosecutor). Well, at some point did – in speaking with your other officers and your own inquiries with the people involved, did you find a suspect of what caused – did you form a belief on why [Victim] was injured?
>
> A (Officer Haskell). *I was told by almost everyone on scene that the reason why the incident took place was [Victim] had discovered that*

the suspect in this case, Steven Williams, 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.

Q. And based on your – the information you received from those folks and your other assisting officers, how did she get hurt?

A. *I was told that he – I believe this is verbatim too, "cold-cock punched her in the face."*

R834-35 (emphasis added) (in Add. D). Williams criticizes the emphasized testimony as being inadmissible hearsay evidence that did not fit within an exception to the rule against hearsay. Aplt.Br. 43.

But reasonable counsel could have come to the opposite conclusion because, as shown by the remainder of the quoted exchange, the testimony was offered to explain why Officer Haskell pursued his investigation.

Q. Okay. And so based on that, did you attempt to locate Mr. Williams?

A. Yeah. Yeah. At that point, I tried to determine where he would have gone, if he had any other known addresses, stuff like that.

Q. Okay. And why did you feel that that was necessary?

A. Due to the extensive injuries, I knew that – it was more – it was entering the realm of criminal rather than just, there's a little altercation between two people. You've seriously hurt this person. I want to at least talk to you and get your side of the story, and that's what I attempted to do.

R835.

Hearsay is an "out-of-court statement offered to prove the truth of the matter asserted[.]" *State v. McNeil*, 2013 UT App 134, ¶44, 302 P.3d 844. But an out-of-court statement that is "offered for some other purpose" and not for its truth is not hearsay. *See Arnold v. Grigsby*, 2018 UT 14, ¶22, 417 P.3d 606 (statement not proscribed by hearsay rule when offered to show the effect on the hearer, not for the truth of the matters asserted in the statement); *State v. Collier*, 736 P.2d 231, 234 (Utah 1987)(officer's testimony regarding conversation with informant was not hearsay because it was admitted to explain the officer's conduct); *see also State v. Dodge*, 2008 UT App 36U, *1 (statement offered to explain chronology of events and conduct of officers was admissible as non-hearsay testimony); *State in re G.Y.*, 962 P.2d 78, 85 (Utah App. 1998) (out-of-court statements about which caseworker testified were admissible because they were meant to explain her actions, not to prove the truth of the matter asserted); *Layton City v. Noon*, 736 P.2d 1035, 1039 (Utah App. 1987)(officer's testimony about his conversation with a store clerk was admissible to explain the officer's conduct).

Whether the officer's statements were truthful was irrelevant. What was important was the part they played in the investigation. Reasonable counsel could conclude that the statements were not offered as evidence of what Williams actually did to Victim or what the children claimed he had

done. As Haskell stated, the information came from his "assisting officers" who gathered it while he was preoccupied with Victim, and it was part of what led him to track down and arrest Williams. R833-36. As such, a reasonable counsel could conclude that the statements were not objectionable. *See Dodge*, 2008 UT App 36U, *2 (no ineffective assistance for not making hearsay objection to statement of Dodge's location where statement was offered to explain police conduct and, therefore, was not hearsay).

Williams's prejudice argument is equally unpersuasive. He claims that the officer's testimony concerning "almost everyone on the scene" allowed him to "restate and refine" the "disjointed" and "contradictory" trial testimony of the four children. Aplt.Br. 43. But the officer's testimony said nothing about the children's trial testimony. He summarized only what other officers told him the children had told them at the scene. And again, the testimony did not vouch for, restate, or refine the children's testimony because it only explained what prompted Williams's arrest.

Moreover, any possible impact his brief testimony may have had on the jury's perception of the children's testimony was miniscule given the discrepancies already established between the written and in-court versions of events recounted by the four young eyewitnesses. Far from "effectively

removv[ing]" any doubt arising from the discrepancies (Aplt.Br. 43), the officer's brief overview of how and why Victim was injured contained too little information factored through other officers to explain or otherwise ameliorate the discrepancies in the children's later reports and trial testimony. And those discrepancies factored prominently in the parties' closing remarks while the officer's testimony did not. R981-85,1002,1009-10. Where the jury heard the testimony of the four children, the discrepancies identified by counsel, the explanations offered by the children, and the characterization of those matters in closing arguments, then took at least one written statement into deliberations, there is no reasonable likelihood that, absent the officer's statements, the jury would have reached a more favorable decision for Williams.

