

Case No. 20170518-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

TRACY SCOTT,
Defendant/Respondent.

Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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INTRODUCTION

Defendant shot his wife three times at point-blank range, killing her. He never disputed that he fired the fatal shots. Instead, his defense at trial was that the jury should convict him of manslaughter because he shot his wife under extreme emotional distress: Their contentious relationship, along with a recent escalation in tensions, allegedly caused him to snap. He testified that in the weeks before the shooting, he and his wife had been fighting worse than ever; that his wife threatened him days earlier; and that when he saw her gun was missing from the gun safe, he was overwhelmed with fear and anger. He was convicted of murder.

Defendant testified that three days before he killed his wife, she had threatened him, and that when he saw her by their gun safe and noticed that a Beretta was missing, he took the threat seriously and believed that she

meant to harm him. When Defendant tried to testify about the exact words of his wife's alleged threat, however, the State objected that those words were inadmissible hearsay. Defense counsel did not counter that the exact words were admissible non-hearsay because they were not offered for the truth of the matter asserted. The trial court sustained the State's objection, so the jury never heard the alleged threat's exact words.

On appeal, Defendant argued that his counsel was ineffective for not making the non-hearsay argument. The court of appeals agreed, reasoning that defense counsel was deficient because admitting the specific words of the threat—which are not part of the record—would only have strengthened his defense. The court of appeals also held that Defendant was prejudiced because the jury may have remained deadlocked had it heard the threat's specific words, which again, are not part of the record.

The court of appeals erred and this Court should reverse. First, the court of appeals failed to hold Defendant to the *Strickland* deficient performance standard, under which the determinative question is whether counsel's performance was objectively unreasonable. Because the court of appeals failed to conduct this analysis, and thereby incorrectly concluded that counsel was deficient, it erred. Likewise, the court of appeals' conclusion

that counsel performed deficiently was not supported by the record because the specific words of the threat were not in the record.

The court of appeals also erroneously concluded that Defendant was prejudiced. Without knowing the content of Teresa's alleged threat, the court of appeals impermissibly speculated that the content of the threat was both serious and would have affected the outcome of the proceeding. Also, the court of appeals did not evaluate the totality of the evidence before the jury, but instead considered evidence of Teresa's alleged threat in isolation.

STATEMENT OF THE ISSUES

1. Did the court of appeals apply an incorrect standard for determining whether defense counsel's performance was deficient under *Strickland v. Washington*, 466 U.S. 668 (1984)?

2. Did the court of appeals incorrectly relieve Defendant of his burden to prove *Strickland* prejudice as a demonstrable reality on the record evidence?

Standard of Review for Issues 1 and 2. On certiorari, this Court reviews a court of appeals' decision for correctness. *State v. Lowther*, 2017 UT 34, ¶17, 398 P.3d 1032.

STATEMENT OF THE CASE

A. Summary of facts.¹

When teenaged brothers Jack and John learned that there were police cars in front of their Salem, Utah home, their first thought was that their father, Defendant, had “finally” killed their mother, Teresa. R.279:100, 108, 124. They were right. Defendant had just called 911 to report that he had shot and killed his wife. R.280:62; State’s Ex.1. When the dispatcher asked what had happened, Defendant calmly explained that he shot Teresa after she “got off the phone with her mother complaining about” Defendant, “telling how she’s tired of it and this and that.” R.280:63; State’s Ex.1. Defendant said that he and Teresa had “been fighting for the last two weeks, almost straight,” and that Teresa had been “trying to take a picture” of him. R.280:63-64; State’s Ex.1. But now, Defendant told the dispatcher, Teresa was dead. R.280:64; State’s Ex.1.

Responding officers found Teresa in the master bedroom sitting on the bed, semi-reclined. R.277:131. Her legs were before her, her slippered feet

¹ The State uses the pseudonyms “Jack” and “John” for the children’s names.

The record is paginated in chronological order, but in reverse. The transcripts, however, are paginated in ascending order. The State’s brief uses the order in which they appear – descending in the record, ascending in the transcripts.

crossed at the ankle. *Id.* Her cell phone was next to her and crochet work lay on her lap. *Id.*

Defendant had shot Teresa three times. R.277:135, 140. One bullet entered the left corner of her mouth and lodged in her esophagus. R.278:46. Another entered under her chin and exited the right side of her neck. R.278:49. The third bullet entered her chest, passed through her heart, and exited out her back. R.278:51-53. Because Teresa had gunpowder stippling over the back of her right hand, which is caused by “unburnt gunpowder particles as they come out of the muzzle of the gun,” the medical examiner concluded that Teresa had been shot from a couple feet away. R.278:54, 64.

Officers recovered two guns from the home. The one Defendant used to shoot Teresa, a black handgun, was lying on the floor near the front door. R.277:45-46, 87, 116, 146, 150-152, 179, 186-187; State’s Exs. 5-7. They found another gun, a loaded silver Beretta, in the master bedroom lying on the lower right corner of the bed – the far opposite corner from where Teresa had been sitting. R.277:125, 134, 137-138; State’s Ex.9-10. A holster lay on top of it. R.277:135, 160-161; State’s Ex.10.

Officers also found a portable gun safe in the master bedroom “poking out underneath the dresser” near the bedroom door. R.277:125-126; State’s Ex.11. It was “open, nothing in it.” R.277:126, 171.

A history of domestic violence

At trial, the State presented evidence that Defendant and Teresa had a difficult relationship, characterized by Defendant emotionally and physically abusing Teresa.

Defendant and Teresa had been married nineteen years. R.278:86, 134. During that time, Defendant worked full-time fixing school buses for the local school district. R.278:213-214. Teresa worked part-time cleaning houses, at Wal-Mart, and with her parents. R.278:94-95; R.279:47. Teresa also took care of their home and their two boys, Jack and John, and managed their finances. R.278:92-94, 140, 147-148. Teresa had gone back to school and earned a business degree, but she had yet to find a steady, full-time job. R.278:92-94, 140, 147. And while friends and family knew that Defendant and Teresa argued often—usually about finances—they believed it was no more than “any other married couple.” R.278:195-196, 202-206, 211, 215-217; 279:42, 48, 65, 119.

Jack and John, however, knew that things were worse than that. Things at home were “rocky and rough.” R.279:77. They witnessed many fights, and believed Defendant was “responsible” for most of them. R.279:127. While Teresa would get mad and yell, Defendant got “aggressive” and “physical.” R.279:82, 90-91. Once they saw Defendant throw a towel at Teresa’s face and

start “punching her in the gut.” R.279:90-91, 116. Another time Defendant “slammed” the vacuum into Teresa’s legs. R.279:118. But they never saw Teresa “get physical” with Defendant. R.297:91. Nor did they hear Teresa call Defendant names or threaten him. R.279:82, 117, 127.

They did, however, hear Defendant threaten to kill Teresa “multiple times.” R.279:82, 86, 117; R.278:150. He promised Teresa that ““one of these days I’m going to kill you.”” R.279:82, 86, 117; R.278:150. And he almost made good on that promise before he shot her. With Jack and John in the backseat, Defendant tried to run Teresa over with their SUV, but Teresa was able to jump out of the way. R.279:88, 115.

During most every argument, Defendant told Teresa that “she was worthless.” R.279:116, 127. He berated her for “putting out no effort to . . . go get a job.” R.278:94. And he would “cuss” at her “a lot,” calling her names like “bitch” or “just anything to put her down, that could hurt her and make her feel like she was a bad person.” R.279:82, 86, 117; R.278:150. He even taunted Teresa that she “like[s] to do it with [her] relatives” because she had been sexually abused as a child. R.279:50-51. And he used the contact name “Bitch Teresa” for her in his cell phone. R.278:150; State’s Ex.29 (Defendant’s cell phone records).

Teresa called the police for help a few times. R.278:88; R.279:91. One time, Defendant's "best" friend since childhood, Officer Howell, responded. R.278:3-4, 13. But he just took Defendant on a ride so that Defendant could "cool off." 278:17, 27.

After one call to the police though, Defendant was arrested, and he pleaded guilty to domestic violence assault. R.278:88-89, 152. Afterwards, Teresa obtained a protective order and they separated temporarily. R.278:89-90, 157. But they soon got back together. R.278:90, 158.

In the months before Teresa's death, one neighbor, Dorothy, believed that "something was very wrong." R.279:34. When she visited Teresa at home, Teresa was "never" comfortable, but "was always nervous" and "always . . . looking around." R.279:30-31. One time when Dorothy came over, Teresa was "crying and shaking" and "distraught." R.279:34-35. Dorothy also witnessed Defendant harangue Teresa for not getting a job for which she had applied. R.279:36. And another time, when Dorothy dropped Teresa home, Defendant "came charging out of the house and threw [the car] door open." R.279:34-35. He yelled, "'What do you think you're doing?'" and ordered Teresa to "'[g]et in the house.'" *Id.*

After that, it became “extremely hard” for Dorothy to “get ahold” of Teresa. R.279:32. Whenever Dorothy called or came over to the house, Defendant would tell her that Teresa was sick or sleeping. R.279:32-33.

The murder

On the day that Defendant killed Teresa, Teresa’s mother, Marsha, talked to Teresa on the phone for about 40 minutes. R.279:52, 56. Towards the end of the conversation, Marsha heard Defendant pick up the other handset to listen in. R.279:53. Teresa was telling her mother that Defendant had “been driving reckless again” and that she was “disappointed.” R.279:56, 62. Marsha heard Defendant exclaim, “My wife and my mother-in-law are saying bad things about me.” R.279:53-54, 57. Seventeen minutes later, Defendant called 911. State’s Ex.29. Teresa was dead.

When officers responded, Defendant complied with their orders and showed no emotion. R.277:42, 62, 69, 72, 91; R.278:10. He answered their questions about where Teresa was, where his gun was, and explained that his sons were at friends’ houses. R.277:43, 49, 70, 90-91. When Defendant’s friend Officer Howell arrived later, however, Defendant became upset and cried. R.277:82, 92-93; R.278:9, 20. Defendant told Officer Howell that he ““thought it would be worth it, but it’s not.”” R.278:30.

B. Summary of proceedings.

Defendant was charged with domestic violence murder. *See* R.3-2.

The defense

Defendant did not contest that he killed Teresa. R.277:19; R.278:161; R.280:48. Rather, he argued that the jury should convict him of the reduced charge of manslaughter because he had acted under extreme emotional distress. R.277:19, 27. He claimed that he “just [got] to the end of his rope” and shot Teresa in a fit of fear and rage. *Id.* Defense counsel declared in his opening statement that “it’s more serious for somebody to think about, plan out, coldly and calmly kill somebody. And it is less serious if somebody does it under what is called extreme emotional distress.” *Id.* Defense counsel told the jury that he would present evidence that Defendant and Teresa fought constantly and that in the weeks before the shooting, their fighting “escalated.” R.277:24. It had gotten so bad, defense counsel stated, that the day before the shooting, Defendant called his mother and said, “‘Mom I’m afraid. The gun safe is open and a gun is missing. And I think Teresa is going to kill me.’” R.277:25. Then, when he heard Teresa talking to her mother on the phone the next day, “‘hamm[ing] it up” and trying to “twist the screws and antagonize him,” defense counsel claimed, Defendant snapped and shot her. R.277:27.

In support of the theory that he laid out in his opening statement, defense counsel called Defendant's mother, his two brothers, and three co-workers to testify. R.278:171, 192, 201, 213-214, 224, 234. Defendant testified as well. R.278:82-170. They all painted Teresa as a nag who pushed Defendant's buttons and would not let things go. For example, Defendant's childhood friend Officer Howell testified that Defendant told him that Teresa "would just kind of nitpick and push and just not let stuff go." R.278:19, 28. Defendant's mother also testified that Defendant and Teresa had a "love/hate relationship" where "they really loved each other but they couldn't get along." R.278:172. They fought "over money" because Teresa would buy things that they could not afford. R.278:189. And before the shooting, their fighting was "bad." R.278:176, 186.

Defendant's brothers testified that Defendant and Teresa "would fight a lot and argue" about money. R.278:193, 196. One of the brothers said that he once saw Teresa yell at Defendant, but Defendant just ignored her. R.278:204-205. The other brother testified that about three days before the shooting, he talked to Defendant on the phone and although Defendant "didn't confide" in him, Defendant seemed "really distraught." R.278:196.

Defendant's coworkers also testified that they had heard Defendant fighting with Teresa on the phone while he was at work. R.278:216, 225, 235.

They said that Teresa would call every so often, but she called “multiple times weekly” in the month before the shooting. R.278:220, 226-227. One time, a coworker noticed that when Defendant hung up on Teresa while she was yelling, she called back, and then came to the shop. R.278:236. Another coworker testified that the night before the shooting, Defendant called to ask if he could come and stay with him. R.278:218-219. The coworker agreed, observing that Defendant seemed “upset.” R.278:219.

Defense counsel elicited on cross-examination of the responding officers that although Defendant was calm and collected when they first arrived, at some point after he was handcuffed and arrested, he became “very emotional and distraught.” R.277:61-62, 64, 93; R.278:20-21.

Defendant also testified. R.278:82-170. He said that in the two weeks before the shooting, he and Teresa argued constantly. R.278:103. According to him, the fights were worse than they had ever been, the “get in your face, yell, scream at each other, spit flying” kind of fighting. R.278:107, 159-160. He said that they fought because Teresa was angry at Defendant for many reasons: he bought the boys and himself guns with their tax return money, R.278:94; Defendant was restoring a car with Jack, but Teresa thought it cost too much money, R.278:97-98; Defendant wanted to take the boys camping but Teresa said they did not have enough money to go, R.278:105; Defendant

drove Teresa's car to work, R.278:106; and when Defendant drove the SUV instead, it used too much gas, R.278:107.

Defendant testified that on Friday, the day before the shooting, Teresa's mother called and he took the phone to Teresa in the bedroom. R.278:110. He said that when he walked in, he saw Teresa sitting on a stool "in front of the bed crouched down." R.278:111. The gun safe had been pulled out from under the dresser, it was open, and "there was only one pistol sitting there." R.278:112. Normally, both his gun and Teresa's silver Beretta were in the safe. R.278:116, 161, 167-168. But now, the Beretta was gone. *Id.* "Having seen that the gun was missing," Defendant testified that he was "scared to death" and "worried that Teresa was going to use that gun to do some harm" to him. R.278:117. Defendant worried especially because "Wednesday there was a threat made. And so when [he] came in and seen that, [he] thought the threat was serious." R.278:113. Defendant said that he left the bedroom and called his mother to tell her what he had seen. R.278:118. But after the kids came home, he "felt a little more comfortable," and that they "kind of just floated through the night." R.278:120. He took Ambien and went to sleep with Teresa that night. R.278:121.

Defendant testified that the next day, Saturday, he was "still feeling scared." R.278:121. He helped a neighbor with his car, went to a haircut

appointment, and went to his work to put some new tires on Teresa's car. R.278:121. Afterward, he "really didn't want to go home" so he called a co-worker and asked if he could stay at his house for the night. R.278:122, 166. His co-worker agreed, but Defendant went home instead. R.278:123. There, Defendant testified, he moved some vehicles and cleaned up an oil spill, fighting with Teresa the "whole time." R.278:125. He said that Teresa was upset that he "kept rubbing the fence" when he moved the vehicles, that he had spilled oil on the driveway, and that he had gotten the wrong sized tires for her car. R.278:108-109, 124-125.

When Defendant went inside to use the master bathroom, he saw that the gun safe "was pulled out again from underneath . . . the dresser" and it was "open with one pistol in it." R.278:126-127. Teresa's silver Beretta was missing again. R.278:163.

Defendant testified that he left the house and "went to the bathroom in a ditch out back in the corner" because he "didn't dare go back in the house." R.278:127. He stayed in the garage. R.278:128. But "the house door to the garage would come open" and "Teresa would be leaning out the door and just staring at [him] and so [he] just was kind of freaking out." R.278:128-129. Although he did not see it, he believed Teresa had the gun with her. R.278:129. Defendant said he "was scared to death." *Id.* He was "starting to

wig out, just freak out.” *Id.* After a while, Defendant “finally” decided that he was going to “go in there and confront this.” *Id.* When he went inside, he could hear Teresa on the phone talking with her mother. R.278:130. He went to the kitchen and got a drink. R.278:131. Teresa then “yelled . . . something” to him and he “snapped.” *Id.* Defendant went “storming in there.” *Id.* He saw that Teresa was pointing her cell phone at him. *Id.* He “reached down and grabbed the gun” from the open gun safe, “cocked it on the way up,” and shot Teresa. *Id.* He then walked over to Teresa and saw that the Beretta was on the floor on the other side of the bed. R.278:132. He picked it up and put it on the bed. *Id.*

Defense counsel finally elicited from the forensic investigator that the Beretta was loaded and that investigators had been unable to obtain comparable fingerprints from it. R.277:160-161, 165-167.

*The prosecutor’s hearsay objection to
Defendant’s testimony about Teresa’s alleged threat
and defense counsel’s response*

During Defendant’s testimony, the prosecutor made six hearsay objections. R.278:98, 106, 110, 113-116, 118-119. The trial court sustained each one. *Id.* When Defendant testified that “Wednesday there was a threat made” and so when he saw that the gun safe was open, he “thought the threat was serious”; the prosecutor did not object. R.278:113. But the prosecutor

objected when Defendant began to answer defense counsel's question about who made the threat. R.278:113, 114. The trial court asked counsel to approach and instructed defense counsel that "[t]here's no way that you're going to dance around and get a threat [in] without [it] being hearsay." R.291:113. Defense counsel did not offer any counterargument. *Id.*

After the sidebar, defense counsel asked Defendant what he was thinking when he saw the gun safe open. R.278:113-114. Defendant began to answer that he "was thinking that the threat that I had received the day before" when the prosecutor asked to approach. *Id.* The trial court excused the jury, then warned defense counsel to stay away from that line of inquiry because "the only responses [it was] getting are clearly hearsay." R.278:115-116. Defense counsel did not argue that the threat was not hearsay at either sidebar. R.278:113-115.

When defense counsel resumed questioning Defendant after the jury returned, he did not ask Defendant about the threat but guided him to talk about seeing the gun missing from the safe and feeling "scared to death" because he "worried that Teresa was going to use that gun to do some harm" to him. R.278:117. The specific words of Teresa's alleged threat are not in the record.

Closing arguments

In closing, defense counsel assured the jury that he was not asking them “to say that . . . what [Defendant] did was right,” but to find that Defendant acted under extreme emotional distress. R.280:43, 54, 57. He argued that if Defendant “was under extreme emotion,” the law provided that “what he did was not as serious as somebody who does it in cold blood.” *Id.*

Defense counsel argued that Defendant suffered from extreme emotional distress because his “reason” had been “overborne by intense feelings” of “passion, anger, distress, grief, [and] excessive agitation.” R.280:48-49 (quoting jury instr. 12). He explained that Defendant’s intense feelings arose from “years of fighting” coupled with an escalation of fighting in the two weeks before the shooting and “a gun out of the safe.” R.280:50-52. He pointed to the loaded Beretta that was sitting on the bed. R.280:52-53.

Defense counsel further argued that Defendant was not substantially at fault for his extreme emotions. R.280:58. Rather, Teresa was. *Id.* He contended that in the two-week period before the shooting, Defendant did not call Teresa names, nor was he “violent with her.” *Id.* He argued that Teresa, however, started all the fights in this period because she was angry at Defendant for doing things like spilling oil in the driveway and using her car.

Id. Teresa also took the gun out of the safe and leered at him several times while he was out in the garage. *Id.* R.280:57-59.

The prosecutor dismissed Defendant's extreme emotional distress defense. R.280:33. The prosecutor first argued that Teresa and Defendant's history of fighting did not create an unusual and overwhelming stress for Defendant because fighting was their norm and Defendant substantially contributed to it. R.280:35-38. As for the gun, the prosecutor argued that Defendant's story about Teresa taking it out of the safe was not credible. R.280:38-39. Most importantly, the prosecutor said, Defendant never mentioned a gun when he called 911. *Id.* Instead, Defendant calmly and collectedly told the dispatcher that he killed his wife because she had been complaining about him to her mother and she tried to take his picture. *Id.* Defendant's story was also not credible, the prosecutor stated, because when Defendant shot Teresa, she "was no threat." R.280:40. The prosecutor pointed out that she "was sitting on the bed, semi-reclined, feet crossed, crocheting." *Id.* "She wasn't pointing a gun at him," and she "didn't provoke him." *Id.* But even if the jury were to believe Defendant's story about the gun, the prosecutor argued, Defendant still failed to establish the defense because it was not "reasonable" to believe that "Teresa was preparing to kill him" where he "didn't see a gun" and did not know where it was. R.280:41.

Jury deliberations and verdict

Sometime after being excused to deliberate, the jury sent a note to the trial court asking what “the legal definition of ‘substantially caused’” was. R.181; R.280:72. The jury had been instructed that the special mitigation of extreme emotional distress did not apply if Defendant’s distress was “substantially caused by [his] own conduct.” R.199 (jury instr. 13).

Later, the jury sent a note to the trial court stating that it was “at an absolute impasse six to two.” R.280:78; R.182. The jury explained that “two feel that ‘substantially caused’ needs to be ‘the majority of the time.’” R.182; R.280:78. Over defense counsel’s objection, the trial court gave the jury a supplemental instruction, asking it to continue its deliberations “in an effort to agree upon a verdict.” R.280:94-95; R.180. After two more hours and thirteen minutes of deliberation, the jury returned a verdict, finding Defendant guilty of murder. R.280:95-96; R.179, 174.

Defendant timely appealed and this Court transferred the case to the court of appeals. R.238, 243.

The court of appeals’ decision

Defendant argued on appeal that his counsel was ineffective because when the prosecutor objected that Teresa’s alleged threat was hearsay, he did

not argue that it was actually admissible nonhearsay.² *State v. Scott*, 2017 UT App 74, ¶¶17, 19, 397 P.3d 837. He also moved under rule 23B, Utah Rules of Appellate Procedure, for a remand so that he could introduce the words of Teresa’s alleged threat into the record. *See* appellate docket.

Without granting Defendant’s rule 23B motion, the court of appeals agreed that defense counsel was ineffective. It held that defense counsel performed deficiently because he failed “to correctly use the rules of evidence to support [Defendant]’s defense” and argue that the alleged threat was not hearsay. *Id.* at ¶25. According to the court of appeals, a reasonable attorney would have made such an argument because Teresa’s threat was admissible under the rules of evidence and it was “central” to Defendant’s defense strategy “to show that his distress originated outside his own behavior.” *Id.* at ¶¶25, 28.

The State had argued that a reasonable attorney may have chosen not to pursue admitting the precise words of the threat because omitting the specific words of the threat may have allowed the jury to magnify the threat beyond its actual words. The court of appeals rejected that argument. *Id.* at

² Defendant also argued that the trial court erred by giving a verdict-urging instruction. *Scott*, 2017 UT App, ¶17. Because the court of appeals held that trial counsel was ineffective, it did not address this issue. *Id.*

¶27. It believed that “the negative repercussions of omitting the *content* of the threat were greater than the possible benefits” where “admitting its *content* would have only strengthened [Defendant]’s defense.” *Id.* (emphasis added). It came to this conclusion even though the precise words of the threat were not in the record. *Id.* at ¶13 n.2.

The court of appeals also held that keeping the precise words of the threat from the jury prejudiced Defendant because “the jury was at an impasse over whether [Defendant] had substantially caused the distress he felt” and testimony of the specific threat and its “effect” on Defendant could have caused the jury to remain deadlocked. *Id.* at ¶34. Again, it came to this conclusion without the specific wording of the threat being in the record. *Id.* at ¶13 n.2. And of course, the jury did hear Defendant testify about how the threat affected him. R.278:113, 117-118.

Judge Voros and Judge Christiansen wrote separate concurring opinions that urged the legislature to consider amending the extreme emotional distress defense statute so that an abusive intimate partner cannot claim special mitigation. *Id.* at ¶¶36-46. And although Judge Christiansen concluded that Defendant did not qualify for the special mitigation here and that she did “not believe that hearing the specifics of the alleged threat would ultimately have made a difference in the jury’s verdict,” she agreed that

remand was “warranted” because “it is ‘not within the province of an appellate court to substitute its judgment for that of a front line fact-finder.’” *Id.* at ¶¶43, 45 (Christiansen, J., concurring).

SUMMARY OF ARGUMENT

Point I: Deficient Performance. The court of appeals applied an incorrect deficient performance standard, and in doing so, incorrectly held that defense counsel performed deficiently. First, the court of appeals never assessed whether defense counsel’s representation was objectively reasonable as *Strickland* requires. Instead, the court of appeals began and ended its deficient performance analysis with assessing whether counsel had a sound trial strategy. Whether defense counsel’s action was a sound strategy may be one consideration. But it is not alone determinative of objectively reasonable representation. Rather, Defendant had to prove that counsel’s actual course of action — proceeding on the uncontested testimony that Teresa had threatened him and the threat made him fear for his life — fell below an objective standard of reasonableness. The court of appeals erred because it never determined whether Defendant met that burden. And because defense counsel’s performance was objectively reasonable here, the court of appeals was incorrect when it held that defense counsel performed deficiently.

Second, the court of appeals erred when it held that defense counsel

was deficient for not trying to introduce the words of Teresa's alleged threat when the evidence was admissible and "would have only strengthened his case." As stated, *Strickland* requires only that defense counsel perform objectively reasonably. It does not require counsel to take every action that is arguably beneficial to the defense. The court of appeals erred because it never determined whether Defendant met that burden.

Finally, the record did not support the court of appeals' conclusion that defense counsel performed deficiently. Because the actual content of Teresa's alleged threat is not part of the record, the court of appeals had no evidentiary basis to support its conclusion that the "content" of the threat would only strengthen the defense, rather than harm it. This was also error.

Point II: Prejudice. The court of appeals also erroneously applied *Strickland's* prejudice standard. First, because the actual content of Teresa's alleged threat is not part of the record, the court of appeals impermissibly speculated that the content of Teresa's alleged threat would have affected the outcome of the proceeding had the jury heard it. For this reason alone, this Court should reverse.

The court of appeals also erroneously held that Defendant had proved *Strickland* prejudice because it did not consider how the jury hearing the content of Teresa's alleged threat would have so changed the entire

evidentiary picture that not hearing it undermined confidence in the outcome. Rather, the court of appeals considered evidence of Teresa's threat in isolation. Under the correct analysis, the jury hearing the content of Teresa's alleged threat would not have tipped the scales in Defendant's favor or otherwise changed the outcome of the proceeding. The totality of the evidence showed that Defendant did not act under distress, but killed Teresa because he felt Teresa disrespected and picked on him.

ARGUMENT

A defendant's burden in proving that defense counsel was constitutionally ineffective is well-established. First, the defendant must prove that his counsel performed deficiently. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, he must prove that his counsel's deficient performance was prejudicial—that there is a reasonable likelihood that, absent counsel's deficient performance, the result at trial would have been different. *Id.* A failure to establish either *Strickland* element is fatal to an ineffectiveness claim. *Strickland*, 466 U.S. at 687, 697. Moreover, it is “not enough” for a defendant to show that “counsel's performance could have been better or that counsel's performance might have contributed to his conviction.” *State v. Tyler*, 850 P.2d 1250, 1258–59 (Utah 1993). Rather, he must

show “*actual unreasonable representation and actual prejudice.*” *Id.* at 1259 (emphasis in original).

“*Strickland’s* standard, although by no means insurmountable, is highly demanding.” *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). And surmounting it “is never an easy task.” *Premo v. Moore*, 562 U.S. 115, 122 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 346, 371 (2010)). The court of appeals incorrectly applied *Strickland’s* standard to hold that Defendant surmounted it here.

I.

THE COURT OF APPEALS APPLIED AN INCORRECT DEFICIENT PERFORMANCE STANDARD THEREBY INCORRECTLY CONCLUDING THAT DEFENSE COUNSEL PERFORMED DEFICIENTLY

Strickland required Defendant to prove that trial counsel’s representation “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 687-88. And “counsel is strongly presumed to have rendered adequate assistance.” *Id.* at 690. To meet his burden, Defendant had to prove that “no competent attorney” would have proceeded as his attorney did. *Moore*, 562 U.S. at 124. This high standard has its roots in the recognition that there “are countless ways to provide effective assistance in any given case,” and that “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689.

The court of appeals failed to hold Defendant to this standard, and by that failure disregarded its underlying premise—that there were “countless ways” for Defendant’s counsel to “provide [him] effective assistance.” *Id.* Instead, it identified only one of many courses available to counsel and found him deficient because he did not follow it.

The court of appeals concluded that defense counsel was deficient because he did not have a “sound” strategic reason for his action. *Scott*, 2017 UT App 74, ¶27. But the determinative question under *Strickland* is not whether counsel’s action was strategic, or even sound, but whether counsel’s performance was objectively unreasonable. Because the court of appeals failed to conduct this analysis—as *Strickland* requires—and thereby incorrectly concluded that counsel was deficient, it erred.

Similarly, merely identifying a course of action that may have benefitted the defense is not the correct inquiry. So even if counsel could have successfully introduced the specific words of Teresa’s alleged threat, and even if that evidence arguably would have supported Defendant’s defense, that did not prove deficient performance under *Strickland*. Rather, as stated, Defendant had to prove that counsel’s actual course of action—proceeding on the uncontested testimony that Teresa had threatened him and the threat made him fear for his life—fell below an objective standard of

reasonableness. The court of appeals erred because it never determined whether Defendant met that burden.

Finally, even the court of appeals' assessment that counsel had a better course of action—that the benefits of admitting the specific words of the threat outweighed any detriment—was not supported by the record. The court of appeals could have legitimately reached that conclusion only if the specific words of the threat were in the record. They were not. This was also error.

A. The court of appeals applied an incorrect deficient performance standard because it never assessed whether defense counsel's representation was objectively unreasonable.

The court of appeals began and ended its deficient performance analysis with assessing whether counsel had a sound trial strategy. Because it found that he did not, it found that he was deficient.

As explained later, even that finding was incorrect. But the analysis itself was also incorrect. Defendant had to prove that his counsel's performance was objectively reasonable—in other words, that “no competent attorney” would have done as counsel did. *Moore*, 562 U.S. at 124. Whether defense counsel's action was a sound strategy may be one consideration. But it is not alone determinative of objectively reasonable representation.

To establish deficient performance under *Strickland*, a defendant must show that his counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. "Judicial scrutiny of counsel's performance," however, is "highly deferential." *Strickland*, 466 U.S. at 689. And "counsel is strongly presumed to have rendered adequate assistance." *Id.* at 690. To prove deficient performance, a defendant must rebut that presumption.

Certainly, whether counsel had a considered strategy for a challenged course can inform whether counsel's representation was reasonable. Again, there is a "strong presumption that under the circumstances the challenged action might be considered sound trial strategy," and a defendant must rebut that presumption in order to succeed. *State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92 (citation and internal quotation marks omitted). This presumption exists because of the "widely varying 'circumstances faced by defense counsel [and] the range of legitimate decisions regarding how to best represent a criminal defendant.'" *Met v. State*, 2016 UT 51, ¶113, 388 P.3d 447 (quoting *State v. Houston*, 2015 UT 40, ¶70, 353 P.3d 55) (alteration in original and citation omitted). "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge."

Harrington v. Richter, 562 U.S. 86, 105 (2011). Reviewing courts thus are “required not simply to ‘give [the] attorneys the benefit of the doubt,’ but to affirmatively entertain the range of possible ‘reasons [defense] counsel may have had for proceeding as they did.’” *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (alterations in original and citation omitted).

And to rebut the presumption of sound strategy, a defendant must “persuad[e] the court that there was *no conceivable tactical basis* for counsel’s actions.” *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (emphasis in original; quotations and citations omitted). The State is not required to articulate a reasonable explanation for counsel’s acts or omissions. Nor does a defendant succeed merely because this Court cannot conceive of a tactical explanation for counsel’s performance. Rather, “‘the defendant’” always bears the burden to “‘overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.’” *Benvenuto v. State*, 2007 UT 53, ¶19, 165 P.3d 1195 (quoting *Strickland*, 466 U.S. at 689); see also *Burt v. Titlow* 134 S.Ct. 10, 17 (2013) (explaining that “burden to ‘show that counsel’s performance was deficient’ rests squarely on the defendant”) (quoting *Strickland*, 466 U.S. at 687). And when it is possible to conceive of a reasonable tactical basis for trial counsel’s actions, then a defendant clearly

has not rebutted the strong presumption that his counsel performed reasonably. *See Clark*, 2004 UT 25, ¶7.

The *Strickland* presumption of a sound strategy thus can be dispositive, but only of a finding of effective performance, not deficient performance. In other words, when counsel's actions appear designed to further a reasonable trial strategy, then a defendant has necessarily failed to show objectively unreasonable performance. *See Strickland*, 466 U.S. at 688; *Clark*, 2004 UT 25, ¶6 (explaining that defendant claiming ineffective assistance must show that "there was *no conceivable tactical basis*" for counsel's actions) (emphasis in original).

But the lack of a considered strategic basis for counsel's performance does not automatically render his performance objectively unreasonable. *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000); *Bullock v. Carver*, 297 F.3d 1036, 1048, 1050-1051 (10th Cir. 2002). Even when a considered strategic reason for counsel's performance seems elusive, a defendant still cannot carry his burden of proving deficient performance unless he can show that his counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Thus, whether counsel's course of action is part of a considered strategy may be relevant, but it is not controlling.

The ultimate question is whether counsel's performance was objectively reasonable. See *Flores-Ortega*, 528 U.S. at 481. "Even where an attorney's ignorance of relevant law and facts precludes a court from characterizing certain actions as strategic (and therefore presumptively reasonable)," "the pertinent question under the first prong of *Strickland* remains whether, after considering all the circumstances of the case, the attorney's representation was objectively unreasonable." *Bullock*, 297 F.3d at 1050-1051.). The Sixth Amendment requires that counsel's representation "be only objectively reasonable, not flawless or to the highest degree of skill." *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000). Thus, counsel does not necessarily perform deficiently even if he makes "minor mistakes" and appears "momentarily confused" during trial. *Id.* at 487. Nor is counsel's action unreasonable simply because "another, possibly more reasonable or effective strategy could have been employed." *State v. Lucero*, 2014 UT 15, ¶43, 328 P.3d 841, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. Counsel's performance is deficient under *Strickland* only when "no competent attorney" would have acted similarly. *Moore*, 562 U.S. at 124; *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011) (explaining that counsel is deficient only when "counsel's error is so egregious that no reasonably competent attorney would have acted

similarly”); *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (explaining that even “if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so”).

Because counsel need not have a strategic reason for his every act, the court of appeal’s analysis of counsel’s performance here misapprehended *Strickland*’s deficient performance standard when it focused solely on whether counsel proceeded under a sound strategy. The measure of deficient performance is not, as the court of appeals held, whether defense counsel could have made a successful nonhearsay argument. Nor is the measure whether evidence of Teresa’s alleged threat would have benefited Defendant’s defense. Rather, the question is whether this evidence was so necessary, and the potential for conviction so great without it, that counsel’s failure to make the nonhearsay argument was objectively unreasonable. See *Strickland*, 466 U.S. at 688. In other words, no competent attorney would have failed to make that argument. *Moore*, 562 U.S. at 124; see also *State v. Houston*, 2015 UT 40, ¶76, 353 P.3d 55 (noting that when a defendant claims his counsel was ineffective for not objecting to prosecutor’s closing argument, “the question is ‘not whether the prosecutor’s comments were proper, but

whether they were so improper that counsel's only defensible choice was to interrupt those comments with an objection'" (quoting *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994)).

The court of appeals never took this step. True, the court of appeals did state that "counsel's failure to correctly argue the rules of evidence fell below an objective standard of reasonableness." *Scott*, 2017 UT App 74, ¶24. But it never articulated how. And while it rejected the State's proffered strategic explanation for counsel's action, the court did not—as *Strickland* requires—explain why the specific words of Teresa's alleged threat were so necessary, and the potential for conviction so great without them, that no competent attorney would have failed to make a nonhearsay argument in answer to the prosecutor's hearsay objection. See *Strickland*, 466 U.S. at 688; *Moore*, 562 U.S. at 124; *Flores-Ortega*, 528 U.S. at 481; *Bullock*, 297 F.3d at 1050-1051. Instead, it simply rested on its determination that defense counsel's strategy was unsound. *Scott*, 2017 UT App 74, ¶¶27-28. As shown, under *Strickland*, this is insufficient. *Strickland*, 466 U.S. at 688.

It is also incorrect. Defense counsel performed objectively reasonably here.

The "inquiry into counsel's performance should focus on 'whether counsel's assistance was reasonable considering all the circumstances.'"

Menzies v. State, 2014 UT 40, ¶76, 344 P.3d 581 (quoting *Strickland*, 466 U.S. at 688); see also *Bullock*, 297 F.3d at 1050-1051 (“[T]he pertinent question under the first prong of *Strickland* remains whether, after considering all the circumstances of the case, the attorney’s representation was objectively unreasonable.”).

Defense counsel faced difficult circumstances here. Defendant admitted he shot and killed Teresa. R.280:62; State’s Ex.1. He explained to the 911 operator that he shot Teresa because she had been talking on “the phone with her mother complaining about” Defendant, and that Teresa had been “trying to take a picture” of him. R.280:63-64; State’s Ex.1. This confession was recorded. State’s Ex.1. On the recording, Defendant calmly and dispassionately describes killing his wife and the reasons why he did. *Id.* And minutes before he shot Teresa, Teresa’s mother heard Defendant pick up the other handset to listen in on their phone conversation and then exclaim, “My wife and my mother-in-law are saying bad things about me.” R.279:53-54, 57. When he was arrested, he told his officer friend that he “‘thought it would be worth it, but [it was] not.’” R.277:95; R.278:30.

In addition, Defendant had a prior conviction for domestic violence against Teresa. R.278:88-89, 152. He used the name “Bitch Teresa” for her in his cell phone. R.278:150; State’s Ex.29. At least one neighbor had been

concerned for Teresa's wellbeing. R.279:34. And his two children had witnessed him punch Teresa, emotionally denigrate her, and attempt to kill her before. R.279:77, 82, 86, 90-91, 115-118, 127, 150.

And although Defendant claimed that Teresa threatened him, no one else had ever heard her threaten Defendant or get "physical" with him as he had with her. R.297:87, 91, 117, 127. Moreover, Teresa's alleged threat was made three days before Defendant shot her, but during that time Defendant never told anyone, called the police, or went somewhere else to stay. Instead, he took Ambien and slept by her side. R.278:113-129.

Defense counsel did well with what he had. Under these facts, Defendant could not credibly claim self-defense. *See* Utah Code Annotated § 76-2-402(1)(b) (West 2017) (providing killing another is justified only when deadly force is "necessary" to defend against "another person's imminent use of unlawful force"). But by raising the special mitigation defense of extreme emotional distress, defense counsel could try to mitigate Defendant's confession in the 911 recording phone call as well as use Defendant's tumultuous relationship with Teresa to claim that he had been overcome by emotion when he shot her. *See* Utah Code Annotated § 76-5-205.5(1)(b) (West 2017) (providing special mitigation when actor suffered "extreme emotional distress for which there is a reasonable explanation or excuse").

But contrary to the court of appeals' assertion, Teresa's alleged threat was not a big piece of this defense. Because Defendant's 911 phone call demonstrated that Defendant had killed Teresa in anger and frustration, defense counsel could not rely alone on Defendant's fear of Teresa harming him. Defense counsel thus argued that Defendant was overcome by an array of emotions – rage, stress, anger, frustration, *and* fear.

Moreover, Defendant testified that he felt threatened by Teresa in many ways – the open safe, the missing gun, Teresa opening the garage door and leering at him, and Teresa being angry with him and starting fights. R.278:94, 97-98, 105-109, 112, 117, 124-129. Again, Teresa's alleged verbal threat was only a part of this defense.

And Defendant was allowed to testify that "there was a threat made." R.278:113. He continued that when he later saw Teresa in front of the gun safe and that a Beretta was missing, he believed the threat was serious. *Id.* He told the jury that this made him "scared to death," and made him believe that Teresa intended to harm him. R.278:117.

With all this in mind, when Defendant drew an objection as he began to testify about what Teresa actually said when she allegedly threatened him, defense counsel could have reasonably concluded that he need not respond to the prosecutor's hearsay objection by arguing that the words were

nonhearsay. By that time, the trial court had already sustained several hearsay objections made by the prosecutor. Defense counsel could have reasonably concluded from the judge's strong admonition against inquiring into the specific words of the threat that he was not likely to succeed in getting the words of the threat admitted. R.291:113. And where the jury had already heard ample testimony that Defendant believed Teresa had threatened him, he "thought the threat was serious," and he believed Teresa intended to harm him, defense counsel could have reasonably concluded that getting the specific wording of Teresa's threat was not so necessary to the defense that it was worth pressing the issue further. R.278:113-114, 117. Indeed, a reasonable attorney could conclude that he already had more than enough to add the threat piece to the larger extreme emotional disturbance puzzle – Defendant testified that he was afraid of Teresa because she had threatened him, he believed she had a gun, and he believed she intended to use it.

And certainly, while the record is silent as to the precise words of Teresa's alleged threat, defense counsel knew what they were. *Richter*, 562 U.S. at 105 ("Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge."). And knowing what the specific words of the threat were, counsel could have reasonably

concluded that introducing the precise words would not have been so materially more helpful to Defendant's defense that it was critical to get them into evidence. By leaving the specific words to the jury's imagination, counsel could magnify the effect of Defendant's testimony, allowing the jury to believe that the threat was greater than what it actually may have been.

The court of appeals ignored the global analysis that *Strickland* required and instead assigned determinative significance to a single event. It therefore ignored *Strickland's* directive to not "second-guess" defense counsel's performance on the basis of an inanimate record. *Strickland*, 466 U.S. at 689. And it ignored the directive to presume that in the context of the entire case, counsel's representation was reasonable.

"The *Strickland* standard must be applied with scrupulous care." *Richter*, 562 U.S. at 105. Because the court of appeals failed to do so here—and incorrectly concluded that defense counsel performed deficiently in the process—this Court should reverse.

B. The court of appeals incorrectly construed *Strickland* to require counsel to act when it will benefit the defense.

The court of appeals also erred when it held that defense counsel was deficient for not trying to introduce the words of Teresa's alleged threat because, according to the court, this evidence was admissible and "would have only strengthened his case." *Scott*, 2017 UT App 74, ¶27. As shown

above, *Strickland* requires only that defense counsel perform objectively reasonably. It does not require counsel to take every action that is arguably beneficial to the defense.

The court of appeals held that defense counsel was deficient here because a reasonable attorney, in response to the prosecutor's hearsay objection, would have argued that Teresa's threat was admissible nonhearsay. *Id.* at ¶25. The reason why, according to the court of appeals, was that Teresa's threat was "central" to Defendant's defense and "admitting its content would have only strengthened" his case. *Id.* at ¶27. In other words, the court of appeals concluded that because counsel could have made an argument to overcome the prosecutor's hearsay objection and doing so would have only "strengthen[ed]" his case, the Sixth Amendment required counsel to make that argument.

The court of appeals' decision follows a pattern of Utah decisions incorrectly finding that counsel's representation is per se deficient when the court concludes that counsel omitted an objection or argument that may have advanced the defense. See *State v. Lewis*, 2014 UT App 241, ¶13, 337 P.3d 1053 (finding counsel deficient where there "was no conceivable tactical *benefit*" to foregoing instruction); *State v. Doutre*, 2014 UT App 192, ¶24, 335 P.3d 366 ("If clearly inadmissible evidence has no conceivable *benefit* to a defendant, the

failure to object to it on nonfrivolous grounds cannot ordinarily be considered a reasonable trial strategy.”); *State v. Cox*, 2007 UT App 317, ¶22, 169 P.3d 806 (finding counsel deficient where the court could “see no tactical *advantage* for not objecting to the clearly erroneous jury instruction”); *State v. Ott*, 2010 UT 1, ¶38, 247 P.3d 344 (holding that if evidence has no “conceivable *beneficial* value to defendant,” failure to object to it cannot be excused as trial strategy).

But this is incorrect. Merely because counsel could have successfully made an argument, and that doing so may have supported the defendant’s defense, is never enough to prove deficient performance under *Strickland*. Rather, the determinative inquiry is, as always, “whether a reasonable, competent lawyer could have chosen the strategy that was employed in the real-time context of trial.” *State v. Nelson*, 2015 UT 62, ¶14, 355 P.3d 1031 (quotation marks omitted). *See also Strickland*, 466 U.S. at 689; *Flores-Ortega*, 528 U.S. at 481. Stated differently, a defendant must prove that no reasonable attorney would have taken the same action that his counsel did. *Moore*, 562 U.S. at 124.

The United States Supreme Court thus “has never required defense counsel to pursue every claim or defense,” nor has it required “counsel to raise every nonfrivolous defense.” *Knowles v. Mirzayance*, 556 U.S. 111, 123, 127 (2009). In each case, counsel faces a “range of legitimate decisions

regarding how best to represent a criminal defendant.’” *Met*, 2016 UT 51, ¶113 (quoting *Houston*, 2015 UT 40, ¶70) (alteration in original) (citation omitted). And within that range of possible decisions, each choice may be legitimate. *Id.* As *Strickland* explained, “[t]here are countless ways to provide effective assistance in any given case.” 466 U.S. at 689.

As a result, “no Supreme Court precedent establish[es] a ‘nothing to lose’ standard for ineffective-assistance-of-counsel claims.” *Mirzayance*, 556 U.S. at 122. Nor does it establish a “[n]o actual tactical advantage was to be gained” standard. *Id.* at 122 n.3. Rather, the analysis is the same: whether the action counsel actually took was objectively reasonable.

Contrary to the court of appeals’ holding, then, merely because counsel here did not present an argument that may have been successful is not dispositive. Defense counsel is permitted to choose a strategy within the wide “range of legitimate decisions regarding how best to represent a criminal defendant.” *Met*, 2016 UT 51, ¶113. And as long as his choice is reasonable, defense counsel performed effectively, regardless of the merits of the other possible choices.

As shown in Point I.A. above, defense counsel performed objectively reasonably here. Merely because he could have made another choice—to argue that the words of Teresa’s alleged threat were not hearsay—does not

change this conclusion. The court of appeals erroneously held that it did. *See Lucero*, 2014 UT 15, ¶43 (explaining that counsel’s actions are not unreasonable simply because “another, possibly more reasonable or effective strategy could have been employed”); *Rogers*, 13 F.3d at 386 (holding that even “if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so”). This Court should reverse for this reason as well.

C. Because the actual content of the threat was not part of the record, the court of appeals had no evidentiary basis to support its conclusion that the “content” of the threat would only strengthen the defense, rather than harm it.

Finally, the record did not support the finding on which the court of appeals based its deficient performance holding. The court of appeals held that “the negative repercussions of omitting the content of the threat were greater than the possible benefits; admitting its content would only have strengthened [Defendant]’s defense.” *Scott*, 2017 UT App 74, ¶27. Likewise, it stated that a “*serious* threat to [Defendant] from Teresa would have been an important piece of evidence at trial.” *Id.* at ¶25 (emphasis added).

But the precise words of the threat are not part of the record. *Id.* at ¶13 n.2 (explaining that Defendant’s “testimony did not include the actual words of the threat” and the “threat’s content is not included in the record on

appeal”).³ The court of appeals thus did not know if the threat was “serious.” *Id.* at ¶25. Nor could it determine whether “the negative repercussions of omitting the content of the threat were greater than the possible benefits” or if “admitting its content would only have strengthened [Defendant]’s defense.” *Id.* at ¶27.

Without knowing the content of the threat, concluding that it necessarily would have strengthened the defense was mere speculation. However, “proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.” *State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082 (citation and internal quotation marks omitted)). And where “the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively.” *Litherland*, 2000 UT 76, ¶17. By determining that the unknown contents of Teresa’s alleged threat would have *only* strengthened Defendant’s defense, the court of appeals turned this presumption on its head. But “[i]t should go without saying that the absence of evidence cannot overcome the ““strong presumption that counsel's conduct [fell] within the

³ Defendant filed a motion under rule 23B, Utah Rules of Appellate Procedure, to introduce evidence of the content of Teresa’s alleged threat into the record on appeal. *See* appellate docket. The court of appeals did not grant, or deny, that motion.

wide range of reasonable professional assistance.’” *Titlow*, 134 S. Ct. at 17 (quoting *Strickland*, 466 U.S. at 689).

As it was, the jury heard Defendant testify that Teresa threatened him and that the threat caused him to fear for his life. R.278:113, 117. But without knowing the precise words of this alleged threat, it would be just as likely that they would have led the jury to conclude that Defendant’s fear was unfounded rather than to conclude the opposite. Indeed, the court of appeals conceded as much. *Scott*, 2017 UT App 74, ¶27. But if the first is true, then counsel chose wisely by not pressing the issue. And without knowing what those words were, there is no basis for concluding that they would have made the defense stronger, let alone so materially stronger that no competent attorney would have let the trial proceed without arguing that they were admissible nonhearsay. *Munguia*, 2011 UT 5, ¶30; *Titlow*, 134 S. Ct. at 17.

The court of appeals thus erred. This Court should reverse for this reason as well.