B. Williams has not proved that no reasonable counsel could have concluded not to object to his daughter's testimony.

Finally, Williams argues that his trial counsel should have objected that D.D.'s characterization of Williams as "manipulative" was improper character evidence. Aplt.Br. 43-45. But reasonable counsel could have chosen not to object.

At trial, D.D. testified that before she saw Williams hit Victim in the face, she saw Victim put her hands on Williams's chest and push him but not choke him. R680-81. Williams kept taunting her and trying to invade her

space but did not seem to lose his breath. *Id.* When Victim later walked in through the back door, D.D. said that Williams walked up to Victim and hit her in the face. R676-77,710-11.

The prosecutor handed D.D. the statement she said she had written at 3 a.m. after being awake a "long time." R688-89. The statement reflected in capital letters that Williams "was using self-defen[s]e." Def. Exh. 4. When asked why she wrote that, she responded

A. Because he [Williams] manipulated me into writing it.
Q. How did he do that?
A. He had his own way of manipulating people.
Q. Were you—did you feel like you had to write that?
A. Yes.
Q. Why?
A. I do not know.

R689.

On cross-examination, defense counsel addressed the written statement at length, using it to support the defense by highlighting parts of the statement that suggested that Victim was the aggressor, establishing that D.D. believed when she wrote it that Williams was acting in self-defense, stressing that D.D. wrote it while living with Ex-Wife, and emphasizing that D.D. and Ex-Wife have talked about the incident since D.D. wrote the statement. R690,701-03,715-17. The prosecutor thereafter returned to the self-defense discrepancy:

> Q. Now, you indicated that at the moment you wrote this you thought your dad was using self-defense; is that accurate?
>
> A. Yes.
>
> Q. Why did you think he was using self-defense when you wrote this statement?
>
> A. Because he manipulated me into saying it and I was also raised by him saying that he always uses self-defense by—when people, like, hit him or—I don't know, like he was just trying—like, he manipulated me into trying to say that he was defending himself.

R719.

Williams proposes that the State used the manipulation terminology to suggest that he acted in conformity with that trait by manipulating what his daughter put in her written statement, implying that what she wrote was a lie. *Id.* at 44. This prejudiced him, he claims, because it undermined the defense before it could present its arguments to the jury. *Id.* at 45. He states that there could be no "conceivable tactical basis" that would justify admission of that characterization. *Id.*

But counsel's conduct was in keeping with their trial strategy. Williams must, but cannot, show that the strategy was unreasonable. The defense theory was one of self-defense, and defense counsel emphasized the fact that Williams claimed self-defense from the very start. *See* Aplt.Br. 45. R1002. Counsel relied heavily on the children's written statements in cross-examination, using them to establish that shortly after the altercation, all of

the children corroborated Williams's explanation that Victim hit, punched and slapped him and that Williams had acted in self-defense. R999,1002-04 (defense closing argument). Counsel argued that the written statements "corroborate a lot of what [Williams] said" and that he could not have manipulated what they wrote because he was in jail at that time. R1003.

At the same time, defense counsel also challenged the credibility of the children's trial testimony by highlighting the differences between that testimony and their earlier written statements, urging the jury to credit the written statements, and blaming the differing trial testimony on Ex-Wife's influence. Aplt.Br. 45. R1003. Counsel explained that Williams's kids had lived with Ex-Wife since the night of the assault, that Ex-Wife "doesn't even like" Williams, and that she "wants to use this event to try to get custody of the kids." R1003.

This theory explains why defense counsel remained silent when D.D. suggested she had been manipulated. They wanted to emphasize that the children first reported that Williams was defending himself. They could not get that part of the statement in and keep the State from letting D.D. explain why she changed her testimony. And they had a way to shift the "manipulation" label to Ex-Wife. The children had lived with her since the night of the incident, and she wanted custody, which they presented as a

motive for her to manipulate the children into changing their story for trial. R610,642, 716,810,908-09. They also offered evidence to establish that Ex-Wife had previously manipulated D.S. to lie about his father. R639-41,667-68; Def. Exh. 3.