For all of the reasons argued, the court of appeals incorrectly held that Defendant’s counsel was deficient when he did not attempt to overcome the hearsay objection to the precise words of the threat and relied instead on Defendant’s uncontested testimony that Teresa had threatened him and the

threat frightened him, in order to support the “threat” component of his larger extreme emotional disturbance theory.

II.

THE COURT OF APPEALS ERRONEOUSLY APPLIED STRICKLAND’S PREJUDICE STANDARD

The court of appeals also erroneously concluded that Defendant was prejudiced when defense counsel did not get the precise words of Teresa’s threat admitted. The court of appeals concluded that there was a reasonable probability that the jury would have remained deadlocked had it heard “more evidence” on what it deemed to be the “central,” disputed point. *Scott*, 2017 UT App 74, ¶¶28, 33. Because Defendant “was not allowed to offer any other information regarding the threat, including the surrounding circumstances, the words used, and the effect it had on him,” and his defense counsel did not address the threat again, the court of appeals held that the jury could have been “influenced” to remain deadlocked had it heard the specific words of Teresa’s alleged threat. *Id.* at ¶¶33-34. This was especially so, the court of appeals believed, because the prosecutor asserted in closing that “Teresa was no threat” and that Defendant had no reasonable basis for believing that she was a threat. *Id.* at ¶33.

This analysis falls short of what *Strickland* requires. To prove prejudice on an ineffective assistance of counsel claim, the defendant “must show 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 "[r]easonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* But "'[s]urmounting *Strickland*'s high bar is never an easy task.'" *Richter*, 562 U.S. at 105 (citation omitted). The "likelihood of a different result must be substantial, not just conceivable," *Richter*, 562 U.S. at 112, such that counsel's error "'actually had an adverse effect on the defense.'" *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (quoting *Strickland*, 466 U.S. at 691, 693). In addition, the defendant's proof of prejudice "cannot be a speculative matter but must be a demonstrable reality." *Munguia*, 2011 UT 5, ¶30 (quotations and citation omitted). That is, he "has the difficult burden of showing . . . *actual prejudice*." *Tyler*, 850 P.2d at 1259 (emphasis in original).

In assessing whether a defendant has carried his burden, appellate courts "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. This "requires . . . a probing and fact-specific analysis." *Sears v. Upton*, 561 U.S. 945, 955 (2010) (per curiam). And the appellate court must take into account that some of the facts underpinning the defendant's convictions will be completely unaffected by counsel's alleged errors, while those that are affected may be affected in trivial ways.

Id. at 695-96. Errors that have an “isolated” or “trivial effect” on the verdict are not prejudicial. *Strickland*, 466 U.S. at 695-96. Thus, at a minimum, the reviewing must consider each of counsel’s alleged deficiencies in the context of the inculpatory evidence presented at trial and demonstrate how counsel’s alleged deficiency would have so altered the evidentiary landscape that a more favorable outcome would be reasonably probable. *Id.*

The court of appeals failed to apply this standard. First, without knowing the content of Teresa’s alleged threat, the court of appeals impermissibly speculated that the content of the threat was both serious and would have affected the outcome of the proceeding. Second, the court of appeals did not evaluate the totality of the evidence before the jury, but instead considered evidence of Teresa’s alleged threat in isolation.

A. The court of appeals impermissibly speculated that the content of Teresa’s alleged threat would have affected the outcome of the proceeding had the jury heard it.

As stated, the content of Teresa’s alleged threat is not in the record on appeal. *Scott*, 2017 UT App 74, ¶13 n.2. But as discussed above, the court of appeals, without knowing the content of the threat, concluded that the outcome of the trial would have been different if the jury had heard the content of the threat. Without having the content of the threat in the record, however, that conclusion was mere speculation.

Speculation is not enough. The *Strickland* standard requires “actual prejudice.” *Tyler*, 850 P.2d at 1259 (emphasis in original). And “proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.” *Munguia*, 2011 UT 5, ¶30.

Because the precise words of Teresa’s alleged threat are not in the record, there was no basis to conclude that hearing them would have so changed the total evidentiary picture that omitting them undermines confidence in the outcome. Indeed, without have those words in the record, there is no basis to reject the possibility that they were just as likely to cause the jury to conclude that Defendant’s fear was unfounded.

The record was thus legally insufficient to support the court of appeals’ finding that Defendant had proved prejudice. Its prejudice holding fails for this reason alone. And because prejudice is a necessary element of an ineffective assistance claim, the entire claim fails for this reason alone.

B. The court of appeals erroneously held that Defendant had proved *Strickland* prejudice because it did not consider how the jury hearing the content of Teresa’s alleged threat would have so changed the entire evidentiary picture that not hearing it undermined confidence in the outcome.

The court of appeals also did not consider “the totality of the evidence” before the jury, *Strickland*, 466 U.S. at 695, in “a probing, fact-specific analysis,” *Sears*, 561 U.S. at 955. Rather, the court of appeals considered

Teresa's alleged threat in isolation of other evidence presented at trial and in doing so, incorrectly magnified the importance of this small piece of evidence.

But when considered under the correct standard—in light of all the evidence presented at trial—there is no likelihood of a different outcome here. *Richter*, 562 U.S. at 111. To prove special mitigation of extreme emotional distress, Defendant must have proved by a preponderance of the evidence that he acted “under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.” Utah Code Ann. § 76-5-205.5(1)(b) (West Supp. 2012). This means he must have been “‘exposed to extremely unusual and overwhelming stress’ that would cause the average reasonable person under the same circumstances to ‘experience a loss of self-control’ and ‘be overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions.’” *State v. White*, 2011 UT 21, ¶26, 251 P.3d 820 (quoting *State v. Bishop*, 753 P.2d 439, 471 (Utah 1988), *overruled on other grounds by State v. Menzies*, 889 P.2d 393 (Utah 1994)). But, the emotional distress cannot be “substantially caused by the Defendant’s own conduct.” Utah Code Annotated § 76-5-205.5(3)(b). And “a reasonable person facing the same situation would have reacted in a similar way.” *White*, 2011 UT 21, ¶37.

Defendant could not prove that he acted under extreme emotional distress. His theory was simply unbelievable. Indeed, the totality of the evidence showed that Defendant did not act under distress, let alone distress that was “extreme[]” or “unusual.” *Id.* at ¶26. Nor would a reasonable person have reacted in the same way Defendant did here. *Id.* The evidence, instead, proved that Defendant killed Teresa because he felt she disrespected and picked on him.

The jury heard the 911 call where Defendant calmly and dispassionately explained to the dispatcher that he killed Teresa because she had been talking on “the phone with her mother complaining about” Defendant, and that Teresa had been “trying to take a picture” of him. R.280:63-64; State’s Ex.1. This explanation was corroborated by Teresa’s mother’s testimony that she heard Defendant pick up another handset to listen in on their phone conversation and then exclaim, “My wife and my mother-in-law are saying bad things about me.” R.279:53-54, 57. And the fact that within seventeen minutes Teresa was dead, further validated that this was the actual trigger for the murder. State’s Ex. 29 & 30.

When he was arrested, Defendant told his friend Officer Howell that he ““thought it would be worth it, but [it was] not.”” R.277:95; R.278:30. This

statement shows deliberation and purposefulness, not a sudden loss of self-control. *See* Utah Code Annotated § 76-5-205.5(1)(b).

In addition, Defendant's prior violence and threatening behavior toward Teresa undercut his defense that this was an out-of-character, extreme, overwrought response to a triggering event. *See* Utah Code Annotated § 76-5-205.5(1)(b); *White*, 2011 UT 21, ¶26. Indeed, Defendant's violence against Teresa was routine. Defendant had a prior conviction for domestic violence against Teresa. R.278:88-89, 152. At least one neighbor had been concerned for Teresa's wellbeing after seeing how Defendant treated her. R.279:34. And his two children had witnessed him punch Teresa, emotionally denigrate her, and attempt to kill her before. R.279:77, 82, 86, 90-91, 115-118, 127, 150.

And although Defendant claimed that Teresa threatened him, no one else had ever heard her threaten Defendant or get "physical" with him as he had with her. R.297:87, 91, 117, 127. Moreover, Teresa's alleged threat was made three days before Defendant shot her, and during that time Defendant never told anyone, called the police, or went somewhere else to stay. Instead, he took Ambien and slept by her side. R.278:113-129.

Indeed, Defendant's mitigation defense was presented for the first time at trial. In his 911 call and his statements to friends and police, he never mentioned any threat, his fear of Teresa, or any missing gun.

And Teresa was no threat. When he shot her, Teresa was sitting on her bed, crocheting. R.277:131. Even Defendant admitted that he never saw her with a gun; he knew she was only holding a cell phone. State's Ex. 1; R.278:164, 169-170. The evidence against Defendant was overwhelming. Hearing the specifics of Teresa's alleged threat would not have changed this evidentiary picture or the outcome. *Richter*, 562 U.S. at 111.

Contrary to the court of appeals' opinion, Teresa's alleged threat was not a "central" piece of Defendant's defense. *Scott*, 2017 UT App 74, ¶28. The specific words of the threat even less so. Defendant's defense was not self-defense or that he was acting solely in fear. Rather, his defense was that he was overcome by an array of emotions – rage, stress, anger, frustration, *and* fear. His fear of Teresa was thus just one part of that array.

True, Defendant did endeavor to portray Teresa as the cause of his distress and emotions, but again, the evidence he relied on was not just that Teresa threatened him. The defense also presented – and focused on – evidence that Teresa nitpicked Defendant, would not let issues go, was

continually angry with him, and started all the fights in the two-week period before Defendant shot her. R.280:57-59.

And the jury did hear that Defendant believed Teresa had threatened him. It heard Defendant's entire mitigation defense on this point: Teresa had threatened him, he believed she had a gun, and he was afraid that she was going to use the gun to harm him. R.278:110-118. Defendant testified that combined with the couple's history of fighting and Teresa continuing to threaten him by "leaning out the door and just staring" at him, Defendant "just freak[ed] out." R.278:128-129. Adding the specifics of Teresa's alleged threat was thus unlikely to have added enough to overcome all the other evidence undercutting the extreme emotional disturbance theory. *Richter*, 562 U.S. at 111. And even the specifics would have required the jury to believe Defendant's uncorroborated testimony weighed against third-party witness accounts and Defendant's recorded 911 call coldly reporting that he had killed his wife for reasons wholly unrelated to any threat.

The court of appeals focused on the prosecutor's closing argument that Teresa was not a threat and that defense counsel did not mention the threat again during the trial to find prejudice. But the prosecutor argued that Teresa was not a threat when Defendant shot her: she was sitting on her bed, crocheting, and Defendant did not see her holding the gun. That was

undisputed and knowing the precise words of the threat made three days earlier was irrelevant to that argument. And the fact that defense counsel did not further highlight Teresa's alleged threat only further emphasizes how unimportant the threat was to the overall defense theory.

Moreover, merely because that the jury was at an impasse for any period demonstrates not that defense counsel was ineffective, or that Defendant was prejudiced, but how well defense counsel performed here. Defense counsel was able to misdirect the jury's focus to whether Defendant or Teresa was substantially more responsible for their tumultuous relationship. But the question whether Defendant or Teresa caused most of their fights was irrelevant. Rather, to prove special mitigation, Defendant had to show that "a reasonable person facing the same situation would have reacted in a similar way" and that the emotional distress he felt was not "substantially caused by the Defendant's own conduct." Utah Code Annotated § 76-5-205.5(3)(b). The hen-pecked husband defense does not meet this standard.

In sum, the court of appeals did not analyze or explain how the specific words of Teresa's alleged threat would have so changed the entire evidentiary picture that not hearing them undermines confidence in the verdict. Under the correct analysis, the jury hearing the content of Teresa's

alleged threat would not have tipped the scales in Defendant's favor or otherwise changed the outcome of the proceeding. Indeed, Judge Christiansen concluded that "hearing the specifics of the alleged threat" would not have "ultimately have made a difference in the jury's verdict." Scott, 2017 UT App 74, ¶¶43, 45 (Christiansen, J., concurring).⁴ The court of appeals erroneously found that Defendant had proved prejudice.

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeals' holding that defense counsel rendered ineffective assistance of counsel. This Court should then reinstate Defendant's conviction for murder and remand the matter to the court of appeals to address Defendant's remaining verdict-urging instruction claim.

⁴ She nevertheless voted to reverse because "it is 'not within the province of an appellate court to substitute its judgment for that of a front line fact-finder.'" *Id.* This clearly misstated the law. It is a reviewing court's duty to assess prejudice by predicting how a jury would have decided the case. *See Sears*, 561 U.S. at 955-956 (explaining *Strickland* prejudice standard "necessarily require[s] a court to 'speculate'" as to how evidence would have affected the outcome of the proceeding). After concluding that hearing the specifics of the alleged threat would not have made a difference in the verdict, Judge Christiansen should have dissented.

Respectfully submitted on November 29, 2017.

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Utah Attorney General

/s/ TERA J. PETERSON

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Assistant Solicitor General
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g)(1), Utah Rules of Appellate Procedure, this brief contains 12,002 words, excluding the table of contents, table of authorities, certificates, and addenda.

I further certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☒ does not contain non-public information

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

/s/ TERA J. PETERSON

TERA J. PETERSON
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on November 29, 2017, two copies of the Brief of Petitioner
were ☒ emailed ☐ hand-delivered to:

Margaret P. Lindsay
Douglas J. Thompson
Utah County Public Defender Assoc.
Appeals Division
51 South University Ave., Suite 206
Provo, UT 84601

Also, in accordance with Utah Supreme Court Standing Order No. 8, a
courtesy brief on CD in searchable portable document format (pdf):

☒ was emailed to the Court and emailed to appellant.

☐ will be filed and served within 14 days.

/s/ MELANIE KENDRICK

Addenda

Addenda

Addendum A

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,

v.

TRACY SCOTT,
Appellant.

Opinion
No. 20140995-CA
Filed May 4, 2017

Fourth District Court, Provo Department
The Honorable David N. Mortensen
No. 131400842

Margaret P. Lindsay and Douglas J. Thompson,
Attorneys for Appellant

Sean D. Reyes and Tera J. Peterson, Attorneys
for Appellee

JUDGE KATE A. TOOMEY authored this Opinion, in which JUDGES
J. FREDERIC VOROS JR. and MICHELE M. CHRISTIANSEN concurred,
with opinions.

TOOMEY, Judge:

¶1 Tracy Scott was convicted of murdering his wife. He appeals, contending he received ineffective assistance of counsel during trial. We agree and reverse and remand for a new trial.

BACKGROUND

¶2 Tracy Scott and Teresa Scott¹ were married for nineteen years. They had two sons.

¶3 Scott and Teresa's relationship was both "good and bad." Some described it as happy and loving, but it was also contentious, and they fought often. The fights were "explosive" and involved taunting, threatening, name calling, profanity, and sometimes, throwing things at each other. Each of them frequently threatened divorce, and Scott threatened Teresa's life "multiple times."

¶4 The police were called to the couple's house on a number of occasions and in 2008 cited Scott for domestic violence. In that incident, the couple argued, Scott tried to hit Teresa with their car, then threw a towel over her face and punched her in the stomach. Teresa filed for a restraining order and they separated, but she later had the restraining order removed and Scott's citation was expunged. The pair reunited.

¶5 Many of the couple's arguments revolved around finances. The family incurred debt so Teresa could earn a degree, but her lack of employment after graduation was a source of conflict. Teresa criticized Scott for spending money on trips and firearms instead of paying bills or having their roof repaired.

¶6 Some witnesses testified Scott was the aggressor in the couple's fights—that he got more upset and was "more aggressive" than Teresa and that he was responsible for "[e]ighty percent" of the contention. Some testified that Teresa "escalate[d]" the situation, that she "nitpick[ed] and push[ed]"

1. Because the parties share a last name, we refer to Teresa by her first name for clarity, with no disrespect intended by the apparent informality. See *Earhart v. Earhart*, 2015 UT App 308, ¶ 2 n.1, 365 P.3d 719.

Scott, and kept “gnawing [at] him” and did “not let stuff go.” Scott’s coworkers testified that Teresa frequently called his cell phone while he was at work, and the two would argue over the phone. If Scott did not answer his phone, Teresa would call the shop phone or come to his workplace. These calls occurred several times a week, sometimes two or three times a day, for four or five years.

¶7 Leading up to the events of this case, Scott and Teresa’s relationship “started to get bad again.” Her calls to Scott’s work became more frequent. Remarks between them “got nastier” and “more hateful,” and in the weeks before her death, Scott and Teresa had “constant arguments.” Their fighting was “[w]orse than it had ever been.”

¶8 The day before Teresa’s death, Scott and Teresa began “fighting and arguing” while Scott was changing the oil in a family car. The argument got “really bad.” Scott spilled oil in the driveway, and they continued to fight about the spill and the lack of money to replace the oil. Later, Scott saw that Teresa’s mother had called, and he took the phone into their bedroom to give it to Teresa. He saw her crouched by the end of the bed, but did not know what she was doing. As he turned to leave the room, he saw that the family’s gun safe had been pulled out from under the dresser where it was usually kept and that it was open. He also saw that Teresa’s gun was not in the safe.

¶9 Scott testified he was “scared to death” when he saw the gun was missing. He was nervous and worried, and he went to the garage and stayed there until their sons came home. He did not sleep well that night. The next day Scott ran errands, and while he was putting new tires on the car, twice purchased the wrong size because he “[wasn’t] thinking straight.” Scott did not want to go home and instead called a coworker to ask if he could spend the night at the coworker’s house. The coworker responded that he could meet Scott later that day, and Scott went home. He did some yard work, but he and Teresa were fighting the “whole time.”

¶10 Scott went inside the house to use the bathroom. As he walked into the bedroom, he saw Teresa sitting by the end of the bed. Although the gun safe had been shut and put away under the dresser, it was again open and pulled out, and Teresa's gun was still missing. Scott immediately left the house without using the bathroom. He went to the garage, and while he was there, he saw Teresa several times leaning her head out the door and staring at him. Scott called his ecclesiastical leader because he "didn't know what to do"; he testified that he "really start[ed] to wig out, just freak out."

¶11 Finally, Scott decided to return to the house and "confront" the matter. As he walked in, he could hear Teresa talking on the phone with her mother. While he was in the kitchen, Teresa yelled at him, and he "snapped" and "[saw] red." He stormed into the bedroom where he saw her lying on the bed and pointing her cell phone at him. He looked down at the safe and saw that her gun was still missing. He reached down, grabbed the other gun from the safe, and shot Teresa three times, killing her, then called 911. The police arrived and arrested Scott.

¶12 At trial, Scott admitted to killing Teresa, but he argued that he had acted under extreme emotional distress, which would mitigate the murder charge to manslaughter.

¶13 Scott testified that "there was a threat made" and when he saw Teresa's gun missing from the safe he "thought the threat was serious." Defense counsel asked him to elaborate: "When you say a threat [was] made, are you saying—Who threatened who?" As Scott started to explain the background of the threat, the prosecutor objected that it was hearsay. The court sustained the objection and in a sidebar conversation stated, "There's no way that you're going to dance around and get [in] a threat without [it] being hearsay." Defense counsel said "Okay," and did not offer any counterargument. Counsel continued his questioning, asking, "After you saw the safe open . . . then what were you thinking?" Scott replied, "I was thinking that the threat

that I had received the day before . . . [t]hat she was going to—she was” The court interrupted Scott and called for another sidebar discussion. The court warned defense counsel to stay away from that line of questioning, because “the only responses [it was] getting are clearly hearsay.” Counsel agreed and made no attempt to argue that the statements were not hearsay and were admissible. Scott did not mention the threat again.²

¶14 At the conclusion of trial, the court instructed the jury on the elements of murder and the special mitigation of extreme emotional distress. The instructions stated:

A person acts under the influence of extreme emotional distress when the then-existing circumstances expose him to extremely unusual and overwhelming stress that would cause the average reasonable person under that stress to have an extreme emotional reaction, as a result of which he experienced a loss of self-control and had his reason overborne by intense feelings such as passion, anger, distress, grief, excessive agitation, or other similar emotions.

The instructions also stated that “[e]motional’ distress does not include . . . distress that is substantially caused by the defendant’s own conduct.”

¶15 The jury deliberated for more than five hours and sent two notes to the court. One note asked, “What is the legal definition of ‘substantially caused?’” The next note informed the court, “We are at an absolute impasse, 6-2,” and continued, “Two feel that ‘substantially caused’ needs to be ‘the majority of the time.’” Defense counsel moved for a mistrial on the basis that

2. Scott’s testimony did not include the actual words of the threat. The threat’s content is not included in the record on appeal, and we do not rely upon it in our analysis.

“absolute impasse” meant that the jury could not “continu[e] to deliberate without doing violence to their individual judgment.” The court denied the motion for a mistrial and instead gave a supplemental jury instruction, which asked the jury to “continue [its] deliberations in an effort to agree upon a verdict.” The instruction stated, in part,

This trial represents a significant expenditure of time and effort by you, the court, the parties, and their attorneys . . . and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried to you. . . . Nevertheless . . . it is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment.

¶16 After receiving the supplemental instruction, the jury deliberated for two more hours and found Scott guilty of murder. Scott was sentenced to prison for fifteen years to life. He appeals the conviction.

ISSUES AND STANDARD OF REVIEW

¶17 Scott raises two issues on appeal. First he contends the trial court erred by giving a verdict-urging instruction when the jury was at an absolute impasse. He also contends his counsel provided ineffective assistance at trial. Because we conclude Scott did not receive effective assistance of counsel and reverse on this basis, we need not address the propriety of the court’s supplemental instruction.

¶18 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 this court must decide whether the defendant was deprived of effective assistance as a matter of law. *Layton City v. Carr*, 2014 UT App 227, ¶ 6, 336 P.3d 587. To demonstrate

ineffective assistance of counsel, a defendant must show that his counsel performed deficiently and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

ANALYSIS

I. Deficient Performance

¶19 Scott argues that his counsel's performance was deficient because, when the prosecutor objected to testimony regarding a threat Teresa made to Scott, defense counsel did not attempt to argue the threat was nonhearsay and thus admissible. Scott asserts defense counsel had no tactical purpose for failing to make this argument.

¶20 To show deficient performance under *Strickland*, Scott must demonstrate that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. This standard asks "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). Scott must also "rebut the strong presumption that 'under the circumstances, the challenged action might be considered sound trial strategy.'" *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (quoting *Strickland*, 466 U.S. at 689) (additional internal quotation marks omitted).

¶21 Scott argues on appeal that Teresa's threat was not hearsay and was therefore admissible. "Hearsay" is defined as an out-of-court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement." Utah R. Evid. 801(c). Scott argues the threat was not hearsay because it was not offered to show the truth of the matter asserted—rather, it was offered to show its impact on Scott. *See* R. Collin Mangrum & Dee Benson, *Mangrum & Benson on Utah Evidence* 779 (2016) (noting that statements may be relevant "because of

their effect on the hearer” and that such statements have “consistently been held to be nonhearsay in a variety of contexts”).

¶22 The State conceded on appeal that the threat was not hearsay, and we agree with both Scott and the State that the threat was not hearsay. Like questions and commands, threats are commonly not hearsay, because they do not make assertions capable of being proved true or false. *See United States v. Stratton*, 779 F.2d 820, 830 (2d Cir. 1985) (stating that a defendant’s “threats are not hearsay because [they were] not offered for their truth; the threats are verbal acts”). Here, Scott’s testimony concerning the threat was not offered to prove the truth of what Teresa asserted but was offered to show its effect on Scott. Scott’s defense depended on demonstrating he shot Teresa while under extreme emotional distress not caused by his own conduct. Testimony about the threat’s impact would further Scott’s defense that his distress came from an external source. And as Scott testified, when he saw that Teresa’s gun was missing from the safe, he “thought the threat was serious.” Whether the threat “[was] true is irrelevant, since the crucial factors are that the statements were made and that they influenced the defendant[’s] behavior.” *See State v. Salmon*, 612 P.2d 366, 369 (Utah 1980) (concluding testimony was not hearsay when it was offered, “not to prove the truth of what [the informant] said to defendants, but rather to show that [the informant] had made statements which induced defendants to commit the offense”).

¶23 The threat was not inadmissible hearsay, and it follows that if defense counsel had demonstrated this through proper argument, the court would have allowed Scott to testify about it.

¶24 Scott next argues that his counsel’s failure to correctly argue the rules of evidence fell below an objective standard of reasonableness. We agree.