Further, when D.D. first used the word, it sounded oddly mature for the witness, and she could not explain what she meant. R689. Defense counsel thereafter used the last question asked of D.D. to play on the incongruity of the word and to plant in the jury's mind exactly what they wanted the jury to believe: that while preparing D.D. for trial, Ex-Wife used that word to describe Williams's behavior. R720. Despite D.D.'s denial that Ex-Wife suggested the word to her, the seed was planted, and the jury could consider it along with earlier evidence counsel had adduced that Ex-Wife had, in the past, "interfered with" and "used" D.S. to make false claims against Williams. Def. Exh. 3.

Additionally, reasonable counsel could conclude that in order to get the statement in, they could not object when D.D. tried to explain it. In fact, the rules would have allowed the explanation. *See* Utah R. Evid. 613(b). Reasonable counsel could also conclude that an objection might be seen by the jury as further evidence of Williams's attempt to manipulate her

testimony. *See State v. Isom*, 2015 UT App 160, ¶38, 354 P.3d 791 (discussing reasons for not objecting to an improper closing argument).

Reasonable counsel could conclude that on the whole, the defense was better off getting the statement in and presenting evidence that it was more likely that Ex-Wife manipulated D.D. than to risk having the statement excluded to prevent D.D. from accusing Williams of manipulating her, especially where D.D. could not detail how Williams actually manipulated her or explain how he could have manipulated her after he was arrested. And with the statement in, they could argue that, like the other children, D.D.'s first report—that Williams was only defending himself—was more likely to be true than her trial testimony. *See id.* at ¶¶37-40 (ineffective assistance claim based on lack of objection fails given possible strategic reasons).

CONCLUSION

For the foregoing reasons, this Court should affirm all of Williams's convictions.

Respectfully submitted on April 17, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 13,495 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Kris C. Leoanrd
KRIS C. LEONARD
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on April 17, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melanie Kendrick

Addenda

Addendum A

West's Utah Code Annotated

§ 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.

(c) The party intending to call the expert is responsible for any fee charged by the expert for the consultation.

(2) If an expert's anticipated testimony will be based in whole or part on the results of any tests or other specialized data, the party intending to call the witness shall provide to the opposing party the information upon request.

(3) As soon as practicable after receipt of the expert's report or the information concerning the expert's proposed testimony, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the information required under Subsection (1)(b).

(4) (a) If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.

(b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose appropriate sanctions. The remedy of exclusion of the expert's testimony will only apply if the court finds that a party deliberately violated the provisions of this section.

(5) (a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.

(b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.

(6) This section does not apply to the use of an expert who is an employee of the state or its political subdivisions, so long as the opposing party is on reasonable notice through general discovery that the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice.

Credits: Laws 1994, c. 139, § 3; Laws 1999, c. 43, § 1, eff. May 3, 1999; Laws 2003, c. 290, § 2, eff. May 5, 2003.

§ 76-5-102. Assault--Penalties

(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.

Credits

Laws 1974, c. 32, § 38; Laws 1989, c. 51, § 1; Laws 1991, c. 75, § 3; Laws 1995, c. 291, § 4, eff. May 1, 1995; Laws 1996, c. 140, § 1, eff. April 29, 1996; Laws 2000, c. 170, § 2, eff. May 1, 2000; Laws 2003, c. 109, § 1, eff. May 5, 2003; Laws 2015, c. 430, § 1, eff. May 12, 2015.

U.C.A. 1953 § 76-2-402

§ 76-2-402. Force in defense of person--Forcible felony defined

(1) (a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.

(b) A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2) (a) A person is not justified in using force under the circumstances specified in Subsection (1) if the person:

(i) initially provokes the use of force against the person with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(ii) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(iii) was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

(b) For purposes of Subsection (2)(a)(iii) the following do not, by themselves, constitute "combat by agreement":

(i) voluntarily entering into or remaining in an ongoing relationship; or

(ii) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(a)(iii).

(4) (a) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property.

(b) Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

(c) Burglary of a vehicle, defined in Section 76-6-204, does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

(a) the nature of the danger;

(b) the immediacy of the danger;

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

(d) the other's prior violent acts or violent propensities; and

(e) any patterns of abuse or violence in the parties' relationship.

Credits

Laws 1973, c. 196, § 76-2-402; Laws 1974, c. 32, § 6; Laws 1991, c. 10, § 5; Laws 1994, c. 26, § 1; Laws 2010, c. 324, § 126, eff. May 11, 2010; Laws 2010, c. 361, § 1, eff. May 11, 2010.

Addendum B

It varies by different facilities, but I work on a schedule where we're -- I make myself available to cover both general, oral, and maxillofacial surgery call which includes, as a subset, traumatic injuries to the face.

Q. And so what type of calls do you usually respond to?

A. We often times, classically, get a lot of assault, ski accidents, motor vehicle accidents, falls, kind of -- you name it. We sort of see it as well as some general calls, infections, neck infections, and the like.

Q. And these are all related to injuries around the face?

A. Correct.

Q. And were you working on call on January 10th of 2016?

A. I was.

Q. And do you recall being contacted by IMC to consult with a patient named Audrey Wallace?

A. I do. I was contacted by the trauma surgery service who -- who admits patients who suffer traumatic injuries, and then they'll call a subspecialist like myself to address specific needs for a patient.

Q. And so when you responded to IMC did you meet Audrey Wallace?

A. I did.

Q. And did you ask her about how she sustained her injuries?

A. I do. I will generally will ask the patient how they sustained the injury. The mechanism of injury is often of some importance to us to help as we formulate a treatment plan for the patient to know what injuries we might be looking for.

Q. And based on your interaction with her, what was your understanding of how she sustained her injury?

A. That she was assaulted, to my understanding, with closed fists by an assailant.

Q. And why did knowing that -- why was that important for you in diagnosing her?

A. The mechanism of injury can be important given the type of fractures and the number of fractures that we will look for.

Q. Now, when you are creating a plan to care for Ms. Wallace, was there imaging taken of her jaw?

A. Yeah. Typically those images have been acquired by the consulting physicians prior to my arrival. That sort of leads them to make the phone call to us when the radiologist will identify that there's injuries.

Q. And you will review those images --

A. Absolutely. Yeah, I'll always review.

(Simultaneous talking.)

Q. Dr. Stoker, I'm approaching you with what I've marked as State's Exhibits 16, 17, and 18. Did you have the opportunity to review those exhibits prior to your testimony

today?

A. Yes.

Q. And what do those exhibits depict?

A. These are the pre-operative images that were taken of Audrey at the time of her admission to the hospital.

Q. And are these images that you reviewed prior to making your, your treatment plan?

A. Yes.

Q. And do they appear to be accurate depictions of her CT images before operation?

A. Yes.

MR. GRAVES: Your Honor, the State would move to admit Exhibits 16 through 18.

THE COURT: Any objection?

MS. REMAL: No objection to State's Exhibits 16 through 18.

THE COURT: They are received.

(State's Exhibit Nos. 16-18 were received into evidence.)

Q. (BY MR. GRAVES) Okay. Now I'm going to put State's Exhibit 16 on this whiteboard on this projector here.

What type of image is this?

A. This is a three-dimensional reformatting of a traditional computed tomography or CAT scan image.

Q. And you said that -- well, keep this here. Can you please use this pen and just circle the general areas where

these were -- Ms. Wallace's mandible was fractured?

Now, she had fractures on both sides of her jaw?

A. Yes.

Q. And is that typical in these types of cases?

A. Yeah. It's certainly not uncommon. We often see the mandible, the lower jaw, break in two places. It's typical.

Q. And why does it break in two places?

A. Physiologically, the shape of the lower jaw is a U shape that sits in a muscular sling. It has the upper projection into the jaw joint or the temporomandibular joint. Blunt force that in cases like an assault that come from, typically, a lateral or side sideways direction create tremendous amount of force at the point of impact. As well as, if you think of, sort of, like a wishbone, they create a counter force at another point in that curvature so we oftentimes will see a fracture. When we see one -- the mantra we say is when we see one, we look for the other. We often see them in pairs; not always, but often.

Q. And in this case, did you see that?

A. Absolutely, yes.

Q. Now, I'm showing you Exhibit 17 which is a closer view of the left side of her face. Again, can you indicate with your -- with that pen up here where these fractures are.

Now, from your assessment where -- and from what Ms. Wallace indicated to you, where was the primary point of

impact?

A. Most likely there on the left posterior aspect of the mandible.

Q. And why is that?

A. 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. And, finally, Exhibit 18 is a side profile of her left. Again, can you circle for us the fracture there?