¶25 In this instance, defense counsel failed to correctly use the rules of evidence to support Scott’s defense: counsel did not argue the threat was admissible because it was offered to show

its effect on Scott, rather than to prove the truth of what Teresa asserted. Counsel's failure was unreasonable, especially in light of Scott's trial strategy, which was to show that his distress originated outside his own behavior. A serious threat to Scott from Teresa would have been an important piece of evidence at trial, and a reasonable attorney would have used the rules of evidence to explain to the court why the threat was admissible. Counsel's lack of argument did not merely "deviate[] from best practices or most common custom"—it amounted to deficient performance. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011).

¶26 The State argues defense counsel's performance was not deficient because "counsel had a sound strategic reason not to seek to admit the specific words of Teresa's alleged threat." Further, it argues defense counsel did not seek to admit the specific words of the threat because an "imaginary threat" could have had a greater impact on the jury than hearing the actual words.

¶27 We do not agree that this was a sound strategic reason for counsel's actions. While an "imaginary threat" could have allowed the jury to conjure something worse than what Scott would have testified to, the converse is also true. Testimony about the threat's actual content could have connected it to various other aspects of Scott's testimony, including Teresa's threatening behavior in other contexts, and would have established the foundation for testimony about Scott's reaction to seeing the empty gun safe. As it was, Scott did not testify about it and counsel did not refer to it in closing argument, even though the underpinning of Scott's defense was that he acted under distress not substantially caused by his own conduct. Under these circumstances, the negative repercussions of omitting the content of the threat were greater than the possible benefits; admitting its content would only have strengthened Scott's defense. We therefore conclude defense counsel's actions could not have been sound trial strategy.

¶28 Because the threat was central to a defense that focused on trying to show that Scott's conduct originated from distress caused by a source other than his own conduct, there was no strategic reason for counsel not to argue that the threat was admissible. Scott has therefore met his burden in showing that his defense counsel's performance was deficient.

II. Prejudice

¶29 To demonstrate prejudice, Scott must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." See *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶30 Scott argues that prejudice is evident because "the jurors expressed their concerns about the very point of law that the excluded evidence would have had a significant impact on." Because Scott admitted he killed Teresa, the sole issue at trial was whether the killing was mitigated by extreme emotional distress. The notes the jury delivered to the court indicate its deliberations had narrowed in on the definition of "substantially caused." This suggests one or more of the jurors was struggling with whether Scott had "substantially caused" the distress he was experiencing. The second note illuminates how the jury was split: "We are at an absolute impasse, 6-2. Two feel that 'substantially caused' needs to be 'the majority of the time.'" Only after a verdict-urging instruction and two more hours of deliberation did the jury arrive at a guilty verdict.

¶31 Scott argues the jury's second note demonstrates that two of the jurors, if not more,³ believed Scott was "suffering under

3. The jury stated it was "at an absolute impasse, 6-2" and that "[t]wo feel that 'substantially caused' needs to be 'the majority of the time.'" At a minimum, two jurors apparently believed at that
(continued...)

the influence of extreme emotional distress” not substantially caused by his own conduct. As a result, Scott reasons that if the jury had been given more specific evidence regarding the threat, there is a reasonable probability that the result of the trial would have been different.

¶32 The State argues there is no reasonable likelihood the outcome of the trial would have been different if the jury had heard the specific words of Teresa’s threat. The jury heard testimony from Scott that Teresa threatened him and that he believed the threat was serious. The jury also heard that after Scott saw the gun missing, he was “scared to death” and “worried that Teresa was going to use that gun to do some harm to [him].” Because of this testimony, the State argues that the “specific words of [the] threat . . . would have added little, if anything, to what the jury already heard.”

¶33 Even though Scott testified that “there was a threat made” and seeing that Teresa’s gun was missing from the safe made him think “the threat was serious,” he was not allowed to offer any other information regarding the threat, including the surrounding circumstances, the words used, and the effect it had on him. After the court warned defense counsel the threat was hearsay and would not be admitted, counsel did not inquire into it again and did not argue, or even imply, that the threat played a role in special mitigation. In contrast, the prosecutor’s closing argument stated that Teresa “was no threat” and had not

(...continued)

point that Scott was acting under extreme emotional distress not substantially caused by his own conduct. It is also possible two other jurors did not believe Scott qualified for the mitigation because he had caused his distress “the majority of the time.” And it is not impossible that six jurors believed Scott qualified for mitigation, while the other two maintained that Scott did not qualify because he had caused his distress the majority of the time.

“provoke[d] him” and asked the jury “what reasonable basis does [Scott] have to make [the] claim that simply the absence of that gun from the safe creates extreme emotional distress[?]” For these reasons, we are persuaded that testimony of the specific threat and its effect on Scott would have given the jury more evidence on the very point that was in dispute.

¶34 In sum, the jury notes demonstrate the jury was at an impasse over whether Scott had substantially caused the distress he felt. At least two jurors were so convinced that Scott acted under extreme emotional distress that the jury described its position as an “absolute impasse.” Testimony about the threat would have directly reinforced the sentiments of these two jurors. That testimony also might have influenced the jurors who believed that “substantially caused” meant “the majority of the time.” Consequently, had Scott been allowed to testify about the threat, there is a reasonable probability the jury would have continued to be deadlocked, ending the case in a mistrial. This probability is enough to undermine our confidence in the outcome of this trial. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

CONCLUSION

¶35 We conclude Scott received ineffective assistance of counsel and therefore reverse and remand for a new trial.

VOROS, Judge (concurring):

¶36 I concur in the majority opinion as a correct statement and application of the law. I write separately to express my concern with the law of extreme emotional distress as it presently exists in Utah, particularly as applied in the context of intimate relationships.

¶37 The facts of the present crime must be viewed against the backdrop of a relationship in which Scott was the usual aggressor. He would call Teresa names like “bitch” or “just anything . . . that could hurt her and make her feel like she was a bad person.” In fact, his contact name for her in his cell phone was “Bitch Teresa.” Scott threatened “multiple times” to kill Teresa, promising that “one of these days I’m going to kill you.” In fact, he did try to kill Teresa once, attempting to run her over with their SUV while their sons were in the back seat. Teresa jumped out of the way. The boys also saw Scott “get physical” with Teresa. One time he threw a towel at Teresa’s face and “started punching her in the gut.” Another time he “slammed” a vacuum into her legs.

¶38 Teresa would also get mad and yell, but she did not get as angry or aggressive as Scott. The boys never saw her “get physical” with him, call him names, or threaten him. She did call the police a few times. Scott called the police too. During one of the police visits, Scott asked the responding officer to tell Teresa to “stop touching” him. In all, the police came to their home “six to eight times.” They arrested Scott on one occasion (he pleaded guilty to domestic violence assault). Teresa obtained a protective order, they separated, but they soon got back together. On the day of the shooting, one of the couple’s sons received a call from a friend who asked why the police were at his house; the son called home and nobody answered. He rushed home, worried that Scott had “finally killed her.” When the other son heard there had been a fatal shooting, he worried that his “mom was dead.”

¶39 And what, according to Scott, ignited his extreme emotional distress? After a fight, he noticed a handgun missing; he heard Teresa on the phone with her mother; she yelled something to him; he stormed into the bedroom and saw her lying on the bed pointing her cell phone at him. In response, he grabbed a gun from the gun safe, cocked it, and shot her three times.

¶40 I do not believe the law should mitigate the culpability of one who kills under these circumstances. “What is generally known as the provocation defense has for two decades been criticized as mitigating violence committed by men against women in intimate relationships.” *State v. Sanchez*, 2016 UT App 189, ¶ 40 n.9, 380 P.3d 375, cert. granted, 390 P.3d 719 (Utah 2017) and 390 P.3d 727 (Utah 2017). It now “is one of the most controversial doctrines in the criminal law because of its perceived gender bias; yet most American scholars and lawmakers have not recommended that it be abolished.” Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. Crim. L. & Criminology 33, 33 (2010); see also Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 Emory L.J. 665, 667 (2001) (“Voluntary manslaughter has never been a female-friendly doctrine.”); Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L.J. 1331, 1332 (1997) (“Our most modern and enlightened legal ideal of ‘passion’ reflects, and thus perpetuates, ideas about men, women, and their relationships that society long ago abandoned.”); Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. Rev. 1679, 1679 (1986) (“[T]he legal standards that define adequate provocation and passionate ‘human’ weaknesses reflect a male view of understandable homicidal violence.”).

¶41 In my judgment, the law should mitigate the culpability of homicides only where society as a whole can to some degree share the rage animating the killing:

To maintain its monopoly on violence, the State must condemn, at least partially, those who take the law in their own hands. At the same time, however, some provoked murder cases temper our feelings of revenge with the recognition of tragedy. Some defendants who take the law in their own hands respond with a rage shared by the law. In

such cases, we “understand” the defendant’s emotions because these are the very emotions to which the law itself appeals for the legitimacy of its own use of violence. At the same time, we continue to condemn the act because the defendant has claimed a right to use violence that is not his own.

Nourse, 106 Yale L.J. 1331, 1393. This “warranted excuse” approach would mitigate the culpability, for example, of a man who murders his daughter’s rapist, but not one who murders his departing girlfriend. *See id.* at 1392.

¶42 But this is not the law in Utah. And here, at least some members of a properly instructed jury seemed to struggle with whether, on these facts, Scott was entitled to special mitigation. In this circumstance, under present law, I cannot say that my confidence in the verdict is not undermined. But like Judge Christiansen, I urge our legislature to revise section 76-5-205.5 so that it can no longer be used to mitigate the final act of abuse perpetrated by an abusive intimate partner.

CHRISTIANSEN, Judge (concurring):

¶43 I agree with the majority opinion’s conclusion that defense counsel’s performance at trial was deficient when he failed to argue that the alleged “threat” made to Scott by Teresa was non-hearsay. As explained by the majority, *supra* ¶ 22, Teresa’s alleged threat to Scott was not a statement offered for its truth and thus fell outside of the definition of hearsay. *See* Utah R. Evid. 801(c); *United States v. Stratton*, 779 F.2d 820, 830 (2d Cir. 1985). Competent defense counsel should have known enough to correctly argue that the rules of evidence would allow the jury to hear this testimony. And, while I do not believe that hearing the specifics of the alleged threat would ultimately have made a difference in the jury’s verdict, I recognize that it is “not within the province of an appellate court to substitute its judgment for

that of a front line fact-finder.” *In re Z.D.*, 2006 UT 54, ¶ 24, 147 P.3d 401. Therefore, I agree that remand is warranted.

¶44 However, though I agree with the majority opinion, I write separately to voice my concern regarding the current statutory implementation of the extreme emotional distress (EED) defense. I do not believe the EED defense should have been available to Scott. After Scott had abused and threatened her over the course of several years, he shot an unarmed Teresa three times, including once in the mouth, while she was lying on their bed with her cell phone in her hand. In my view, this “reaction” to the marital difficulties combined with an alleged threat by Teresa does not create a situation in which Scott should be able to claim he was exposed “to extreme emotional distress” that would reasonably explain and mitigate his loss of self-control. Though our courts have employed a generous approach to the EED defense, *see, e.g., State v. White*, 2011 UT 21, ¶ 29, 251 P.3d 820, we must still consider the circumstances surrounding a defendant’s purported EED from the viewpoint of a reasonable person. “Thus, the legal standard is whether the circumstances were such that the average reasonable person would react by experiencing a loss of self-control.” *Id.* ¶ 36 (citation and internal quotation marks omitted).

¶45 I do not agree with Scott’s assertion that a difficult and contentious marriage, combined with Teresa’s alleged threat, could have resulted in the type of extremely unusual and overwhelming stress that would cause “the average reasonable person” to experience “a loss of self-control.” *See id.* (citation and internal quotation marks omitted). Allowing the defendant to claim special mitigation under facts such as these undercuts and de-legitimizes the proper purpose of the battered-spouse aspect of the EED defense.

¶46 Indeed, the availability of the EED defense to persons in Scott’s situation highlights the defense’s problematic history. As this court has recently stated, and as noted in Judge Voros’s concurring opinion, “What is generally known as the

provocation defense has for two decades been criticized as mitigating violence committed by men against women in intimate relationships. It now is one of the most controversial doctrines in the criminal law because of its perceived gender bias[.]” *State v. Sanchez*, 2016 UT App 189, ¶ 40 n.9, 380 P.3d 375 (citation and internal quotation marks omitted) (collecting authorities), *cert. granted*, 390 P.3d 719 (Utah 2017) and 390 P.3d 727 (Utah 2017); *see also, e.g.*, James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 Yale L.J. 1845, 1865 (1999) (noting that the “provocation doctrine has its historical roots in a value system that embraced the oppression of women”). It is true that EED defense jurisprudence has come a long way since the old common law provocation/heat of passion defense. *See, e.g.*, *State v. Bishop*, 753 P.2d 439, 468–70 (Utah 1988) (plurality opinion) (discussing the evolution of the EED defense in Utah), *overruled on other grounds as recognized by Ross v. State*, 2012 UT 93, 293 P.3d 345. But, as applied here, the EED defense allows an abusive defendant such as Scott (who had committed domestic violence against Teresa and who had at one time been the subject of a restraining order) to claim that the cumulative emotional stress of a difficult marriage and a single alleged threat mitigated his otherwise unprovoked murder of his wife. By doing so, the current statutory implementation of the EED defense gives continued life to antiquated notions of spousal control and perpetuates a belief that violence against women and intimate-partner homicide are acceptable and legitimate. The law should not do so. I therefore urge our legislature to review Utah Code section 76-5-205.5, and to consider explicit recognition in the statute that an abusive spouse or partner cannot claim special mitigation under these types of circumstances.

Addendum B

Utah Code Annotated § 76-5-205.5 (West 2017)

(1) Special mitigation exists when the actor causes the death of another or attempts to cause the death of another:

(a)(i) under circumstances that are not legally justified, but the actor acts under a delusion attributable to a mental illness as defined in Section 76-2-305;

(ii) the nature of the delusion is such that, if the facts existed as the defendant believed them to be in the delusional state, those facts would provide a legal justification for the defendant's conduct; and

(iii) the defendant's actions, in light of the delusion, were reasonable from the objective viewpoint of a reasonable person; or

(b) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.

(2) A defendant who was under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not claim mitigation of the offense under Subsection

(1)(a) on the basis of mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

(3) Under Subsection (1)(b), emotional distress does not include:

(a) a condition resulting from mental illness as defined in Section 76-2-305; or

(b) distress that is substantially caused by the defendant's own conduct.

(4) The reasonableness of an explanation or excuse under Subsection (1)(b) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(5)(a) If the trier of fact finds the elements of an offense as listed in Subsection

(5)(b) are proven beyond a reasonable doubt, and also that the existence of special mitigation under this section is established by a preponderance of the evidence, it shall return a verdict on the reduced charge as provided in Subsection (5)(b).

(b) If under Subsection (5)(a) the offense is:

(i) aggravated murder, the defendant shall instead be found guilty of murder;

(ii) attempted aggravated murder, the defendant shall instead be found guilty of attempted murder;

(iii) murder, the defendant shall instead be found guilty of manslaughter; or

(iv) attempted murder, the defendant shall instead be found guilty of attempted manslaughter.

(6)(a) If a jury is the trier of fact, a unanimous vote of the jury is required to establish the existence of the special mitigation.

(b) If the jury does find special mitigation by a unanimous vote, it shall return a verdict on the reduced charge as provided in Subsection (5).

(c) If the jury finds by a unanimous vote that special mitigation has not been established, it shall convict the defendant of the greater offense for which the prosecution has established all the elements beyond a reasonable doubt.

(d) If the jury is unable to unanimously agree whether or not special mitigation has been established, the result is a hung jury.

(7)(a) If the issue of special mitigation is submitted to the trier of fact, it shall return a special verdict indicating whether the existence of special mitigation has been found.

(b) The trier of fact shall return the special verdict at the same time as the general verdict, to indicate the basis for its general verdict.

(8) Special mitigation under this section does not, in any case, reduce the level of an offense by more than one degree from that offense, the elements of which the evidence has established beyond a reasonable doubt.

Addendum C

1 THE COURT: Mr. Scott, come forward, please.
2 Stand before my clerk, please. Raise your right hand and be
3 sworn.

4 TRACY A. SCOTT
5 having been first duly sworn, testified
6 upon his oath as follows:

7 THE COURT: Thank you, sir. Please be seated on
8 the witness stand.

9 DIRECT EXAMINATION

10 BY MR. GALE:

11 Q Tracy, I'm going to ask you some questions about
12 your life with Teresa and what happened. Where were you
13 born, Tracy?

14 A Ah, Logan, Utah.

15 Q Okay. And where have you lived during your life?

16 A Ah, Logan a little bit, about a year maybe.
17 Brigham City a couple years and then Orem and then from Orem
18 to Salem.

19 Q Okay. And how long have you lived in Salem?

20 A Ah, 19 years.

21 Q Okay. And who did you live in Salem with?

22 A With my wife Teresa.

23 Q Okay. You heard Officer Howell testify earlier
24 that you guys grew up together as kids and stuff, that you
25 knew Doug Howell and he also knew Teresa. Where did that

1 take place?

2 A Doug was my neighbor. He was in my ward. His dad
3 was the stake president.

4 Q Where at?

5 A In Orem.

6 Q In Orem?

7 A Right above the UVC.

8 Q Okay. Did - when did you meet Teresa?

9 A Ah, I actually met Teresa through a friend of mine
10 who was dating her.

11 Q And when was that?

12 A Ah, probably '87, '88.

13 Q Okay. And what happened when you met Teresa?

14 A Ah, well, when I first met her, she was with
15 somebody else. So I didn't really, you know - I just met
16 her. I just knew her as an acquaintance or a friend, a
17 friend of a friend.

18 Q Okay. And so at some point I'm assuming the two of
19 you became more than just friends?

20 A Yes.

21 Q Okay. Explain that. What happened?

22 A Ah, it actually started - this is funny - they had
23 got some Ozzie Osbourne tickets. And her friend that she was
24 dating didn't want to go. And they needed a ride. So I
25 said, I'll take you. And we went to the Ozzie Osbourne

1 concern and that's when the spark hit.

2 Q When was that?

3 A Ah, I'm guessing maybe '89.

4 Q Okay. And so from 1989 until her death, what was
5 the nature of your relationship?

6 A Ah, good and bad.

7 Q Okay. At some point did you get married?

8 A Yes, we did.

9 Q When was that?

10 A Ah, '94.

11 Q Okay.

12 A October.

13 Q And how old were you - well, let me ask this, what
14 was the age difference between you and Teresa?

15 A Ah, three years.

16 Q Someone was older?

17 A I was older. I was three years older. I was born
18 in '66. She was born in '68.

19 Q Okay. And so why did the two of you decide to get
20 married?

21 A Well, we were two peas in a pod. We - she lived
22 with me - we lived at my parents' house. We just - we were
23 together all the time. We just - we loved each other. We
24 were, you know, we just - we were a pair.

25 Q Okay.

1 A And I think - some people, you know, started, you
2 know - you know, we had discussed marriage and stuff like
3 that. But we never really - I guess maybe I was shy. I
4 didn't want to get married. You know, I was young. I mean -
5 and I know her parents would - you know, they weren't really
6 too particular about not being married and living together.
7 And so we just - both of us just one day decided, you know
8 what, we need to move on to the next step, make this, you
9 know, true.

10 Q Okay. So did you love each other?

11 A Yes, we did. We really did.

12 Q Okay. You described your relationship as good and
13 bad. When did - when did you start to have things that were
14 difficult or bad things happen with you?

15 A Well, I - I - I think there was - there's been
16 jealousy ever since the very beginning because of, you know,
17 she was with somebody else when I first met her and I was
18 friends with him and I was still friends with him after.
19 And, you know, there was always a spark of jealousy and that
20 would start a fight.

21 Q What do you mean when you say "a spark of
22 jealousy?"

23 A Well, the friend would come over or, you know,
24 something. And I know that that bugged her. I don't think
25 exes really like hanging around each other.

1 Q Uh-huh (affirmative).

2 A And so that would - that would become a problem.
3 You know, she just didn't like me being around him and didn't
4 like him coming around.

5 Q Okay.

6 A And I felt, you know, Well, he is my friend. He's
7 not - you know, he's not saying nothing bad about you.

8 Q Okay. Who was that?

9 A Randy Lavell (phonetic).

10 Q Okay. So that started fairly early on?

11 A Yes. That would be issues.

12 Q Um, you were married for how many years?

13 A Ah, married 18 years - well, 19 years.

14 Q While the two of you were married did you have
15 fights?

16 A Yes, we did.

17 Q How often?

18 A Ah, there - a lot. I can't say it was 50/50. I
19 can't say it was 65 percent. But it was - well, it probably
20 would have been 65, 70 percent of the time.

21 Q So you're saying that 65, 70 percent of the time
22 you guys were fighting?

23 A Yes.

24 Q Thirty percent you were getting along?

25 A Yes. Getting along or just avoiding - you know,

1 staying out of each other's space.

2 Q Okay.

3 A Towards the end.

4 Q Towards the end, what do you mean?

5 A Well, we would - we would, you know, fight and then
6 we wouldn't. We were, you know, happy. I mean, we were
7 doing everything. Holding hands - you know, we - towards the
8 end, you know, it got to where we weren't even, you know,
9 holding hands unless it was like in a public place or if
10 somebody came over to the house or our parents, you know, it
11 was a pretend thing. It was pretend that we were getting
12 along. But other than that, you know, it got to where if we
13 weren't fighting, we were separated - well, ignoring each
14 other or staying out of each other's area.

15 Q Okay. Did the two of you talk about getting a
16 divorce?

17 A Ah, yeah. I would threaten it; she would threaten
18 it. That was just a common, common thing.

19 Q There was a time period when the two of you were
20 separated?

21 A Yes.

22 Q When was that?

23 A Ah, I think that was in - in, ah, 2008 or 2009.

24 Q Okay. Let me ask you this, there have been other
25 occasions when the police had to come out to your house where

1 the two of you were fighting?

2 A Yes.

3 Q Do you remember when that happened?

4 A Ah, it happened quite a few times.

5 Q How many times?

6 A Ah, I'm guessing maybe six to eight times.

7 Q Okay. Okay. So prior to this happening, the

8 police had been out maybe six to eight times. Did anybody

9 ever get arrested?

10 A Yes, I did.

11 Q Okay. How many times did you get arrested?

12 A Ah, just once.

13 Q Okay. And what - what was that? What were those

14 circumstances?

15 A Ah, it was - the charges were domestic violence.

16 Q Okay. And when did that happen?

17 A That was in, ah, '08 or '09. I can't remember.

18 Q 2008 or 2009. Okay. And was that about the same

19 time you guys were separated?

20 A Yes, we separated after that.

21 Q Okay.

22 A I think there was another time when we separated, I

23 think, for like a week.

24 Q Okay. So over the 18 years you've maybe been

25 separated twice?

1 A Yes.

2 Q Okay. One time prior to 2008 was maybe a week?

3 A Yeah.

4 Q And then in 2008, how long were you guys separated?

5 A Ah, a little over a month.

6 Q Okay. And why did you guys get back together?

7 A Ah, because we - we couldn't seem to stay apart. I
8 mean, it seems like -

9 Q Did she contact you?

10 A Yeah - actually, yes. There was a restraining
11 order. I was staying in Orem. And then one night about
12 one o'clock in the morning, I got a text message.

13 Q Okay.

14 A And, you know, she wanted to talk. And there was a
15 restraining order then for no contact.

16 Q Okay. Did - so you were arrested and charged with
17 domestic violence. Did you plead guilty to something?

18 A Ah, I argued it at first. But that was kind of
19 like senseless because nobody was, you know - nobody was
20 going to buy my story. So I just - I pled. I just said yes.

21 Q Okay. Um, and a protective order was put in place.
22 At some point was that protective order lifted?

23 A Ah, actually there was one protective order that
24 they actually give you, because of the crime - she went down
25 - I think Christine Johnson and one of the battered women

1 ladies went with her or something and went down to this court
2 here and filed an extension for, ah, a restraining order.

3 Q Okay.

4 A And then I was actually back home living with her
5 when me and her both came down here and re-called the
6 restraining order.

7 Q Okay. So she came down with you and got the
8 protective order, the restraining order lifted?

9 A Yes.

10 Q Okay. The charges that you got for the domestic
11 violence, did she do anything to get those off your record?

12 A Yes. She - she, ah, put - she went out and
13 actually did all the footwork and actually come down and
14 talked to the courts and she pushed it through.

15 Q For what?

16 A To get it expunged.

17 Q Okay. To get it taken off your record?

18 A Yes. I mean, we would do things to each other.
19 And then - and then after, you know, a little bit of cooling
20 down time and thinking - we would feel remorse and try to
21 make it up.

22 Q Okay. And did you believe she did that, too.

23 A Yes. She knew it was hurting both of us.

24 Q Okay. So - after 2008, you got back together.
25 Now, did you guys have some conditions or things that you

1 were going to do to work on your relationship so that that
2 didn't happen again?