So you circled surrounding, kind of, this line in the middle of that jaw bone. Is that line the fracture?

A. Yes.

Q. How should that normally appear?

A. There would be no line. Just continuous smooth segment of bone.

Q. And what did you note of -- what was noteworthy about this particular fracture?

A. It does have fairly gross or significant displacement where the proximal segment, which is the segment closer to the base of the skull, is rotated in a clockwise direction, fairly significantly secondary to the muscle pull at the base of that that connects up to the cheekbone. It's not an uncommon displacement. However, hers was grossly displaced and caused a

laceration which, obviously, you don't see here in the --

Q. Can you just point to where --

A. Sure.

Q. -- on that, while you are describing this?

A. This -- up here up above this fracture the mucosa or the upper tissue of the mouth is torn. That deviates upwards basically, in effect, pushing it into the mouth.

Q. Was there any section of her jaw, though, that was simply missing or --

A. Sure. And you actually can see here this smaller, sort of what we call a sequestrum, or comminuted segment of bone, a small little wedge of bone that was at that size essentially becomes a nonviable piece of bone. It's sort of -- shattered maybe is the best way to describe it.

Q. Of what?

A. Like a shattered piece.

Q. Sorry?

A. Looks like a shattered piece of glass.

Q. And when -- when a bone shatters like that, where do those fragments go?

A. We typically discard them. They are too small to fixate. And if left in the fracture site are a high risk of causing an infection.

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

A. Yeah, it is.

Q. 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.

Q. Now, can you describe -- did she sustain any nerve damage from this fracture?

A. Yes. As a matter of fact, on the same upper rotation of this segment now being pushed in kind of an upward clockwise rotation, there's a nerve that passes within the bone and it runs within the bone. It emerges from that small foramina, that small hole in the bone, and a branch of that nerve goes to the lip and the chin. So the simple way to assess the status of this particular nerve, and as is fairly common this type of injury when you have the shearing, separation of those bones, that nerve will be transected which hers was. So she, as a result, has numbness of the lip and the chin and some of the gamma mucous inside the mouth.

Q. So when you say "transected", what do you mean?

A. Separate.

Q. Separate?

A. Yeah.

Q. And is that something that you would have been able to repair in surgery?

A. No. With a traumatic injury like this and a shearing

transection, there's really no hope for -- for putting it back together.

Q. So after you observe these pre-operative scans, what plan of action did you come up with?

A. With mandible fractures, the most definitive form of treatment is open reduction and internal fixation. Which broken down: Open means making an incision to open and view the fractures in direct vision, reduction is to place the bones back into their anatomic position, and internal fixation is the use of hardware plate -- titanium plates and screws to fixate the bones into positions to allow it to heal.

Q. And did you conduct that operation the same day --

A. Yes.

Q. -- on January 10th?

A. Yes.

Q. And was -- did you have to put her under anesthetics during that [inaudible]

A. Yeah. So this involves the patient undergoing a general anesthetic where they go to sleep. We have the anesthesiologist place a breathing tube into the nose. As part of the repair of these fractures, we have to wire the patient's mouth shut to assure we have the bones in appropriate anatomic reduction. So she was, yeah, put to sleep for that procedure and we [inaudible]

Q. So it is -- essentially, the goal is to align those

bones as best as you can to the original position?

A. Correct. And to fixate them into place so they can heal.

Q. And while you are doing the surgery, are you taking x-rays to monitor your progress?

A. On occasion we do, yes.

Q. I'm approaching with Exhibits 19 and 20. Again, did you have a chance to review these prior to today?

A. Yes.

Q. And what do they depict?

A. These are intraoperative radiographs taken near the end of the procedure.

Q. And do they appear to be accurate depictions of the surgery you performed on Ms. Wallace on January 10th?

A. Yes.

MR. GRAVES: Your Honor, the State would move to admit State's Exhibits 19 and 20.

MS. REMAL: No objection --

THE COURT: They are received.

MS. REMAL: -- to State's Exhibits 19 and 20.

(State's Exhibit Nos. 19 & 20 were received into evidence.)

Q. So I'm publishing 19 here which is one of these X-rays. Can you just circle the areas where you had to insert plates on Ms. Wallace's jaw?

And can you mark with a R or a L the ones that are on

the right and the left.