3 A Yes. We were counseling with our bishop.

4 Q And what were you two planning on doing to - or
5 what did the two of you do to help your relationship?

6 A Well, we would go weekly down and visit with the
7 bishop and he would give us suggestions and things to do and
8 things to read. And he was bringing over talks and other
9 things for us, you know, both of us singly to read and then
10 to read together.

11 Q Were you guys working towards a goal?

12 A Yes. We were working towards going to the temple.

13 Q Okay. Were you able to do that?

14 A Yes, we were.

15 Q Okay. When was that?

16 A Ah, two thousand - I'm thinking it was October
17 2009.

18 Q Okay. And so in 2009 how did you think your
19 relationship was going?

20 A I thought it was going good.

21 Q Okay. Were you guys fighting as much? You said
22 70/30 percent -

23 A Well, we had fights. They weren't as, you know -
24 they were a little calmer than they were.

25 Q Okay.

1 A We were - you know, I think we both grew up enough
2 between us that, you know, this game of calling the cops was,
3 you know, doing nothing but hurting us and hurting our
4 children and hurting our, you know, our reputation in the
5 community.

6 Q Okay.

7 A So I thought, you know, we were starting to - to be
8 better people with each other.

9 Q Okay. So that was in 2009. At some point did your
10 relationship start to sour or start to go bad again?

11 A It started - you know, it started to go sour again.
12 There was, you know, a lot of issues that started to come up.

13 Q What were the issues that were coming up?

14 A Ah, one of the issues was finances.

15 Q Okay. What was going on with your finances?

16 A Not enough to spread around.

17 Q You didn't have enough money?

18 A No. We - just there wasn't enough. We were living
19 above our means.

20 Q Okay. You had arguments about who was working?

21 A Yes.

22 Q What was that about?

23 A She, she went to school for a while, you know. She
24 wanted to get into something that she could comfortably do.
25 And, you know, I didn't want her to do a bad job. So she

1 went to school and then she graduated. And then -

2 Q What did she study in school?

3 A Ah, I know - I can't remember exactly, but it was
4 business. I think to do with finances in a business.

5 Q Okay. Were you working?

6 A Yes.

7 Q Where were you working?

8 A At that time I was working at Alpine School
9 District.

10 Q Okay. How long had you worked at Alpine School
11 District?

12 A I had worked - I started in 2000.

13 Q Okay.

14 A February 2000.

15 Q Okay. And you worked up until this happened?

16 A Yes.

17 Q You worked at Alpine School District?

18 A Yes.

19 Q So for 13 years?

20 A Yes.

21 Q And what did you do for Alpine School District?

22 A I mechaniced (sic) on the school buses.

23 Q Okay. Did you get paid a good wage?

24 A Yes.

25 Q Okay. But it wasn't enough to support your family?

1 A No.

2 Q Okay. So Teresa went to school. Did - how did you
3 guys pay for school?

4 A Voc-Rehab helped and she got student loans.

5 Q Okay. Was that an issue, the student loans?

6 A Yes.

7 Q Why?

8 A Because the - she graduated and then the student
9 loan peoples are very quick on getting that first bill to
10 you.

11 Q Okay.

12 A And she had not had a job yet. And they were
13 adamant about, you know, wanting their first payment.

14 Q How much were the student loans?

15 A Ah, the total of the student loans were \$20,000. I
16 don't know what the payment was.

17 Q Okay. And so you guys fought about that?

18 A Yeah.

19 Q What - why did you fight about that?

20 A 'Cause I felt that she wasn't putting out no effort
21 to, ah, to go get a job.

22 Q Okay. Did she find a job?

23 A She would find jobs, part-time jobs. A lot of
24 people in the ward were actually finding her jobs, too. And
25 actually the bishop helped find jobs. She would do some

1 housecleaning in Salem for a little old lady. And so me and
2 Thayne and Tyson would go help her do it, you know. She had
3 a knee operation. So, you know, I felt bad, you know, for
4 her doing that kind of work. So I would go help her and, you
5 know...

6 Q All right. Did she ever work anywhere for a
7 company or anything like that?

8 A Yes. She worked at Miller Trailer. She worked
9 some holiday work at Wal-Mart. She...

10 Q So it sounds like it didn't last very long?

11 A No, they were just short, little periods.

12 Q Okay. Was - so one of the financial issues was her
13 not working. Were there other issues about spending habits
14 or anything?

15 A Yeah. There was spending habits. There was -

16 Q What was that?

17 A Well, I - I really didn't know exactly what it was
18 'cause my check was deposited into the bank. And she's
19 always been good with finances from the day I've ever known
20 her so she always took care of the finances. And I would
21 never know about finances until there was a problem. Then it
22 was thrown in my face, Well, here's the bills. What are you
23 going to do about it?

24 Q Did - how did you get money? How did you pay for
25 things?

1 A I would ask her. Or I would do side jobs. And I
2 would - I would do a lot of side jobs. I would do - my in-
3 laws, I would actually go up and clean their carpet for them.
4 And she paid me, you know, she paid me a good price. And I
5 would bring it home. And I would give it to Teresa, tell her
6 to put this in the family fund.

7 Q How about - did you guys have arguments about
8 things that you spent money on or - I think there's been
9 mention of a tax return.

10 A Yes. Yes, the tax return. Ah, back in 2007 - oh,
11 '07, '08, we didn't have no money then either. But I had
12 some guns. And we took two of them rifles, the most
13 expensive rifles and we went and hocked them at VanWagner's
14 in Orem. Ah, \$2,500 - maybe \$3,000 worth of guns and we
15 walked out of there with \$800. We took that \$800. We bought
16 Christmas. That following March is my birthday. She, ah,
17 she gave me a birthday card and told me she felt bad for what
18 had happened and she would make it back up to me one time.

19 And then two years ago or three, I guess that time
20 rolled around 'cause she told me she had - she had done taxes
21 and she had saved me a thousand dollars to go buy a gun. So
22 I went and bought a gun. And I went and bought two other
23 guns, .22's for each son.

24 Q Okay. So you took the thousand dollars from the
25 taxes. You bought a gun with it?

1 A Yes.

2 Q And then you bought two guns for your sons?

3 A Yes.

4 Q Okay. Did that become an issue with Teresa?

5 A It wasn't an issue at first 'cause I consulted with
6 her. You know, she said, Yes, that's what it is for. Yeah,
7 yeah, yeah. And then a month later, here come the bills.
8 Here come other problems. Then all of a sudden it became an
9 issue, that I took tax money and spent it on me.

10 Q And so you guys fought about it because she then
11 later resented the fact that you had spent that money?

12 A Yes. Like I - I - I didn't have checks. I had one
13 bank account card. I didn't, you know - if I spent money, it
14 was okayed by her because she was the one that gave it to me.

15 Q Okay. Um, was there an issue with your car, with
16 Thayne's car?

17 A Yes.

18 Q What was that?

19 A I tore - I first bought the car. I tore it apart.

20 Q Tell me when this was.

21 A Ah, I can't remember exactly what year I bought the
22 car. But we bought the car. I tore it apart. It sat in the
23 garage for years, just all torn apart. And that, you know -
24 and then Thayne was getting older. And that's what we bought
25 it for, was to give it to our first son. Actually we bought

1 the car. Tyson wasn't born yet. So we bought the car. And
2 that's what it was for, you know, be a project for me and my
3 son to do.

4 So I tore it apart, and it sat there for years and
5 years. And then Thayne was getting up to the age to where,
6 you know, he was going to be able to drive. And I says,
7 Okay, well, let's start to put it back together.

8 Well, if you know when you go to put something back
9 together, it costs money. I did as much labor as I could,
10 but, you know, you have to buy stuff to do it. And so I
11 would ask her for money and she would - you know, she
12 thought, you know, I was just asking - I guess she didn't
13 realize what it was going to cost versus I knew what it was
14 going to cost. And so at first she started giving me money.
15 You know, Here, get this. Get that. Then finally she says,
16 When is this going to end?

17 MR. STURGILL: Judge, I'm - this is hearsay. We've
18 heard a lot of what -

19 THE COURT: Sustained. The objection is sustained.

20 MR. GALE: You can't say what she said.

21 THE WITNESS: Okay. Okay. It was costing more, so
22 that became an issue.

23 Q (By Mr. Gale) Okay. At some point did the two of
24 you argue about selling the car?

25 A Yes.

1 Q Explain what happened there.

2 A Well, she -

3 Q Did you - maybe, I will try and make it easier.

4 A I don't want to say she, 'cause then -

5 Q I'll try and make it easier.

6 Did she want you to sell the car?

7 A Yes.

8 Q Did you want to sell the car?

9 A No.

10 Q Okay.

11 A It was - the car issue was kind of like the rifle
12 issue. It had a big wad of money into it but to sell it the
13 way it was, you were going to get nothing.

14 Q Okay.

15 A I couldn't see the reason of selling something for
16 nothing.

17 Q Okay. So you were - the two of you were under
18 financial pressure. And you disagreed about selling assets
19 in order to pay for your financial issues?

20 A Yes. I - I disagreed about selling assets because
21 I looked at the picture and I said, Okay, if we want to sell
22 everything, then we need to cut things. But that's what the
23 problem is, was - everything was to be sold to pay the bills.
24 But yet we weren't going to cut any of the habits. So we
25 were going to be in the same spot the next month. But we

1 were going to be a lot less of owning anything.

2 Q Okay. Um, did - did you have fights - so mainly, I
3 think you've said your fights were over a lot of financial
4 things. Did you guys also have fights over prescription
5 drugs?

6 A Yes.

7 Q Tell me about that.

8 A Ah, there's a couple of areas. We had fights over
9 'cause the money it cost for prescription drugs. And then we
10 would have fights over prescription drugs because they were
11 coming up missing.

12 Q Okay. Whose drugs? What are we talking about?

13 A Um -

14 MR. STURGILL: Judge, may we approach?

15 THE COURT: Yes.

16 (Whereupon a sidebar was held as follows:

17 MR. STURGILL: I understand where Mr. Gale is going
18 and (inaudible). I think he's trying to paint a picture that
19 Teresa Scott had a drug problem and that was the source of
20 many of their fights (inaudible). And our problem is is that
21 we have no way to respond to that. So I think if he's going
22 to talk about her having a drug habit we can respond to that.
23 I just think it's so prejudicial, Judge -

24 MR. GALE: You can respond to it by asking the boys
25 about it, asking the family about it. I mean if you have - I

1 mean -

2 THE COURT: (inaudible).

3 MR. GALE: Well, and you have her DOPL and you have
4 - I mean and see did have charges (inaudible).

5 (Inaudible conversation)

6 (End of sidebar)

7 Q (By Mr. Gale) So you said that drugs would come up
8 missing. Can you tell us what that was about?

9 A Prescriptions would, ah, come up missing, misplaced
10 is what was happening.

11 Q Whose prescriptions?

12 A Teresa's prescriptions. She would misplace them.

13 Q Okay. And then what would happen?

14 A Then we would get in a fight over it because I
15 would get accused of taking them.

16 Q Okay. And the prescriptions, when did she start
17 getting those prescriptions?

18 A She's had prescriptions for quite a while. But the
19 prescriptions that was starting to come up missing were, I
20 think, after - when she got her knee replacement they put her
21 on some, uh, some type of like Valium. And she would - she
22 would forget things - she would do things at night time and
23 then by in the morning, she would not remember them.

24 Q Okay. And so how would that cause a fight, if she
25 would not remember something?

1 A Well, 'cause she couldn't find her prescription.

2 Q Okay.

3 A And automatically I was, you know - there was only
4 four of us in the house. The kids, you know, they had no
5 need for prescriptions. So that leaves me. And so I was -
6 that's, you know, I was the one.

7 Q Okay. Did you feel like she was taking too many
8 prescriptions?

9 A Yes. She was taking too much of the Valium.

10 Q Okay. When was the knee surgery?

11 A Ah, I can't remember exactly. It's been - she's
12 had - actually she's had two knees. The first knee they just
13 went in and cleaned it out and did some other stuff. And
14 then she didn't follow what the doctor claimed for her to do.
15 She got up and walked on it and drove on it and did stuff.
16 So it ended up not taking what the doctor wanted. So they
17 had to do a knee replacement a year later. So it's been just
18 right after - I think right after 2010.

19 Q Okay. Was it after you guys got back together and
20 went through the temple and stuff in 2009? It was after
21 that?

22 A Yeah.

23 Q Okay. And, so in 2010?

24 A Yeah, I think so.

25 Q Okay.

1 A Was the first of her knee operations.

2 Q So between 2010 and 2013, was this a common source
3 of argument?

4 A Yes.

5 Q Um, I'm going to take you a little bit closer to
6 the date of the event. What - what had happened - how were
7 the two of you getting along the week or two weeks prior to
8 the event?

9 A Ah, not very good at all.

10 Q Okay. Why not?

11 A Ah, constant arguments. Ah, we argued so much that
12 I can't really tell you exactly what each argument was over.

13 Q Okay. Um, you had gone somewhere with your boys
14 the weekend before?

15 A Yes. We went down to - by Otter Creek by Monroe to
16 go shed hunting.

17 Q What is shed hunting?

18 A Ah, deer sheds, elk sheds.

19 Q When you say "shed," you're talking about the
20 antlers?

21 A Yeah, the antlers. They drop them.

22 Q Okay. And so you went there with who?

23 A Thayne, Tyson, and one of his friends. I think his
24 name was Keyan (phonetic).

25 Q Whose friend?

1 A Thayne.

2 Q One of Thayne's friends?

3 A Yes.

4 Q Okay. So it was you and the three boys?

5 A Yes.

6 Q Okay. Um, what did you guys do?

7 A We took four-wheelers and went shed hunting.

8 Q Okay. Did you bring any guns with you?

9 A Yes.

10 Q What guns did you bring with you?

11 A We brought two .45's and a 30/30 rifle.

12 Q Okay. Was one of the .45's you brought, one of the

13 .45's that you saw here?

14 A Yes.

15 Q Okay. Which one?

16 A Para-ordinance P-13.

17 Q Okay. The one that was found in the door?

18 A Yes.

19 Q You saw another gun there on the bed?

20 A Yes.

21 Q Um, whose gun was that?

22 A That was Teresa's.

23 Q Okay. That was the nine millimeter?

24 A Yes.

25 Q Okay. Um, did you discharge your .45 while you

1 were hunting or shed hunting?

2 A Yes. Actually, I didn't discharge it. Thayne shot
3 it. Tyson shot it, and then Thayne's friend Keyan shot it.

4 Q Okay. Did you and Teresa get in arguments about
5 that, about you guys going shed hunting?

6 A Yes.

7 Q What was that about?

8 A That was about finances.

9 Q Okay. Why would finances be an issue?

10 A Because there wasn't enough money to take out of
11 the family fund to go.

12 Q Okay. Did you resolve that?

13 A Yeah, I - I took all my birthday money that was
14 given to me because went and - you know, the third week of
15 March - it was after my birthday. So everybody that, you
16 know, gave me birthday money, I used that. And I told her
17 that I would use that.

18 Q Okay.

19 A And we had the food at the house. And all we
20 needed to do was pay for gas.

21 Q Okay. When you got back, did you guys get in a
22 fight?

23 A Ah, not - not that time right when we got back.
24 But by bedtime, we were back to our normal pushing buttons
25 and bickering at each other.

1 Q This would have been on Sunday?

2 A Yes.

3 Q Okay. And do you remember what you were fighting
4 about then?

5 A No.

6 Q Okay. Um, later during the week, did you guys
7 continue to fight?

8 A Yes. We pretty well fought all the way through.

9 Q Okay. Was there an argument about what car you
10 were driving to work?

11 A Yes. I had gotten - she had a car - there was a
12 car - we had two vehicles. We had a Durango and we had a
13 Honda. And I was driving the Honda to work 'cause we - I
14 commuted - car pooled with three other people. And so I
15 would take the Honda to drive to work 'cause it was cheaper
16 on gas.

17 But that car was given to her by her father. And
18 so to her, in her mind, that wasn't actually a household
19 item. That wasn't - that had nothing to do with me. That
20 was hers and hers strictly. And she said that -

21 MR. STURGILL: Judge, objection.

22 THE COURT: Sustained.

23 MR. GALE: You can't say what she said.

24 THE WITNESS: Okay. But I was - she accused me - of
25 beating the car.

1 Q (By Mr. Gale) She didn't like you putting so many
2 miles on her car?

3 A Yes.

4 Q So, um, what did you do?

5 A I took the Durango.

6 Q Okay. Did that cause a fight?

7 A Yes.

8 Q Why?

9 A 'Cause we couldn't afford the gasoline for that.
10 It was a gas guzzler.

11 Q Okay. Did - did this - you said you were fighting
12 those whole two weeks. This happened on Wednesday, the thing
13 with the car?

14 A Ah, I can't remember it all.

15 Q Was it that week?

16 A I think so.

17 Q Okay. Now, this week, were things the same as they
18 had been for years and years or -

19 A No, it was bad. It was get in your face, yell,
20 scream at each other, spit flying...

21 Q So was it the same as it has always been?

22 A No, it was a lot, lot worse.

23 Q Worse than it had ever been?

24 A Yeah. It was actually worse than the time that I
25 had the domestic charge.

1 Q Okay. So it was as bad as it had ever been,
2 probably worse than it had ever been?

3 A Yes, it was pretty bad.

4 Q Okay. Um, on Friday, the day before the event, can
5 you explain what happened that day.

6 A Friday? Ah, Friday we - she slept in. And I got
7 up -

8 Q You weren't working that day?

9 A No, I was off that day.

10 She slept in. I got up. I slept in a little bit.
11 I was getting up at 5:00 in the morning. So I slept in until
12 about 7:30, 8 o'clock. And then I would slip out back and
13 tinker in the garage or tinker in the yard. I like to be
14 outside.

15 And then we kind of just avoided each other. Then
16 when the children had got home, we had discussed that we
17 wanted to change the oil in the car. So Thayne - me, Thayne,
18 and Tyson, we jacked the car up. And he had a hotrod car -
19 the one that we built - and we were changing the oil. And me
20 and Teresa were fighting and arguing. And I was trying to
21 put the filter on. And we were fighting and arguing. And I
22 was trying, you know, to concentrate on what I was doing.
23 And she wanted me - and she - for some reason, she liked eye-
24 to-eye contact when you talked.

25 And so I was going back on, rolling on the creep -

1 I'd roll out and, you know, and argue with her. Then I'd
2 roll back under and try the filter on. Then I'd roll back
3 out - and it just - and then Thayne started the car, you
4 know, to build the oil pressure and that. And the old filter
5 was on crooked - or the O-ring rolled out and spit oil
6 everywhere. It just flooded the driveway with oil.

7 And then we fought over that, 'cause the oil went
8 everywhere. I was ruining the car. I was ruining the
9 driveway. I was doing this. So I says, Well, we need to go
10 get some oil so we can get this and get it out of the way.
11 And then I was told that there was no money to go buy oil, we
12 were tapped out.

13 Q Okay.

14 A And then time - you know, maybe a half an hour went
15 by and she come out and got me and said, Let's go get the
16 oil. So we went and got the oil.

17 Q Okay. Did the kids go somewhere?

18 A Yes. After we come back, filled the car up, they
19 left. They took off in the car. I threw rags all over in
20 the driveway to soak up the oil. She went inside. I went
21 back in the garage. The phone ring. The phone rang and it
22 rang and it rang. And I looked at the caller ID, and it was
23 her parents' house. And so I just figured, you know, it's
24 her family, she'll get it. And, ah, she didn't. So I yelled
25 through the back window - 'cause it was back by the garage -

1 I yelled, That was your family calling. And she said, Well,
2 why didn't you answer it?

3 MR. STURGILL: I'm just asking that you be careful
4 about hearsay.

5 THE COURT: Sustained.

6 MR. GALE: Okay. I'll try to ask questions to help
7 you.

8 Q (By Mr. Gale) So you - the telephone, you told her
9 that you didn't answer the telephone because it was her
10 family. After that what happened?

11 A I called her parents' house.

12 Q Okay.

13 A Her mother answered. I said, Did you call? She
14 says, Yeah.

15 THE COURT: Mr. Gale -

16 MR. GALE: Yeah.

17 THE COURT: You understand.

18 MR. GALE: I do.

19 THE COURT: I just - we can't have conversations
20 where we tell both sides because that is going to require you
21 to say what somebody was saying and then Mr. Sturgill is
22 going to object and Mr. Scott will try again. So if you
23 limit it to what you said.

24 THE WITNESS: Okay. So, ah, when I was walking in
25 the house to take the phone in to Teresa, I told her mom that

1 we were fighting and we were fighting really bad.

2 Q (By Mr. Gale) So you took the phone in to Teresa in
3 the bedroom. And what did you see when you went in the
4 bedroom?

5 A I went in the bedroom. Teresa was off to the front
6 of the bed, sitting on a stool crouched down at the bed, in
7 front of the bed crouched down.

8 Q Okay.

9 A I didn't know what she was doing.

10 Q Could you - now, was she in between the bed and the
11 door, or -

12 A No, this was on the side.

13 Q Would it help for you to look at the exhibit?

14 (Inaudible conversation)

15 Q (By Mr. Gale) Could you point to where Teresa -
16 where you said that you saw Teresa.

17 A Can you see where the 12 is right there?

18 Q Right.

19 A That's basically where the stool was that she was
20 sitting on, and she was facing the bed.

21 Q Okay, facing the bed so -

22 A Yes, that direction.

23 Q What else did you see when you went in the bedroom?

24 A Well, I leaned across -

25 Q Well, I guess first where were you standing?

1 A I came in through the door, leaned across the
2 corner of the bed there, and I threw the phone to where she
3 was where Number 9 is right now. The phone landed there.
4 And I says, Your mother is on the phone.

5 And then when I stood back up and I went to turn,
6 there I think - the gun safe, it was open. It was open and
7 there was only one pistol sitting there.

8 Q Okay. So that was - the safe was the same place
9 that you saw in the picture?

10 A The safe usually stayed further under the dresser.
11 That's - but it was pulled out and opened.

12 Q This right here is the dresser. And so the safe is
13 usually underneath the dresser?

14 A Yes. Out of sight. Out of sight, out of mind.

15 Q Okay. And so when you went in Friday, you saw the
16 safe out from under the dresser?

17 A Yes.

18 Q Open?

19 A Yes.

20 Q And one of the guns -

21 A The black pistol was in there.

22 Q Okay. What did you do?

23 A I looked at it, and then I just walked out.

24 Q What did you think?

25 A Well, I walked out in the garage and I - I just

1 couldn't - I didn't know what to think. Now, I was thinking
2 something that Wednesday there was a threat made. And so
3 when I came in and seen that, I thought the threat was
4 serious.

5 Q Okay. When you say a threat made, are you saying -
6 who threatened who?

7 A Ah, Wednesday night we got into a big fight, a big,
8 big fight. The - we were fighting and arguing. We got
9 everything - I mean, it got from, you know, accused of having
10 an affair -

11 MR. STURGILL: Judge, again, objection. Hearsay.

12 THE COURT: Sustained.

13 Q (By Mr. Gale) Okay -

14 A So we fought.

15 THE COURT: Just a second. Will you approach.

16 (Whereupon a sidebar was held as follows:

17 (Inaudible conversation)

18 (End of sidebar)

19 Q (By Mr. Gale) Okay. Go back to what you were
20 thinking on - with the safe. After you saw the safe opened,
21 and you went into the garage, okay, then what were you
22 thinking?

23 A I was thinking that the threat that I had received
24 the day before -

25 MR. STURGILL: Judge -

1 Q (By Mr. Gale) What I am asking is -

2 A That she was going to - she was -

3 THE COURT: Just a second.

4 MR. STURGILL: May we approach?

5 THE COURT: Yes.

6 (Whereupon a sidebar was held as follows:

7 MR. STURGILL: It might be a good time to take a
8 break and maybe Mr. Gale can speak to his client about -

9 (Inaudible conversation)

10 (End of sidebar)

11 THE COURT: All right. The attorneys have pointed
12 out to me that it is the noon time. We usually take our
13 lunch-time break at that time.

14 Mr. Scott, if you would step down, please.

15 We will take our noon break. We are going to break
16 until 1:15.

17 It's your duty not to converse amongst yourselves
18 or with anyone else about any subject of this trial. You
19 must not permit anyone to speak to you on any subject of this
20 trial. You must not show your notes to anyone. You must not
21 attempt to learn anything about the case outside the
22 courtroom. Finally, it is your duty not to form or express
23 an opinion about the case until it is finally submitted to
24 you.

25 With that, we will be in recess until 1:15.

1 (Off the record from 11:58:34 to 11:58:59)

2 THE COURT: - on the record. Before we broke for
3 lunch. You don't need to -

4 MR. STURGILL: - hearsay issue.

5 THE COURT: Right, and unless we can figure, you
6 know, I don't know what you want to do but I'm only going to
7 give you - I'm not going to give you any more lead way on
8 that. I'm going to - if we can't - I know where you want to
9 go.