So the one on the lower jaw on the top, that's the right side of her?

A. On the left side of this image as you see it, that is the right side of her mouth. This is the left side here. So this is the right and that's left.

Q. Okay.

A. That's left there.

Q. Now, when you -- when you put these plates in someone's jaw with screws, what are associated risks with that?

A. When -- anytime you introduce a foreign body into the body, there's a risk of infection.

Q. Okay. And were there any unique challenges to Ms. Wallace's case when you were performing this operation?

A. Yeah. She -- we -- it was -- it was relatively difficult in her circumstance because of the degree of displacement of the bone on the left side reducing the reduction of that bone to anatomic position was fairly difficult.

Q. And, again, just publishing Exhibit 20, is this an inverted view of the X-ray?

A. Yeah. Like a reverse or a negative, yeah. Same essential image.

Q. Okay. Now, what postoperative instructions did you give Ms. Wallace after the surgeries?

A. With -- certainly regular oral hygiene is part of the postoperative care. Probably the most significant and poignant instruction to the patient is we instruct them not to chew solid food for typically about two months.

Q. And why is that?

A. Although the fractures are reduced and stabilized, it takes about two months for the first phase of bone healing to occur where there's enough stability that you can start to function and use the bone, and the function at that point actually helps to continue the healing and strengthen and organize the bone.

Q. And have you subsequently treated Ms. Wallace since this surgery was performed on the 10th?

A. I have. She had, what I would consider, a relatively complicated postoperative recovery where she developed what we call a nonunion here. There was a small gap that was from that small segment of bone that I had outlined on the initial image where it was missing. Because of the anatomical location of that fracture to compress the two segments completely together, which is what we ideally like to have, is bone-to-bone contact. It's not feasible there because in doing that you put counter-rotation on the joint which then leads to additional problems. So we were forced to leave a small gap. We don't like to do that because the gap -- and as actually happened in Audrey's case -- because there is not a bone-to-bone contact

and continuity there, it does allow for some micromovement of the bone as it heals. And as minimal as that movement can be, it does lead to break down and poor wound healing, which it did in her case. I --

Q. Did that require additional surgery?

A. It did. I removed -- of the two plates that are circled, the one closer to the top or to the left on this image, I removed in a separate procedure to alleviate some problems. She continued to have issues. And then, actually, in August of 2016, I removed the other plate and performed a procedure where I made an incision through her neck and approached the jaw and placed a large mandibular reconstruction bar to strengthen her jaw.

Q. And after that surgery, were there also postoperative instructions?

A. Yeah. It's similar to the first.

Q. No solid foods?

A. Correct.

Q. Okay. Now, based on your treatment of her, what long-term effects is she going to experience?

A. Uh, I'd say probably the most significant, she'll have permanent numbness of the left lip and chin as well as some of the gums and mucosa inside the mouth. She'll likely have problems with her -- her bite, the way her teeth fit together. With most fractures that involve the mandible,

there's some degree of change to the bite. Patients generally are able to adapt to a degree, but it's troublesome, and I suspect for her that will be a long-term issue.

Q. And the numbness is due to the severed nerves?

A. Correct.

Q. Is her jaw going to ever return to the condition it was prior to this incident?

A. In my definition, no. It never is exactly like it is before. Our hope is to return people to normal function that they had before but the jaw is sort of forever changed once an incident like this occurs.

MR. GRAVES: Okay. No further questions.

THE COURT: Ms. Remal.

CROSS-EXAMINATION

BY MS. REMAL:

Q. Good morning, Dr. Stoker.

A. Good morning.

Q. One of the things that you do, as you've already indicated, is that you talk to the patient if that's possible?

A. Yes.

Q. To get information about how this all occurred?

A. Yes, ma'am.

Q. Have you reviewed your report where you have talked about the information you got from Ms. Wallace in this case?

A. I have.

Q. All right. Let me know if you need another copy because I've got --

A. Okay.

Q. -- a copy.

A. Sure. I look -- it's been a year so.

MS. REMAL: Do I need to keep asking to approach, your Honor?

THE COURT: Oh, no.

Q. What I -- those are copies of the records that I received. I believe that they include your own reports and --

A. Yeah, I see it.

Q. -- other reports that were generated by other medical personnel --

A. Yes, ma'am.

Q. -- in the course of Ms. Wallace's treatment.

So do you find the section where -- of your report that -- I believe it's entitled "History of Present Illness"?