10 MR. GALE: Right.

11 THE COURT: I'll let you try and talk to your client
12 about it but the point is if we get a feel within even one
13 question, I'm just going to make you move onto a new line of
14 inquiry.

15 MR. GALE: Okay.

16 THE COURT: Okay.

17 MR. STURGILL: And I appreciate that, Judge, and I'm
18 in a tough spot because I hate to keep objecting.

19 THE COURT: No, and that's why I intervened.

20 MR. STURGILL: I don't mind if he talks very
21 directly and frankly with Mr. Scott and tells him exactly
22 what he can and can't say. It needs to stop here because he
23 was just -

24 THE COURT: Well, why don't you do this - there's
25 one remedy but it's also an objectionable question, but of

1 course, you don't have to object. Why don't you see if
2 there's a leading question that you won't object too.

3 MR. STURGILL: That's what I'm suggesting.

4 THE COURT: Okay.

5 MR. STURGILL: Okay.

6 THE COURT: I don't know. Otherwise I've got no -
7 because all I'm getting - the only responses I'm getting are
8 clearly hearsay and so I have that, some sort of remedy and
9 that's only one I could think of, unless you can think of
10 another one.

11 MR. GALE: Okay.

12 THE COURT: All right. We'll be in recess until one-
13 (Whereupon a noon recess was taken)

14 THE COURT: You may be seated.

15 Mr. Scott, if you could re-take the witness stand,
16 please.

17 You may proceed.

18 Q (By Mr. Gale) Tracy, before we broke for lunch, I
19 had talked to you about the safe that was - that you saw open
20 in the bedroom. When you saw the safe, you said that one of
21 the guns was missing?

22 A Yes.

23 Q Which gun was missing?

24 A The Beretta 9 millimeter.

25 Q The Beretta 9 millimeter, is that the same one that

1 you saw in the pictures here, Number 5 at the end of the bed?

2 A Yes.

3 Q Okay. That was not in the safe -

4 A No.

5 Q - on Friday when you went into the room.

6 So when you saw it - you said that you saw that gun
7 missing from the safe. You saw Teresa sitting on the stool
8 behind the bed.

9 A Yes.

10 Q And then you went out to the garage?

11 A Yes.

12 Q Okay. When you went out to the garage, having seen
13 that the gun was missing, were you worried that Teresa was
14 going to use that gun to do some harm to you?

15 MR. STURGILL: Objection. Leading.

16 THE COURT: I'm going to allow the question.

17 THE WITNESS: Yes.

18 Q (By Mr. Gale) Okay. What did you do after that?

19 A I, uh, sat out there and stewed, nervous and
20 worried and then finally I called my mother.

21 Q Okay. What - you said that you stewed and were
22 worried. What were you feeling at that point?

23 A I was scared to death.

24 Q Okay. So you called your mother. And what did -
25 why did you call your mother?

1 A 'Cause I didn't know who else to call.

2 Q Okay.

3 A I mean, I was scared.

4 Q Okay. And what did you tell your mother?

5 A I told her what I seen.

6 MR. STURGILL: Objection. Hearsay.

7 THE COURT: It's overruled.

8 MR. STURGILL: May we approach?

9 (Whereupon a sidebar was held as follows:

10 (Inaudible conversation)

11 THE COURT: What did you tell your mother?

12 MR. STURGILL: Exactly, Judge, it's a statement made
13 by the defendant out of court that's being offered to prove
14 the truth of the matter asserted and there is no exception.
15 It's not been an issue because it's not going to be offered
16 by a party opponent or against (inaudible). It's his own
17 statement that he's offering in his behalf. It's not an
18 admission.

19 MR. GALE: He's not offering it for - I wish I had a
20 guy behind me that could say "yeh", every time I said
21 something but it's not being offered for the truth of the
22 matter, it's just being offered to -

23 THE COURT: It's not hearsay anyway because it's his
24 statement, but -

25 MR. STURGILL: I know one exception (inaudible)

1 hearsay (inaudible).

2 (Inaudible conversation)

3 MR. STURGILL: I know one exception to hearsay.

4 Assuming that it is being offered to prove the truth of the
5 matter asserted, it is not coming under the admission.

6 THE COURT: You're saying he can't say what he said.

7 MR. STURGILL: Cannot, not if it's being offered to
8 prove the truth of the matter asserted because the only -
9 what allows (inaudible) introduced and statements made by a
10 defendant outside of court (inaudible) this isn't an issue.
11 This is being offered against a party opponent. Well, it's
12 being offered against him by a party opponent, in this case
13 that's not the case.

14 THE COURT: Anything else?

15 MR. GALE: Judge, that it's not being offered for
16 the truth of the matter, just for what he said to his mom.
17 It was also his present sense impression and his state of
18 mind. He said that he was, that he was scared to death and he
19 was explaining to his mom what -

20 THE COURT: Well, I'm going to sustain the objection
21 because I don't think it makes - under 801, I don't think it
22 even meets the definition of hearsay. It's something that
23 isn't hearsay but it's not allowable, so I'm going to sustain
24 the objection.

25 (End of sidebar)

1 Q (By Mr. Gale) Okay, so you called your mom?
2 A Yes.
3 Q Okay. And then after calling your mom, what did
4 you do?
5 A I pretty well just stayed hidden out until the
6 children got home.
7 Q Okay. So you stayed out in the garage until the
8 children got home. Okay. What time is this that we're
9 talking about?
10 A Um, I'm guessing four o'clock, five o'clock.
11 Q Um, okay. So after the children got home, what
12 happened?
13 A I felt a little more comfortable. I felt a little
14 more like nothing would happen with the children there.
15 Q Okay.
16 A So I just kind of went back in.
17 Q Okay.
18 A And things were - I mean, things were thick. You
19 could cut it with a butter knife. But there was no, ah,
20 things were back where they were supposed to be. And we just
21 kind of just floated through the night without, you know,
22 just stressed.
23 Q Okay. The next day, on Saturday, tell me what
24 happened - when you got up in the morning what happened?
25 A I, ah, actually hadn't got up yet when the neighbor

1 had called.

2 Q Okay. And he needed some advice on his vehicle.
3 So I got up and headed out over there to help him.

4 Q Okay. How were you feeling that morning?

5 A Ah, I was feeling actually pretty weird. I didn't
6 sleep very good that night. Ah, I didn't sleep worth a crap
7 that night. I had taken (sic) quite a few Ambien to just
8 get me through the night.

9 Q Okay.

10 A I would wake up, take another one. I just - yeah,
11 it was a bad night.

12 Q Okay. Were you still feeling the stress that you
13 had the day before?

14 A It never went away.

15 Q Okay. Were you still feeling scared?

16 A Yes.

17 Q Okay.

18 A That's why I didn't sleep worth a crap.

19 Q Okay. So in the morning your neighbor called. You
20 went over to help your neighbor with a car. Then what
21 happened?

22 A I had a haircut appointment in Payson.

23 Q Okay. And what did you do?

24 A I went there. I was late. So they told me to come
25 back at a certain time. And so I headed to American Fork to

1 put some tires on the car.

2 Q Okay. Is this the same car that you had had an
3 argument about earlier in the week?

4 A Yes.

5 Q And you were getting new tires for it?

6 A Yes. We already had purchased them. They were up
7 there at the garage.

8 Q Okay. So you went to the tire place - or I'm sorry
9 - to your work?

10 A Yes.

11 Q Okay. And you were going to put the tires on the
12 car?

13 A Yes. I started to do that. Then when I went to
14 put it on to the rim, it was the wrong size.

15 Q Okay. What did you do then?

16 A I, ah, called the boss and asked him if I could run
17 up and swap the tires out. And so I went up, swapped the
18 tires out, then once again - not having my mind where it was
19 supposed to be, I got the wrong size again.

20 Q Okay. When you say you called the boss, which boss
21 are you talking about?

22 A I called Ed Backus and when I got back and had the
23 wrong tires again, I knew - you know, I had to go home. So I
24 called a co-worker. And I didn't want to go home. I really
25 didn't want to go home. I called a co-worker. I knew he

1 wasn't staying at his house for three days to a week. So I
2 called him and asked him, Can I come over to your house and
3 stay for a while? I need somewhere to go.

4 Q Okay. And who was that?

5 A His name is Troy Frackrell.

6 Q Okay. And did Troy allow you - or indicate that
7 you could come over to his house?

8 A Yes. He said that he was busy and not around right
9 now, to text him when I was ready and he would meet me at the
10 house and give me a key.

11 Q Okay. So you had found an alternative place to
12 stay that night?

13 A Yes.

14 Q Okay. After you tried to put the tires on the
15 second time and they turned out to be the wrong size, what
16 did you do?

17 A I went over to American Fork into the city or town
18 area, filled the car up with gasoline and then headed back
19 home.

20 Q So did you put the old tires back on the car?

21 A Yes.

22 Q Okay. So you went up there with the old tires,
23 tried the first set of tires. They didn't fit. You went
24 back to the tire place and got a second set of tires. And
25 those also didn't fit -

1 A Once again.

2 Q -and then you put the old tires back on the car -

3 A Yes.

4 Q And went back home?

5 A Yes.

6 Q Okay. And the reason that you believe you got two
7 sets of tires, the wrong tires?

8 A The first reason, I guess I just communicated with
9 the tire salesman the wrong size.

10 Q Right.

11 A The second time, I didn't even - I - I - apparently
12 I communicated the wrong size again. And I didn't even check
13 them.

14 Q You're saying you just weren't thinking straight?

15 A No, I was not.

16 Q Now, the - ah - so after that you went home?

17 A I went and gassed up the car and then went home.

18 Q Okay. And then what happened after you got home?

19 A I remember coming home, advising that I had gotten
20 the wrong tires and I didn't get the job done. And that
21 caused problems.

22 Q Okay. So then what happened?

23 A Ah, ah, I went out to the yard and decided I was
24 going to till the garden.

25 Q Okay.

1 A And so I went out to till the garden and looked at
2 the garden and realized I needed to get some compost. So I
3 went back in the house and asked if there was any money to
4 where I could run over here to the compost place and get some
5 compost manure. And basically the answer was no, there was
6 not. And Thayne and his friends were there - his friend and
7 Tyson were there at the house. And they had made a comment
8 they had manure at their farm. And so I said, Well, cool.
9 Run over to the neighbors and ask them if you can borrow his
10 truck and you three jump in the truck and run over and get
11 it.

12 So they did. They went over to get it.

13 Q Okay. And then what happened?

14 A I needed to move the vehicles out of the side of
15 the house so we could, ah, get the truck back there to put
16 the manure in the garden.

17 Q Okay. And as I was trying to pull the truck out,
18 the trailer kept rubbing the fence. And that was causing
19 another argument. And so I ended up dropping the trailer,
20 pulling the truck out, getting the Durango, backing it in,
21 hooking it to the trailer, pulling the trailer out.

22 Then Thayne showed up. We pulled back and they
23 unloaded the manure on the garden.

24 Q Okay. And you were fighting this whole time?

25 A Yes, even in front of the kids.

1 Q Okay. She was outside?

2 A Yes. Yes, 'cause she was the one that could see
3 the trailer where I could not see anything. It was hitting
4 the fence and she kept letting me know I was hitting the
5 fence.

6 Q Okay. What happened after you got the garden all
7 done?

8 A Ah, the kids took the truck back to the neighbors.
9 And then I think Thayne and his friend took off somewhere and
10 Tyson was still at the house.

11 I went and got the soap and a brush and squirted
12 down the oil spill in the garage -

13 Q Okay.

14 A - and started washing it. I washed it, got it all
15 up, down the drain. I went to the garage. I needed - and
16 was doing some stuff, needed a hand, went into the house,
17 opened the door and yelled for Tyson. I was told that Tyson
18 was gone to a friend's.

19 Q Okay.

20 A So I stood there for a minute - not a minute, just
21 a second or two. And then I - I went - I decided I just as
22 well go to the restroom. So I headed into the house, headed
23 around to go into our master bedroom to the bathroom there.

24 As soon as I walked in, one step into the door,
25 the - Teresa was back over in the corner. And the safe was

1 pulled out again from underneath the safe - I mean underneath
2 the dresser - open with one pistol in it.

3 Q Okay. So you saw the same thing that you had seen
4 the day before?

5 A Yes.

6 Q And Teresa was sitting on the stool in the same
7 place?

8 A Yes. It was a quick in, turn around, and get out
9 of there.

10 Q Okay. And so you were going - it looks like there
11 is a bathroom in the master bedroom right here?

12 A Yes.

13 Q And you were going to use that bathroom?

14 A Yes.

15 Q But you went there and decided not to use the
16 bathroom?

17 A As soon as I walked through the door and seen what
18 I seen, I decided that was the last of my problems.

19 Q Okay. And so you went out and used the other
20 bathroom?

21 A Actually I went out back - you see where the house
22 is at - I went to the bathroom in a ditch out back in the
23 corner.

24 Q Okay. Why did you do that?

25 A I didn't dare go back in the house.

1 Q Okay. Then what happened?

2 A And then I was out in the garage and the garage -
3 the house door to the garage would come open. And I was down
4 in the lower part of the garage. I would look up, and Teresa
5 would be leaning out the door and just staring at me and so I
6 just was just kind of freaking out.

7 So I - she went back in. I called my bishop. And
8 - cause I wanted, you know, advice from him before I did
9 something. I was - I didn't know if I should call the cops -
10 I - I didn't know what to do, so I called him.

11 And so while I was starting to talk to him, Teresa
12 came out and come down - and I was asked, Are you calling in
13 the cavalry? And I just ignored and was talking to the
14 bishop and the bishop could hear. And he says, Mr. Scott -
15 or Tracy - he says come in tomorrow early to the church and
16 he says, we'll talk.

17 Q Okay. So then what happened? I'm assuming you
18 ended your phone call to the bishop?

19 A Yes. I ended the phone call to the bishop. Teresa
20 went back into the house. I sat there again.

21 The door - the door to the house, when you open it,
22 it makes a chirp. It's kind of like an alarm, you know. We
23 - you can be anywhere in the house and when you hear that
24 door open, it chirps. So you would know, like if the kids
25 got home from school.

1 The door chirped. I looked back up and Teresa was
2 leaned out the door again, just giving me the stare. You
3 know, the stare I've seen - just - yeah. So she stared for -
4 I don't know - to me it seemed like endless. But, you know,
5 it could have been 15 seconds, 20 seconds and then back in
6 she went.

7 Q Okay.

8 A I stayed out.

9 Q How did you feel when that happened?

10 A I was scared to death. I was -

11 Q Did you think she had a gun?

12 A I really did 'cause she was only leaning her head
13 out. She was not walking the body out, just leaning the head
14 out.

15 Q Okay. Then what happened?

16 A Ah, I don't know how long it took but I sat out
17 there and just felt like I called everybody I could, unless I
18 called the cops. And I just didn't know. I just was really
19 starting to wig out, just freak out. I don't know how long I
20 was out there for. I mean, time just was not of an essence
21 right there and then.

22 And then so I finally decided I'm going to go in
23 there and confront this. So I opened - went in the house,
24 opened the door, stood there and looked in the kitchen for a
25 second, in the hallway/kitchen. Then I went walking in. And

1 I could hear somebody on the phone. So I went around -

2 Q Teresa was the only one in the house; right?

3 A Yes.

4 Q Could you hear Teresa on the phone?

5 A Yes, I could hear Teresa on the phone.

6 Q Okay.

7 A So I walked around. And as you can see, you can
8 have a little wall to go into the bedroom -

9 Q Do you still have that laser pointer?

10 A Yes.

11 Q Hold up a second. Let the prosecutors get over
12 here.

13 That's good.

14 A I came in the back door, stood there for a second,
15 walked up to here, to this little entrance, and I just could
16 hear her talking. And I just kind of made a dart across to
17 there. And I stood there and I could hear her talking.

18 Q Okay. Did you know who she was talking to?

19 A Ah, I didn't know for sure until I was started
20 hearing the conversation.

21 Q After hearing the conversation, did you think you
22 knew who she was talking to?

23 A Yes.

24 Q Who?

25 A Her mother.

1 Q Okay. Um, so she was talking on the phone with her
2 mother. Then what happened?

3 A I listened for a second. And then I walked back
4 out into the kitchen to the refrigerator to - to - to get a
5 drink out. And I was kind of drinking, worked my way over to
6 the counter and was looking out the window. And then there
7 was a voice that yelled at me. It was Teresa said something
8 to me.

9 Q Okay. And what did you do?

10 A Ah, I snapped. I decided - I just seen red. I
11 just - it's - I went storming in there. She was laying on
12 the bed. She's got her cell phone pointed at me. And I
13 looked at her and I looked at the cell and I looked down at
14 the gun safe and the only gun there was the black one.

15 I reached down and grabbed the gun. I cocked it on
16 the way up. Then I was standing there with the gun in my
17 hand pointed at Teresa. I said in my mind, Oh, my God. And
18 then I noticed my hand just shaking. And then, boom. And I
19 watched the concussion of the gun, the cloud, the - I watched
20 the gun do it's action. I watched the bullet flip out.

21 Then I looked at Teresa and I just stared at her.
22 She was just sitting there. Nothing. I mean, nothing. Just
23 - just - just not a movement. I didn't see nothing obvious.
24 I didn't know. But I knew the gun had just went off.

25 And I just - I started walking that way. And as I

1 was walking, I was still like this. And then all of a sudden
2 she just started to lean and was dead. I jumped like that,
3 and the gun went boom. And then it was - I just - so I
4 walked around the corner of the bed and I looked down and
5 there the 9 millimeter with the casing was sitting on it. I
6 walked up, started at her for a second, grabbed the other gun
7 instantly, backed up. And then I just looked at her.

8 I'm holding - the gun is still in my hand, both of
9 them. And I told myself, I am going to join her. I can't do
10 this. So I started walking up. And I put the gun on the
11 bed. I just dropped it. I walked into the living room and I
12 was just about ready to kill myself when I seen Thayne and
13 Tyson's pictures on the walls and I knew I couldn't do it. I
14 had done enough already.

15 So I looked for a phone. I couldn't find one in
16 the living room. I walked into the kitchen, no phone. I was
17 forced to walk back into that bedroom and grab the cell phone
18 off the dresser. I didn't even look at her.

19 I dialed 911 and I just went through the motions.

20 Q Let me ask you about that, Tracy. Um, in the 911
21 you sounded calm, in the 911 call. Were you calm during that
22 time period? What was going on?

23 A I don't know what I was. I was just running on
24 auto pilot. I just - I don't - I just knew I had to get the
25 phone call in. I knew - I just - I just - I don't know.

1 Q What happened after you called 911?

2 A I talked to 911 for a minute and I stood at the
3 front door. And I waited for the officer. I seen a car pull
4 up, a white one. And the officer got out of the car and ran
5 to the house. I opened up the front door. I walked out in
6 the front on the patio toward the front. And I yelled, Over
7 here. And he turned around and seen me and then he pulled in
8 front of the Durango.

9 I turned around, walked a step into the house,
10 realized I still had the pistol in my hand. I knelt down and
11 put the pistol on the ground, turned around, just walked out,
12 and just went to the ground.

13 Q Did you hear him giving you directions or anything?

14 A I couldn't really hear anything. When that gun
15 went off, all I heard was ringing.

16 Q Tracy, would you have done that same thing if you
17 weren't - if you were in your right mind?

18 A No, I wouldn't do a thing like that. I don't know
19 why - I mean, you know, why it turned out like that. We've
20 never done nothing that bad. We've never, ever pulled guns
21 out or acted like that.

22 MR. GALE: I don't have anything further.

23 THE COURT: Cross-examine?

24 MR. STURGILL: Yes, sir.

25 THE COURT: Do you need a moment, Mr. Scott?

1 THE WITNESS: Yes, please.

2 THE COURT: If you'd just wait, Mr. Sturgill.

3 MR. STURGILL: Mr. Scott, you -

4 THE COURT: I said - I just asked him. So just
5 wait.

6 Ladies and gentlemen, we're going to take a quick
7 break. The admonitions that I've given you many times before
8 pertain here about not conversing amongst yourselves, not
9 showing your notes and not forming or expressing an opinion.

10 We'll just take a short break.

11 (Whereupon a recess was taken.)

12 THE COURT: All right, you may be seated.

13 Mr. Sturgill, you may proceed.

14 Oh, I'm missing a juror. I'm sorry.

15 CROSS-EXAMINATION

16 BY MR. STURGILL:

17 Q Good afternoon, Mr. Scott.

18 A (Inaudible).

19 Q I just have some questions for you. We've never
20 officially met but I'm sure we've seen each other quite a few
21 times here in this courtroom. Is that fair to say?

22 A Yes.

23 Q Okay. So - just so I am correct or that I have the
24 right information, it sounds like you and Teresa were married
25 19 years, 18 or 19 years; is that about right?

1 A Yes.

2 Q And that you guys married in 19- was it '94?

3 A Yes.

4 Q And you were born in 1966?

5 A Yes.

6 Q You were 28 years old when you got married?

7 A That's about right.

8 Q Did I do the math right?

9 A Yes.

10 Q So about 28. Teresa was, what two or three years
11 younger?

12 A Three years.

13 Q Three years. So she was born in '68 -

14 A No, two to three years. Yeah, '68.

15 Q Okay. So she was 25, 26 when you two got married?
16 Right?

17 A Yeah.

18 Q And it sounds like, at least at that point in your
19 life, things were pretty good. Is that fair to say?

20 A Yes.

21 Q Otherwise, why would you marry her. Right?

22 A Yes.

23 Q Um, you separated twice. I believe, if I wrote it
24 correctly, in 2008 and 2009. Did I write that down correct?
25 Or am I wrong about that?

1 A Right - I don't exactly know that first time when I
2 left for a week how - what year it was.

3 Q But it's been some years ago that you two
4 separated?

5 A Yes.

6 Q And it was only briefly. It was maybe for a week
7 or so?

8 A Yes.

9 Q Was the longest time that you were separated a
10 week?

11 A No. The longest was a little over a month.

12 Q A little over a month. And was that the first time
13 or the second time that you two separated?

14 A Second time.

15 Q Okay. But, again, it's been quite some time ago?

16 A Yes.

17 Q And ever since then you have not separated? You
18 basically lived under the same roof the entire time?

19 A Yes.

20 Q On March 23, 2013, you were married to Teresa
21 Scott?

22 A Yes.

23 Q You were living together?

24 A Yes.

25 Q In the home in Salem?

1 A Yes.

2 Q Okay. You're not separated at that time?

3 A No.

4 Q You have two sons, Tyson and Thayne?

5 A Yes.

6 Q And they are - I believe your oldest is Thayne?

7 A Thayne.

8 Q And Thayne is now - do you know how old he is now?

9 A Eighteen.

10 Q And how old is Tyson?

11 A Fifteen.

12 Q And how would you characterize - prior to March 23,

13 2013, how would you characterize your relationship with your

14 boys?

15 A Probably a little rough.

16 Q What do you mean by that?

17 A Well, 'cause I wasn't in the right mind of being

18 how I usually was with them.

19 Q Okay. I'm talking about in general. I'm not

20 talking about close in time to March 23rd. Was that the

21 entire relationship with your sons, ever since they were

22 born?

23 A No, I had a good relationship with my boys.

24 Q Okay. Do you consider yourself a good father?

25 A Yes.

1 Q Did you do things with them?

2 A All the time.

3 Q Okay. In fact, you went camping with them.

4 A I went camping with them. I went to pow-wow's with
5 them. I went to everything with them.

6 Q Went shed hunting?

7 A I did everything with them.

8 Q Okay. And do you think that they appreciated
9 that - from your perspective, from what you gathered, your
10 observation, do you think they appreciated that?

11 A Oh, sometimes. Ah, I know that sometimes on Scout
12 outings they would probably preferred not to have their
13 father there so that they could be a little more -

14 Q Rambunctious?

15 A Yes.

16 Q I think that is pretty common.

17 A Yes, it is.

18 Q But in general they - you got along with your boys?

19 A Yes.

20 Q And you went out of your way to do good things and
21 nice things with them?

22 A Yes.

23 Q Fair to say?

24 A Yes.

25 Q Okay. Ah, you said that that relationship changed,

1 that they - if I understand you correctly, that at some point
2 that relationship kind of got strained a little bit because
3 you weren't doing the right things or doing -

4 A Well, which child are you talking about?

5 Q Both or either one.

6 A I think there was a little resentment with Thayne.
7 He was at that age, ah, I don't know if it was puberty or
8 just - he was at that age where he, uh, during the fights
9 that me and Teresa would have, he - I feel that, you know, at
10 that age I would have sided with my mother -

11 Q Uh-huh (affirmative).

12 A And I feel that - you know, he was starting to do
13 that a little bit.

14 Q So during these fights - and I don't think there
15 is - we are not questioning whether they were fights. They
16 were fights - Thayne - is what you are saying is that Thayne
17 would oftentimes side with his mother?