A. Yes, ma'am. I see it here.

Q. And that's what you are talking about when you talk about the information that you received from Ms. Wallace about how her injury occurred; am I correct about that?

A. Correct. And to a degree there's oftentimes overlap. With the admitting physicians, we use their reports as well.

Q. Okay. And one of the things that she indicated is that she's not clear if she lost consciousness or not; correct?

In that --

A. Correct. That's what I noted, yes.

Q. And what's also indicated in there is that she reportedly discovered her boyfriend cheating on her; correct?

A. Correct. Yes.

Q. And subsequently, he assaulted her?

A. Yes.

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

A. Yes.

Q. Okay. In preparation for Ms. Wallace's treatment, various other tests were done besides this. Is this a CAT scan or a CT scan, or are those the same?

A. This is a plain radiograph.

Q. Okay.

A. But a CAT scan and CT scan are the same thing, yes.

Q. Okay. So in addition to this radiograph, other scans were done of Ms. Wallace to determine if there were other injuries besides the facial injuries that you've talked about; correct?

A. I assume so but those were not ordered by me.

Q. Okay. To your knowledge, the injuries that Ms. Wallace suffered as a result of this incident, were these facial injuries that you treated?

A. Correct.

Q. You're not aware of any other injuries that she

Addendum C

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. 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. 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.

Addendum D

that she had sustained, Audrey.

I did speak with two -- there's two kids, I think. It was Elizabeth -- no. There's -- Angelique is the main person I spoke with because her mom couldn't speak. Audrey couldn't speak. And I spoke with Ananiah for just a quick second. But I had my assisting officers on scene grab info for the people who were there and involved, and then I left to assist with whether she was going to get transported by ambulance or take a personal vehicle, and so I assisted with that. So that's kind of how we work; we have assisting officers on scene.

Q. Well, at some point did -- in speaking with your other officers and your own inquiries with the people involved, did you find a suspect of what caused -- did you form a belief on why Audrey was injured?

A. Yeah. I was told by almost everyone on scene that the reason why the incident took place was Audrey had discovered that the suspect in this case, Steven Williams, 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.

Q. And based on your -- the information you received from those folks and your other assisting officers, how did she get hurt?

A. I was told that he -- I believe this is verbatim too, "cold-cock punched her in the face."

Q. Okay. And so based on that, did you attempt to locate Mr. Williams?

A. Yeah. Yeah. At that point, I tried to determine where he would have gone, if he had any other known addresses, stuff like that.

Q. Okay. And why did you feel that that was necessary?

A. Due to the extensive injuries, I knew that -- it was more -- it was entering the realm of criminal rather than just, there's a little altercation between two people. You've seriously hurt this person. I want to at least talk to you and get your side of the story, and that's what I attempted to do.

Q. And were you able to find a location of Mr. Williams?

A. I was. I was given an address for his mom's house that was possibly out in West Valley, and I headed that way.

Q. Okay. And do you recall responding to that address?

A. Yeah. I responded to that address. I don't remember what the address is off the top of my head but went there. I had West Valley assist me; only one officer assisted me and attempted to make contact. We did locate the truck however. That's how we knew that he was possibly there is because before we even arrived to the LaSalle address we were told that -- what his truck looked like. So by the time we wrapped everything up at that address and then went to West Valley,

that's what we were looking for was that truck, that same truck. We were able to find that truck and we knew that's -- he was probably there.

Q. And so -- now, when you approached this house, did you have a body camera activated?

A. I did.

Q. Okay. Have you had a chance to review that body camera?

A. I have.

Q. When you initially approached, describe how you knocked and what occurred.

A. Well, we first saw -- there's some cracks in the blinds. We first poked our heads in to see if there was anyone that matched the description of Steven in there. We did see someone that looked like Steven in the downstairs living room. At that point, we then said, okay, let's knock on the door then.

So as soon as we knocked on the doors, the lights in the living room did go off and I thought they were going to try to hide, but eventually Steven himself came out to the front door. I asked him to identify himself. He did say, "I'm Steven Williams." He did match the description of what I could see in the driver's license photo too. So at that point I thought, okay, this is Steven Williams in front of me. He's identified himself, and from what I could see from his driver's