18 A He wouldn't publically side with her. But, you
19 know, as soon as we, like, broke off from each other, he
20 would flock to her to comfort her.

21 Q Did he ever confront you about fighting with your
22 wife?

23 A Just the one time in 2009.

24 Q Okay. We're going to talk about that here shortly.
25 But let's just wait a moment.

1 Ah, Teresa always managed the finances?

2 A Yes.

3 Q Was that from the very get-go?

4 A Yes.

5 Q The beginning of the marriage?

6 A Yes.

7 Q It sounds like she actually went into business, or
8 she got a business degree?

9 A Yes.

10 Q Okay. So probably a good idea that she handled the
11 finances; is that fair?

12 A I thought so.

13 Q Okay. And did she pay the bills?

14 A Yes.

15 Q She kind of knew - she was the one that was in the
16 best position to know how much money you guys had in your
17 account?

18 A Yes.

19 Q All right. She saw it coming in. She saw it going
20 out?

21 A Yes.

22 Q You didn't.

23 A No.

24 Q You didn't go out of your way to even keep track of
25 that, you just relied on Teresa to do that?

1 A Uh, after so many years of it, yes.

2 Q Okay. Is it - ah, it's fair to say, isn't it, that
3 the bulk of your fights were financial-related?

4 A Yes.

5 Q And had to do with spending?

6 A Ah, I don't know - I don't know where it comes off
7 on the spending.

8 Q Okay, well, let me ask you - let's talk about the
9 tax return. Um, I think there was some mention about that
10 tax return and how it was eventually spent.

11 A Yes.

12 Q You know which tax return I'm talking about?

13 A Yes.

14 Q When was that?

15 A I would guess it was two years ago.

16 Q Okay, so 2011, 2012?

17 A I would say it was probably 2011's returns.

18 Q Uh-huh (affirmative). So it was 2012, by the time
19 you got the return; is that -

20 A Yeah, I would say so.

21 Q Okay. So not too far back in time.

22 A No.

23 Q And you spent that tax return on an assault rifle?

24 A Yes.

25 Q And what kind of an assault rifle was it?

1 A Ah, just the normal common AR-15.

2 Q And did you spend any money on accessories or
3 upgrades or anything like that?

4 A I bought a laser with it.

5 Q Okay. How much did the assault rifle cost?

6 A It was on sale at Cabella's for, I think, 699.

7 Q And the accessory, the laser sight, how much was
8 that?

9 A I'm guessing \$80 to \$100. I can't remember.

10 Q That - that became a source of contention between
11 you and Teresa; isn't that right?

12 A Later on it did.

13 Q Okay. And it became a source of contention later
14 on because Teresa actually wanted to spend that money, the
15 tax return, on repairing your roof to your house; correct?

16 A Not that I know of.

17 Q You never discussed that with her?

18 A We discussed that roof for years and years. And
19 then when I went up there and looked at it and realized it
20 was double layered, I wasn't as concerned any more as I used
21 to be.

22 Q Okay. Ah, what did she want to spend that money
23 on, if it wasn't for the roof?

24 A Ah, I would imagine probably a bill somewhere.

25 Q A bill -

1 A Maybe a vacation.

2 Q Maybe groceries, things like that?

3 A No.

4 Q Would you consider Teresa someone who splurged and
5 spent money frivolously?

6 A Yes.

7 Q You would?

8 A Yes.

9 Q Okay. What did she spend your money on that was
10 frivolous?

11 A Ah, she would get on the internet and, ah, packages
12 would show up at the house on my days off.

13 Q Uh-huh (affirmative).

14 A And I would take them in and I would say, Here's a
15 package here. And I was just told to go put it in the
16 bedroom. Ah, there was countless -

17 Q Did you open up the package and see what it was?

18 A No. I wasn't like that.

19 Q Have any idea what it was?

20 A No.

21 Q No idea what she was spending on?

22 A Well, I knew it was from one of them clothing
23 stores or, you know, stores like that because of the name on
24 the outside of the box.

25 Q Sure.

1 A But I had no idea. Kind of like when we were going
2 camping -

3 Q Uh-huh (affirmative).

4 A - it was March. It wasn't that cold, but she had
5 ordered - a box had showed up from like Kohlers and it had
6 two bibs in it that were camouflage. And I says, Well, it's
7 not that cold. We don't need them. They've got other ones.
8 And she says, Yeah, but they were on sale at a good price.

9 Q Okay. What do you mean by bibs? What are bibs?

10 A Ah, insulated coveralls.

11 Q One of those - and were they for you?

12 A No, they were for the kids.

13 Q Okay. So they were for the boys?

14 A Yes.

15 Q Okay. That first package that showed up that you
16 didn't know what it was, you don't know whether it was
17 clothes or -

18 A There was - it wasn't like the first package.
19 There was packages all the time.

20 Q No, but I'm talking about the first package that
21 you talked about that you didn't open up. You didn't look
22 inside -

23 A I didn't any of them.

24 Q Okay. So -

25 A If it's not my name on it, I wasn't - it was not

1 my...

2 Q Okay. So not knowing what was inside - you don't
3 know who those packages were for, who they were purchased
4 for, except for the bibs. Apparently you knew the bibs were
5 purchased and they were purchased for your sons.

6 A 'Cause she opened it right there.

7 Q Okay. Very good. Um, shed hunting. I have
8 misunderstood that from the very get-go, probably 'cause I'm
9 not from Utah. But shed hunting is not like Tuff Shed
10 hunting. You were not looking for a shed to put behind your
11 house -

12 A No.

13 Q Are you talking about antlers that were shed by -

14 A Every year they fall off the animals.

15 Q Okay, and - antlers?

16 A Antlers.

17 Q Okay. And this was talked about earlier. This
18 particular occasion there had been some discussion about you
19 going shed hunting with the boys?

20 A Yes.

21 Q And I believe it was a source of some contention.
22 And I believe you said it was because finances were tight -

23 A Yes.

24 Q - and Teresa was concerned about you spending the
25 money to go down and go shed hunting. Okay. Where did you go

1 shed hunting?

2 A Down by, ah, Otter Creek.

3 Q Where is that?

4 A Down south.

5 Q Okay. How far?

6 A Ah, it's about a three-hour drive.

7 Q Okay. And before you left, you and Teresa had this
8 discussion about going?

9 A We had a discussion about going even before that,
10 quite a few times.

11 Q And she wasn't very comfortable with you going
12 because she felt like finances were tight and you would have
13 to spend money?

14 A She was -

15 Q Yes or no, Mr. Scott.

16 A No.

17 Q No?

18 A Yes. Yes. I'm confused. Sorry.

19 Q Yes. I'm sorry. I don't mean to confuse you. So
20 I want to make sure that you understand the question that I'm
21 asking.

22 A Okay. Do you want to restate that?

23 Q You had - there was a disagreement about you going
24 shed hunting even before you left because Teresa was
25 concerned about the cost -

1 A Before I left?

2 Q Before you left.

3 A No.

4 Q There was no discussion before?

5 A No.

6 Q Oh, I misunderstood.

7 A Okay.

8 Q How about the time that you were leaving?

9 A Well, I'm confused.

10 Q Okay. Have you and Teresa discussed you and the

11 boys going shed hunting prior to you leaving and going?

12 A Yes.

13 Q Okay. And isn't it true that she expressed some

14 concern about you going because it was going to cost money

15 that you did not have?

16 A Yes.

17 Q Okay. You went anyway?

18 A Yes.

19 Q Okay. Teresa went to school. She got a degree.

20 You've mentioned that before. It was in business, and there

21 was a student loan. Correct?

22 A Yes.

23 Q Okay. She wasn't just a student, though? I mean,

24 she actually worked?

25 A She had jobs -

1 Q She had part-time jobs. She even worked - there
2 were times when she was actually working out of the home.
3 Isn't that true?

4 A Uh-huh (affirmative).

5 Q And earning money from outside the home?

6 A Yes.

7 Q Okay. Isn't it also true that she pretty much took
8 care of most of the duties there at the home, keeping it
9 clean, keeping everybody fed?

10 A It seemed in the last couple of years, not as much
11 as she used to.

12 Q Is that maybe because the boys are a little bit
13 older?

14 A It's because she was, ah, - 'cause Thayne and Tyson
15 did it.

16 Q They did it on their own?

17 A No, they were told to do it.

18 Q Okay. By?

19 A Their mother.

20 Q Okay. But she still helped out around the house?

21 A Yes.

22 Q Kept it clean. Made meals.

23 A Yes.

24 Q Ah, made sure the boys were clothed?

25 A Yes.

1 Q Right?

2 A Uh-huh (affirmative).

3 Q Have you heard the phrase stay-at-home mother?

4 A Yes.

5 Q Okay. She, at times, may not have been working

6 outside the home or even working inside the home making a

7 wage, but it's fair to say she was working?

8 A Yes.

9 Q Okay. And she was making efforts to get a job;

10 correct?

11 A Yes.

12 Q Even up until that very last week before she died,

13 she had been trying to arrange to get a job. Are you aware

14 of that?

15 A As far as I know.

16 Q I'm sorry?

17 A As far as I know.

18 Q Okay. In fact, she talked to your next-door

19 neighbor about using his dad as a reference; correct?

20 A Yes. He had actually come over and told me, and I

21 had told her. Because we were asking everybody.

22 Q Okay. So Teresa was making an effort to be

23 employed; correct?

24 A Uh-huh (affirmative).

25 Q Some of your fights, though, weren't necessarily

1 related to finances; is that also fair to say?

2 A Yes.

3 Q Um, oftentimes you fought in front of the kids;
4 correct?

5 A Yes.

6 Q And during those fights, you would insult Teresa,
7 wouldn't you?

8 A Yes.

9 Q You'd use profanity?

10 A Yes.

11 Q You would threaten her?

12 A Probably.

13 Q Call her names?

14 A Yes.

15 Q Like bitch?

16 A Yes.

17 Q In fact, your phone contact for her in your cell
18 phone - do you recall what that was?

19 A Yes.

20 Q It was Bitch Teresa, wasn't it?

21 A Yes, it was.

22 Q So every time she called, on your phone it would
23 show up Bitch Teresa?

24 A Just in the time period that I put it on there.

25 Q Okay.

1 A It was a two-week period, I think.

2 Q Okay. So two weeks prior to her death, you changed
3 that contact to that?

4 A Yes.

5 Q Okay.

6 A Or somewhere around there. That's when we were
7 fighting and -

8 Q Gotch ya. But using profanity and the threats and
9 the insults and those things, those weren't limited to the
10 last two weeks of her life; were they?

11 A Um, no.

12 Q That was throughout your marriage?

13 A Yep.

14 Q Many years of that.

15 A Um...

16 Q Correct?

17 A Not - no.

18 Q No?

19 A You say many years. It wasn't like that in the
20 beginning. Like you said before -

21 Q Yeah, no, no, no, no. Yeah, not in the very
22 beginning. It sounds like things actually might have been
23 pretty good at the very beginning.

24 A I just misunderstood you. When you said many
25 years, I got the impression you were talking the whole time.

1 Q No. I'm not saying the whole time. But for many
2 years you guys fought. And I think that you have made that
3 evidently clear. And during those many years that you
4 fought, the insults, profanity, the threats - those came from
5 you, did they not?

6 A Yes.

7 Q You even got physical with Teresa; correct?

8 A Yes.

9 Q Okay. Let's talk about the domestic violence
10 incident that you mentioned during your direct examination.
11 I believe it occurred in 2009.

12 A Yes.

13 Q That's the one you pled to; right?

14 A Yes.

15 Q You pled to a domestic violence assault?

16 A Yes.

17 Q And what resulted in those charges was you throwing
18 a towel in Teresa's face?

19 A Yes.

20 Q And punching her?

21 A No.

22 Q You deny that you punched her?

23 A Yes.

24 Q Okay. Did you shove her?

25 A Ah, what went on in that few seconds, I can't

1 exactly tell you what was - what was a hit, what was a push,
2 what was anything.

3 Q So you are not quite clear whether it was any of
4 those. But it might have been one or all; a shove, a push, a
5 punch?

6 A It had to be one of them.

7 Q Okay.

8 A I mean...

9 Q All right. I believe the police were called also
10 in 2006. Do you remember that?

11 A Nope.

12 Q Do you remember getting physical with Teresa in
13 2006? You guys had gone to bed. There had been a fight
14 over a cell phone cover. Does that ring a bell?

15 A That started the fight.

16 Q That started the fight. Okay. Do you remember
17 going to bed - or actually Teresa going to bed -

18 A We both went to bed.

19 Q You both went to bed.

20 A Yes.

21 Q Do you remember during that particular incident
22 literally kicking Teresa and forcing her out of your bed?

23 A No

24 Q You deny that?

25 A Can I explain?

1 Q No. I'm asking you whether you deny it.

2 A Yes, I kicked her.

3 Q Okay. You did kick her?

4 A I didn't kick her. I put my foot against her to
5 pull on the blanket.

6 Q Okay. You said that cops were called on a number
7 of occasions?

8 A Yes.

9 Q On these two occasions that I just talked about,
10 2006 and 2009, Teresa called the police; right?

11 A Yes.

12 Q But it wasn't always Teresa that called the police?

13 A No.

14 Q In fact, you called the police?

15 A Yes.

16 Q On a number of occasions?

17 A Yes.

18 Q And, in fact, there was one occasion where you
19 called the police and when they showed up, the complaint was
20 that Teresa just simply wouldn't stop touching you. Do you
21 remember that?

22 A Yep.

23 Q Okay. And I believe the officer asked if there was
24 anything that you believe Teresa could do to stop this, this
25 incident. Do you recall what you told the police officer?

1 A No.

2 MR. STURGILL: May I approach?

3 THE COURT: You may.

4 Q (By Mr. Sturgill) Let me have you read this. See
5 if that refreshes your memory about that incident. I don't
6 want you to read it out loud. Just read it to yourself. Let
7 me know when you are done.

8 Did you get through that?

9 Now, Mr. Scott, I believe the question -

10 THE COURT: Well, first you need to ask him whether
11 that refreshes his memory.

12 MR. STURGILL: Oh, I'm sorry.

13 Q (By Mr. Sturgill) Does this help you remember that
14 incident?

15 A Yes, it does.

16 Q Does it refresh your memory?

17 A Yes.

18 Q I know it has been some time ago.

19 A Yes.

20 Q All right. That's the wonderful thing about
21 reports.

22 MR. GALE: Can we say when it was?

23 MR. STURGILL: December 7, 2002.

24 MR. GALE: Fourteen - twelve years ago.

25 Q (By Mr. Sturgill) Does that help you? I know it

1 was a long time ago, but do you remember this incident?

2 A Yes, I remember - I knew the officer.

3 Q Go ahead.

4 A I remember it.

5 Q And do you remember making the statements that he
6 credits to you?

7 A Ah, I remember it different.

8 Q Ah -

9 A He was more gentle with the wording.

10 Q Okay. He was more gentle with the wording?

11 A Yeah.

12 Q So he asked you basically how the situation could
13 be resolved. And do you remember telling him, Tell her to
14 stop touching me?

15 A Yes.

16 Q Is that what you remember telling him?

17 A Uh-huh (affirmative).

18 Q And just so we're clear, that didn't result in any
19 charges or anything like that; correct?

20 A No.

21 Q All right. You made mention of a protective order
22 and, I believe, a restraining order. Was there more than one
23 protective order that was -

24 A I know that when there is an original charge
25 there's an automatic protective order. Isn't there?

1 Q Well, I -

2 A I mean, anybody I've ever -

3 Q I need to ask the questions. I don't have the
4 answer to that one. But...

5 A Anybody that I've ever talked to that gets that
6 charge, there is always some type of an instant order.

7 Q Uh-huh (affirmative). Okay. And the restraining
8 order that was issued - you were aware of that order.
9 Correct?

10 A Yes.

11 Q Did you get a chance to look at it, read it?

12 A No.

13 Q Do you understand how restraining orders work?

14 A Well, yeah, basically yes.

15 Q All right. Isn't it true that the restraining
16 order actually prohibited you from contacting her?

17 MR. GALE: Judge, I think I am going to object at
18 this point. I think that he's asking him about the
19 specifics -

20 THE COURT: That's sustained.

21 MR. STURGILL: Well, could I be heard?

22 THE COURT: You can approach.

23 MR. STURGILL: Okay.

24 (Whereupon a sidebar was held as follows:

25 THE COURT: (Inaudible). You're asking him about the

1 contents of the document.

2 MR. STURGILL: I'm asking him if he understands how
3 it generally works and then I was going to ask him -

4 THE COURT: That was the last question, the last
5 question was whether (inaudible).

6 MR. STURGILL: Fair enough, fair enough.

7 THE COURT: (inaudible).

8 MR. STURGILL: Fair enough. Fair enough.

9 THE COURT: If you want to ask a different question
10 (inaudible).

11 MR. STURGILL: Nope, I accept that, that's -

12 (End of sidebar)

13 Q (By Mr. Sturgill) You testified that that order,
14 the protective order, the restraining order, was eventually
15 lifted - or it was removed, the second one, one or the other.
16 They were - one of them was removed. And I believe you said
17 it was because Teresa actually helped accomplish that.

18 A Yes.

19 Q Okay.

20 A They can't be lifted until the person that signed
21 for it - can't be lifted until they're - they're the ones
22 that say they don't want it any more. Right?

23 Q Let me ask the questions.

24 Teresa helps you get rid of that order because she
25 was making an effort to -

1 MR. GALE: Judge, I would object. He is asking -

2 THE COURT: That is sustained.

3 MR. GALE: - the reason Teresa was doing something-

4 THE COURT: I sustained it.

5 Q (By Mr. Sturgill) Uh, something that wasn't quite
6 clear to me - and I just want to clarify - and maybe it's
7 just me. But you had talked - you mentioned during your
8 direct examination that the fighting had gotten pretty
9 intense. There had been fighting and it was so frequent
10 that - I believe you said you don't even recall what the
11 fights were about. Do you remember saying that?

12 A Yep.

13 Q And what - exactly what time frame were you talking
14 about when you said, I don't even know what the fights were
15 about? Was that immediately before Teresa's death? Or were
16 you talking about some other period of time?

17 A Ah, probably five years to six years previous.

18 Q Okay. So you weren't talking about the two weeks
19 prior to Teresa's death? Okay. You understood what those
20 fights were about?

21 A No - well, I understood that we were fighting. We
22 were fighting over the same stuff. But I don't - I can't sit
23 here and tell you what each fight started with.

24 Q I believe you did say, though that it was so
25 intense that it was - and I think your words were, "It was

1 kind of get-in-your-face, spit-flying type of deal"?

2 A Uh-huh (affirmative).

3 Q Do you remember saying that?

4 A Yes.

5 Q That included you, too; right?

6 A Oh, yes.

7 Q You got in her face?

8 A Yes.

9 Q In Teresa's face and you were spitting in her face?

10 A That's true.

11 Q Okay. Tracy, you've been here - or, Mr. Scott. I'm
12 sorry. You've been here from the very get-go. You heard
13 that 911 call.

14 A Yes.

15 Q It's been played a couple of times now. That's
16 you. Correct?

17 A Yes.

18 Q You on the 911 call, the recording?

19 A Yes.

20 Q The other person is the dispatcher?

21 A Yes.

22 Q Do you remember making that phone call?

23 A Yes.

24 Q Do you remember the details of that phone call?

25 A Yeah. I heard it so many times, yes.

1 Q Mr. Scott, you shot and killed Teresa.

2 A Yes.

3 Q You don't deny that.

4 A (No audible response.)

5 Q And you used that black .45 that was shown by

6 Doug Squire. You looked at it in the box. That's the gun

7 that you used; correct?

8 A Yes.

9 Q And I'm not going to show them to you, but you did

10 see the pictures that depicted your wife in the bed dead?

11 A Yes.

12 Q Did you see those pictures?

13 A Ah, I've seen them once before. But I didn't

14 really look at them.

15 Q You didn't look at them while they were displayed

16 here?

17 A No, I didn't want to have an issue.

18 Q Okay. Ah, the other gun, let's talk about that for

19 just a moment. The first time you noticed that safe opened

20 and the gun was missing was the day before?

21 A Yes.

22 Q You didn't see it in the safe?

23 A No.

24 Q Did you see it anywhere else on that day?

25 A That day that I walked in there, on the other side

1 of the bed.

2 Q The day that you walked in -

3 A No, I didn't see the gun the day I walked in there.

4 Q Okay.

5 A I only seen the black one.

6 Q You only saw the black one inside the safe?

7 A I kind of relate to them as the silver one and the
8 black one.

9 Q And I will do that, too. I think that is a good
10 way to do it.

11 So the black one, you saw inside the safe. The
12 silver one you saw was missing from the safe?

13 A Yes.

14 Q But you didn't see it anywhere else that day?

15 A No.

16 Q And at least at that time on that day, you have no
17 idea where that silver gun was?

18 A No.

19 Q Um, between that time and the next time that you
20 saw the safe open, which I believe was the next day -

21 A Yes.

22 Q - had you seen that safe in a different condition
23 than what it was in? Had you seen it closed?

24 A Closed and shoved back under the dresser.

25 Q Okay. So the next day you again see the safe, door

1 open and, again, the same condition?

2 A The - the -

3 Q The black gun still here. The silver gun is
4 missing?

5 A Yes.

6 Q At that point in time, you noticed that it was
7 absent from the safe. But did you see it anywhere inside
8 that room?

9 A No.

10 Q Okay. The, ah - it wasn't until after you had shot
11 and killed Teresa that you saw that silver gun next; correct?

12 A Yes.

13 Q And remind me again: Where exactly was that gun?

14 A In the corner where I explained on the chart where
15 she was sitting the two times that I came in.

16 Q Okay. And I understand kind of the general area.
17 But was it sitting on top of something? Was it on the
18 floor -

19 A On the floor.

20 Q Okay. All the way down onto the carpet?

21 A Yes.

22 Q Okay. And where was it in relation to the bed?
23 Was it underneath the bed, at the side of the bed?

24 A Just like right off the side.

25 Q Okay.

1 A Maybe a little closer to the bed.

2 Q And the stool, was the stool still there?

3 A I don't remember seeing the stool or - I don't

4 remember seeing it.

5 Q The stool?

6 A Yeah. I knew there was a stool and I knew she was

7 sitting on a stool. But I don't remember the stool that day

8 of the incident.

9 Q Okay. And - I'm talking about that very last time.

10 Ah, you removed the black gun from the safe?

11 A Yes.

12 Q And I believe you testified that at some point

13 Teresa was pointing or was holding her phone up?

14 A Yes.

15 Q And, ah, you believed that she was going to take a

16 picture. Is that fair to say?

17 A Yes. That or she was recording. I don't know.

18 Q Okay. Taking a picture or recording.

19 Um, it was very clear and evident that it was a

20 phone; correct?

21 A Yes.

22 Q You didn't think it was that silver gun?

23 A No.

24 Q Okay. And do you know if she did, in fact, take a

25 picture of you -

1 A I have no idea.

2 Q - or made any recording of that incident?

3 A I have no idea.

4 Q How long have you owned that black gun?

5 A Ah, probably at least - we had both of them before,

6 ah, before we were married.

7 Q Uh-huh (affirmative). So for quite some time?

8 A Yes.

9 Q Have you shot it?

10 A I've shot it probably when we bought it.

11 Q Uh-huh (affirmative). So at the time you got

12 married you shot it?

13 A Yeah.

14 Q Had you shot it between the time that you bought

15 it -

16 A I haven't shot that one. I've shotten (sic) the

17 nine millimeter.

18 Q Okay. So the .45 you shot the day you bought it,

19 18, 19 years ago.

20 A Yep.

21 Q And haven't touched it since - or at least haven't

22 shot it?

23 A No, hadn't shot it.

24 Q Up until the day that you shot and killed your

25 wife?

1 A That's right.

2 Q You testified that you had arranged to spend the
3 night with Mr. Fackrell.

4 A At his house.

5 Q At his house. Okay. And that became unnecessary;
6 correct?

7 A Ah, unnecessary -

8 Q To spend the night at Mr. Fackrell's house.

9 A Ah, I never contacted him to get over there. So,
10 yeah, I didn't make it.

11 Q Okay. Just give me one moment, Mr. Scott.

12 Just one last question. The holster, do you see
13 the picture - you saw the picture of the silver gun on the
14 bed?

15 A Yes.

16 Q And there was a holster?

17 A Yes.

18 Q That silver gun was not holstered; correct?

19 A No.

20 Q Does that holster - does it belong to the silver
21 gun or the black gun?

22 A It fits, ah, basically any gun that size.

23 Q So it could fit either one?

24 A Yes.

25 Q Was it customary to have it holster one or the

1 other gun?

2 A Well, we usually only kept one gun in the safe.
3 When I went camping, we put the silver gun in the safe for
4 her to use if she needed it while we were gone.

5 Q Okay.

6 A We came back home, put the other one in it. So
7 they were both in there.

8 Q Okay. And when you put - the last time you saw
9 both guns, when you put the black gun in - well, when you
10 went camping, was the hols- Did you take the holster - did
11 you holster the black gun?

12 A I holstered the silver gun and put it on the bottom
13 and put the black gun on top of it.

14 Q Okay. So while you were gone, the gun that stayed
15 in the safe was the one that was holstered?

16 A Yes.

17 Q Fair enough.

18 MR. STURGILL: No more questions.

19 THE COURT: Redirect, Mr. Gale?

20 REDIRECT EXAMINATION

21 BY MR. GALE:

22 Q So the silver gun, Teresa's gun, was the one that
23 was in the holster?

24 A I had the holster when I went camping. But when I
25 came back I put the silver gun back in the holster, put it in

1 the safe and then put the black gun on top of it.

2 Q Okay. When Mr. Sturgill asked you about your
3 relationship with Teresa, then you said that you insulted,
4 threatened, used profanity against her, called her names -

5 A Yes.

6 Q Okay. Did she ever insult you?

7 A Yes.

8 Q How often?

9 A Ah, just as much as I could pour it out, she was
10 pouring it right back.

11 Q Okay. Did she use profanity against you?

12 A Yes.

13 Q Did she call you names?

14 A Yes.

15 Q What kind of names did she call you?

16 A Ah -

17 MR. STURGILL: Judge -

18 MR. GALE: He asked the same thing. I mean, it's -

19 THE COURT: The objection is sustained.

20 Q (By Mr. Gale) Okay. Did she threaten you?

21 A Yes.

22 Q Okay. So you were doing things; she was doing
23 things. You were both being mean to each other?

24 A (Inaudible).

25 Q Okay. Prior to this event with the guns, had

1 either of you ever introduced a gun or anything into any of
2 your arguments?

3 A No. Never.

4 Q Had the domestic violence thing in 2009 - that
5 didn't involve a gun?

6 A No, that involved a towel.

7 Q Towel. And the thing in 2006, that didn't involve a
8 gun?

9 A No.

10 Q It involved a blanket?

11 The thing in 2002, then you called the police
12 because she wouldn't stop touching you? And you read that
13 thing about what happened. And she told the police, Well, if
14 he is going to stay in the bed with me, then I should be able
15 to touch him. Right?

16 A Yeah.

17 Q The thing about taking pictures, is that something
18 that the two of you would do with each other sometimes?

19 A Yes.

20 Q Explain that. What was that?

21 A It was kind of like our - our little part to show
22 our cavalry.

23 Q Cavalry, what are you talking about?

24 A Well, if we were in the fight, it was always you
25 wanted somebody on your side. So you would call somebody to

1 back you up, which would be your cavalry.

2 Q Uh-huh (affirmative). And so you would take
3 pictures or videos of each other?

4 A Yeah, just to show somebody else, you know, it's
5 him or it's her.

6 Q And so that's what you thought she was doing with
7 her phone when you walked in?

8 A Yes.

9 Q Okay. That's something that both of you had done
10 in the past?

11 A Yes.

12 MR. GALE: I don't have anything further.

13 MR. STURGILL: Nothing.

14 THE COURT: You may step down, sir.

15 Your next witness.

16 MR. GALE: Judge, we would call Linda Warren.

17 THE COURT: Okay. Ma'am, if you'd come up here to
18 the front, raise your right hand and be sworn, please. Right
19 there.

20 LINDA WARREN

21 having been first duly sworn, testified

22 upon her oath as follows:

23 THE COURT: All right. If you would take the
24 witness stand, please.

25 ///

Addendum D

1 thinking on - with the safe. After you saw the safe open,
2 and she went into the garage, okay, then what were you
3 thinking?

4 A I was thinking that the threat that I had received
5 the day before -

6 MR. STURGILL: Judge -

7 Q (By Mr. Gale) What I am asking is -

8 A That she was going to - she was -

9 THE COURT: Just a second.

10 MR. STURGILL: May we approach?

11 THE COURT: Yes.

12 (Whereupon a sidebar was held as follows:

13 MR. STURGILL: It might be a good time to take a
14 break and maybe Mr. Gale can speak to his client about -

15 THE COURT: It is lunch time. Do you want to break
16 for lunch?

17 MR. GALE: Yeah, sure.

18 THE COURT: Okay. All right.

19 (End of sidebar)

20 THE COURT: All right. The attorneys have pointed
21 out to me that it is the noon time. We usually do take our
22 lunch-time break at that time.

23 Mr. Scott, if you would step down, please.

24 We will take our noon break. We are going to break
25 until 1:15.

It's your duty not to converse amongst yourselves or with anyone else about any subject of this trial. You must not permit anyone to speak to you on any subject of this trial. You must not show your notes to anyone. You must not attempt to learn anything about the case outside the courtroom. Finally, it is your duty not to form or express an opinion about the case until it is finally submitted to you.

With that, we will be in recess until 1:15.

(Off the record from 11:58:34 to 11:58:59)

Addendum E

1 leave it in the car or at home, whatever, if you don't want
2 to -

3 On the other hand, we have a special basket for
4 your phones that Chris can put them in during your
5 deliberations. If you are hyper-sensitive, you can keep your
6 battery. But you will have to give the device to us. I just
7 give that to you up-front so if you don't want somebody else
8 to hold your phone, that you put it somewhere else, because
9 you can't have it. Okay.

10 With that, we will turn to the opening statements,
11 as indicated yesterday. And we will start with the State.

12 MR. STURGILL: Judge, may we approach?

13 THE COURT: Sure.

14 (Whereupon a sidebar was held as follows:

15 MR. ?: - exclusionary rule.

16 THE COURT: Okay. (inaudible).

17 MR. STURGILL: Yeah, his brother is one of them
18 (inaudible). I don't know what other witnesses there might
19 be (inaudible)

20 THE COURT: (inaudible)

21 MR. GALE: And we agree.

22 THE COURT: Thank you.

23 (End of sidebar)

24 THE COURT: All right. Before we proceed, I do
25 need anyone who is going to be a witness in the case, other

1 than the case officer, to wait in the foyer. We will call
2 you when you need to be called as a witness.

3 I'm going to ask the lawyers to please advise
4 because I don't know who is who.

5 You may proceed.

6 Yeah, you're free to go.

7 MR. BASTIAN: Ladies and gentlemen, good morning.
8 I know that we were introduced yesterday, but I will
9 introduce myself again.

10 My name is Lance Bastian. And my colleague here is
11 Dave Sturgill. We are Deputy Utah County Attorneys and we
12 represent the State of Utah in this action against Mr. Scott,
13 in which he has been accused of murdering his wife Teresa.
14 It will be my opportunity to speak with you here for a little
15 bit about a number of things.

16 Before I get into that, I would like to very
17 sincerely thank you for being here, for giving your service.
18 And I know I speak on behalf not only of the State, but of
19 the defense and the Court when I say that. We appreciate
20 your being here.

21 When I say that, you might be thinking, Well, I
22 don't know that I had a whole lot of choice in that. You
23 guys kind of summoned me here and threatened me if I didn't
24 come. But I'm not just talking about physically being here.
25 I'm talking about being here and being willing to serve. You

1 all sat through a very lengthy process yesterday where we
2 took a group of 71 people and we narrowed it down to the 10
3 of you.

4 And there were a lot of reasons why people got
5 eliminated during that process. But one of the reasons, with
6 respect at least to some of the people, was because they
7 didn't seem to us to express the same willingness to serve.
8 So we appreciate the fact that you're here and you are
9 willing.

10 You know, our jury system is one of the several
11 things that make our justice system, and more particularly
12 our criminal justice system, the best in the world. And when
13 I say that, I mean that's not just - it's not just hyperbole
14 and I'm not sitting here flag waving. Literally I mean our
15 justice system is the gold standard in the world.

16 I mean, other countries - I've spoken to people
17 from other countries who have literally come here to learn
18 about our justice system and to take those principles back
19 and incorporate them into the justice system in their home
20 countries. A lot of countries have patterned their
21 constitutions and their justice systems after ours. And, as
22 I said, the jury system within our justice system is one of
23 the things that really makes it special. That doesn't mean
24 it is perfect. It doesn't mean that there aren't ever
25 mistakes made. But it is the most fair and the most just

1 system that we know of. And that has a lot to do with you
2 and folks in this community being willing to come here and
3 serve, to give this service.

4 Um, so I'm going to have a chance to address you
5 here for a few minutes and to kind of tell you the story of
6 this case. The reason I get to do that, in my mind, is
7 twofold. The first - and I don't know that this one is quite
8 as official as the other one. This is more like the gospel
9 according me to. But I think the first is because somebody
10 sort of threw a bone to us attorneys because they know we
11 like to talk. And during the trial, we'll certainly be doing
12 some talking, but it is mostly going to be asking questions
13 and the witnesses are going to be the real stars of the show.
14 They are going to be the ones actually giving the evidence
15 and giving testimony. And so because they know we like to
16 listen to ourselves and we kind of need our egos stroked a
17 little bit, they give us a chance to get up and talk a bit.

18 The more official reason as to why I get to get up
19 and address you is because of the nature of our trials, the
20 nature of the way that we present evidence. Um, what we do
21 is we call witnesses. We put a witness on the stand and we
22 get every piece of information from that witness that they
23 have and then we call another witness.

24 In a perfect world, we would be able to present the
25 evidence in a way that lent to good story telling. We would

1 present every piece of information in the order - the ideal
2 order in which we want to present it so that it all comes out
3 chronologically or in some other order that tells a story and
4 it all makes sense.

5 But because if you were to look at all those pieces
6 of information and sort of put them all in order and number
7 them one to whatever, our first witness might be the one from
8 whom we are going to get pieces of information numbers 1, 2,
9 5, 8, and 12. And the second witness might be 3, 4, 6, 9,
10 15. It just comes in in a way that is a little disjointed
11 and doesn't always make a whole lot of sense.

12 And so if you don't have sort of a sense for the
13 broad overview of what the case is and what the entire story
14 is, then when you hear piece of information number 15 before
15 you have heard some of the pieces of information that should
16 have proceeded it, you might not have any idea why you are
17 hearing that or whether or not it's important, because there
18 will be a lot of things that you are going to hear that
19 aren't necessarily critical to the case. We have to lay
20 foundations sometimes for pieces of evidence. And that's not
21 so much the critical part as the evidence itself.

22 But having an idea of that big picture, then you
23 will understand where each piece of information fits within
24 the picture and whether or not it is important, whether or
25 not it is something that you are going to need to keep in

1 mind of to be aware of.

2 It's a little like a puzzle. If I asked you to sit
3 down and put together a puzzle and I just started handing you
4 random pieces, as you are taking those pieces, you are really
5 going to have no idea what to do with them until you have
6 them all. And even then, it is going to be a little
7 confusing. So hopefully this opening statement will be kind
8 of like the lid to that box that the puzzle came in that has
9 the picture of what the puzzle is supposed to look like when
10 it is all said and done.

11 So when I hand you a piece and you look at it and
12 say, Well, it's a red piece. There's a red barn up here in
13 this corner of the picture and that's the only red thing. So
14 I know this goes up here somewhere. Hopefully it will be
15 helpful in that way.

16 Um, so I'm going to have an opportunity to tell you
17 the story of the case, to tell you why we are here. But
18 before I do, before I give you my version of that story, I'm
19 going to let Mr. Scott tell his version of that story. I'm
20 going to let him tell you why we are here. And as he does
21 so, I want you to listen to the way he tells that story, to
22 the way he explains why it is that we are here, to the way
23 that he describes the fact that he just shot his wife to
24 death.

25 (Whereupon a 911 phone call was played - not transcribed.)

1 MR. BASTIAN: You're going to have an opportunity
2 to hear that probably a couple other times during the course
3 of the trial and then during your deliberations you'll have
4 an opportunity to take it back with you and you can listen to
5 it again during deliberations if you choose to do so.

6 As you heard it just now and as you hear it again -
7 I hope you're listening for the tone and demeanor in which he
8 describes those events, for the emotion or the lack thereof.

9 And as you listen to the rest of the evidence in
10 the case and the issues that we end up talking about, I hope
11 you will run that evidence through the filter of what you
12 just heard there. So that's Mr. Scott's version of what
13 happened that day.

14 Now I'm going to give you mine. About a year and a
15 half ago, March 23, 2013, it was a Saturday. And as far as
16 we can tell, it was a fairly ordinary day in the Scott
17 household. Everybody was going about doing their thing.

18 Mr. Scott lived in Salem with his wife Teresa and
19 their two boys, Tyson and Thayne, who were 13 and 16 at that
20 time. In the morning and into the early afternoon, Mr. Scott
21 had been running some errands. He had ordered some tires for
22 one of their vehicles. He went to pick them up and put them
23 on. It turned out they were the wrong size. He was
24 frustrated with that. He ended up coming home again.

25 The two boys were at their buddies' houses, over

1 just hanging out, playing video games or doing whatever it
2 was that they were doing that particular day. They weren't
3 around.

4 And in the afternoon about 5:30 - by Teresa's phone
5 records it shows as 5:36 - she called her mom. She talked to
6 her for exactly an hour. They talked about a lot of things.
7 You've heard Mr. Scott mention on that tape that some of the
8 things they were talking about were him, that Teresa was
9 expressing some of her frustrations. She was tired of this
10 or that.

11 And her mom will testify that during that phone
12 call, toward the end of it, she actually overheard Mr. Scott
13 in the background, that he was there, apparently in the same
14 room with Teresa. And she overheard him actually say, "My
15 wife and my mother-in-law are saying bad things about me."
16 It wasn't in a playful way. He wasn't joking around. She
17 will say that by his tone he seemed irritated. He seemed
18 angry. And then they ended the phone call, 6:36.

19 At 6:53, about 17 minutes later, that 911 phone
20 call was made by Mr. Scott. And we don't know exactly what
21 happened in those 17 minutes. Nobody was there but Teresa
22 and Mr. Scott.

23 But the evidence in this case actually paints a
24 pretty clear picture of what happened during that time. We
25 don't necessarily know what was said but we have a pretty

1 good idea of what happened.

2 When the police arrived in response to that phone
3 call - and the initial responding officer was very close to
4 the house when he actually saw the call on his computer - he
5 arrived within seconds. He initially set up actually on the
6 house across the street. He got a little bit mixed up about
7 which house he was responding to.

8 And as he was sitting there looking at the house
9 across the street, Mr. Scott actually stepped out onto his
10 porch behind him and made the statement about having just
11 shot his wife. Then he turned around and saw that Mr. Scott
12 went back into the home.

13 So the officer came across the street and set up
14 facing the Scott house and started calling him trying to make
15 contact with him. Eventually he came out again. He came
16 out. Officer Lowe started giving him commands. He came out.
17 He got down on the ground. He was taken into custody.

18 And up until the time he was actually taken into
19 custody, Officer Lowe will describe the demeanor of Mr. Scott
20 as he was interacting with him as they were talking and he
21 was giving commands and he was responding to him. And he is
22 going to describe it as basically the same flat affect, lack
23 of emotion that you heard on the 911 tape. And it wasn't
24 until the moment that he actually placed the handcuffs on him
25 and snapped them into place that all of a sudden there was a

1 flood of emotion from Mr. Scott.

2 And then within a few minutes of that, because
3 Officer Lowe took him into custody, put the cuffs on him, and
4 then actually transferred custody to the second officer who
5 arrived on the scene, then Officer Lowe went into the home
6 because they had heard that there was a shooting. He was
7 concerned that there might be someone inside that might need
8 some kind of medical attention.

9 So he went in and as he was sweeping, he was
10 calling back outside to Officer Cobbley asking question about
11 this room, this and that. And Officer Cobbley was asking the
12 defendant. He was passing that along. He was kind of
13 helping to guide him through and, again, he kind of re-
14 composed himself.

15 And then when a friend of Mr. Scott's turned up at
16 the scene - as it happens, he's good friends and has been for
17 a lot of years with an officer with the Payson Police
18 Department at that time. His name is Doug Howell. You're
19 going to hear from him. When Doug arrived and approached Mr.
20 Scott and there was eye contact there, again, another flood
21 of emotions. And they embraced and they talked.

22 And so keep that in mind, as well, that the
23 emotion - the only emotion that we seem to see from Mr. Scott
24 who is a man who is obviously capable of emotion, is when the
25 handcuffs went on and when he saw his buddy. Whereas at the

1 time of that phone call, presumably within minutes or seconds
2 of his wife's death, the most contemporaneous thing to her
3 death that we are aware of, you heard the way he described
4 it, the way he was unwilling to even go back in and see if
5 there might be a chance to save her.

6 He didn't remember where he had shot her. He
7 didn't know if the shots were fatal. Yet he was unwilling to
8 even go back in and check. So keep that in mind. And,
9 again, as you hear the evidence in this case, run it through
10 the filter of that information.

11 Now, the Judge read to you from the Criminal
12 Information in this case, which is the charging document
13 yesterday and it has the elements of the crime with which Mr.
14 Scott has been accused. There's only one charge and it is
15 murder. It's murder, domestic violence related. So there
16 are essentially two things that you are ultimately going to
17 end up having to decide. One, was it domestic violence
18 related and two, was it murder?

19 With respect to the domestic violence, there's
20 basically one question there: Was the victim in this case,
21 Teresa Scott, an adult co-habitant of the defendant?

22 Now, co-habitant is what we like to call a term of
23 art in the legal world. It's a term that is specifically
24 defined within the statute. And when you receive your final
25 instructions, you'll have that definition as well as the

1 definition of a number of other terms. But included in that
2 definition is a spouse. So you're going to have to determine
3 whether or not she was a co-habitant of the defendant, as to
4 whether or not this was domestic-violence related.

5 The other question, of course, is murder. And
6 there are three ways that you can get to murder. There are
7 three different elements - not that you have to meet all
8 three, but that any one of those three is enough to get to
9 murder. So if you find beyond a reasonable doubt that any
10 one of the three elements I'm about to tell you about was
11 proven beyond a reasonable doubt, then that is enough to
12 convict him in this case.

13 And the elements are these, the first one is that a
14 person intentionally or knowingly caused the death of another
15 person. Again, intentionally and knowingly are defined. You
16 will see those definitions, but suffice it to say, they
17 basically mean exactly what you think they mean. So if he
18 intentionally or knowingly caused the death of another person
19 in this case, then he is guilty of murder.

20 Okay, the second element - and, again, you don't
21 need to meet two or three of these. Any one of these will
22 get you there. The second element is with intent to cause
23 serious bodily injury. So not intending to kill but
24 intending to cause serious bodily injury, commits an act
25 clearly dangerous to human life that causes a death. That's

1 another way to get there. If you find that there wasn't the
2 intent to kill but there was the intent to cause serious
3 bodily injury and that there was an act committed that was
4 clearly dangerous to human life and caused a death, that will
5 get you there, too.

6 And the third way - and this one is kind of a
7 mouthful - it is under circumstances evidencing a depraved
8 indifference to human life knowingly engages in conduct that
9 creates a grave risk of death and causes a death.

10 Again, you will have these instructions and you
11 will have a chance to look at these things, so you don't have
12 to remember these now. But let me say it one more time.
13 Under circumstances evidencing a depraved indifference to
14 human life knowingly engages in conduct which - I'm sorry.
15 I'm getting it mixed up - which creates a grave risk of death
16 and causes a death.

17 So any one of those three. If one, two, or all
18 three of those are proven beyond a reasonable doubt, then
19 that's a murder conviction in this case. And that's pretty
20 much - that's pretty much the murder portion of the case.

21 Now, you might be wondering why I said it that way
22 as the only charge here is murder. But the thing about
23 trials is we don't always know exactly how a trial is going
24 to go. We don't always know what is going to be an issue.
25 And there is an issue in this case that might become

1 important and it might not. You might have to make a
2 decision about it and you might not. But what I can
3 guarantee - well, as much as we can guarantee anything in a
4 trial - what I am very confident about is that you are going
5 to hear about it. And that is the relationship between Mr.
6 Scott and his late wife. We anticipate that the defense is
7 going to put on witnesses - and they are under no obligation
8 to do so. They don't have to present a thing. If they don't
9 think we've met our burden, they don't have to do anything.
10 But we anticipate that they are going to be putting on some
11 witnesses; family members, friends, co-workers, neighbors.
12 And you are going to hear from these folks and they are going
13 to talk about that relationship. They are going to talk
14 about what went on inside that home.

15 And in the event that they do so, we are going to
16 put on some witnesses to talk about the same kinds of things.
17 And these people are going to do the best they can to talk
18 about what went on inside that home from the perspective of
19 the outside looking in. They're going to tell you whatever
20 they know about the relationship leading up to and including
21 the events on that particular day.

22 But you are also going to hear from two other
23 individuals, two individuals who can tell you exactly what
24 went on inside that home because they lived there. They are
25 going to talk about the arguing and the fighting and the

1 screaming and the name-calling and the accusations and the
2 demonizing. They're going to talk about the emotional abuse
3 and they're going to talk about the physical abuse because
4 they lived it, and that is, of course, the sons of Mr. Scott
5 and Teresa, Tyson and Thayne. They are going to be able to
6 describe those things to you because they woke up to it every
7 morning and they went to bed to it every night. They lived
8 it every day.

9 And as you are listening to that, as you are
10 listening to them talking about those things, I want you to
11 keep a question - a three-part question - in the back of your
12 mind. And it is this; with respect to the evidence of the
13 arguing and the fighting and the screaming and the blaming
14 and the abuse, was it him, was it her, or was it them?

15 Right now it might not be terribly clear why that
16 question is so important. And it may not end up becoming
17 important. But it might. So as you are listening to those
18 things, as you are listening to people talk about the
19 screaming and the arguing and the abuse, keep that question
20 in mind. Was it him? Was it her? Or was it them? Make a
21 mental note of that because it might become important.

22 And at the end of the case when all the evidence
23 has been presented, when we've presented our entire case and
24 the defense has presented whatever case they intend to
25 present and we've responded to that if they should do so,

1 then the attorneys are going to have an opportunity to get
2 back up here and argue about the things that you have heard.
3 They are going to look at the facts and they are going to
4 look at the law and slam them together and tell you what
5 conclusions you ought to draw from those things, from the
6 marriage of those two things.

7 And at that time, we are confident that you are
8 going to know exactly what needs to happen in this case. And
9 Mr. Sturgill is going to stand here - I don't know that he is
10 going to stand right here. He's going to stand up here
11 somewhere - and he's going to ask you to convict Tracy Scott
12 of murdering his wife Teresa.

13 Thank you for your attention.

14 THE COURT: Mr. Gale.

15 MR. GALE: Ladies and gentlemen, I - first of all,
16 let me talk to you about a few things. I saw some of you as
17 I walked into the courthouse this morning. You were all
18 sitting downstairs. I walked by and ran into the elevator
19 real quick. It's not because I'm trying to be rude. It's
20 not because I'm arrogant. The reason it is is because we are
21 not supposed to have contact. I think the Judge has
22 explained that a little bit.

23 If I or Mr. Sturgill or a police officer or any
24 witness in the case had contact with any of you outside the
25 presence of everybody else, it's called ex parte contact.

1 And it could make it so that this whole thing - we'd have to
2 excuse a juror or the jury and start over with the whole
3 thing, including the jury selection and everything.

4 So out of an abundance of caution, I think we try
5 to avoid having contact with you. I think one of you said
6 that you went to the same restaurant at lunch as the
7 prosecutors and they were in and out. And the reason why is
8 because they didn't want to have contact with you. So I'm
9 not trying to be unfriendly. I'm normally a friendly person.
10 But that's the reason why.

11 Right now I have a chance to talk to you and I'll
12 have a chance to talk to you at the end of the case and those
13 are my only two opportunities. The rest of the time there is
14 going to be witnesses up here on the witness stand, and I am
15 talking to them and I can ask questions to them and I can
16 look over at you like, Did you catch that? But I can't talk
17 to you. Okay? And so that's the way this whole thing works.
18 So this is my first chance to talk to you. And what I am
19 supposed to do is tell you what I think the case is about and
20 what I think the witnesses are going to say.

21 And then the second time I get a chance to talk to
22 you, then what will happen is I will tell you, Well, this is
23 what they said and this is what it means. And so that's the
24 way it goes here.

25 Now, let me tell you what my belief the case is

1 about. You heard - and I am going to be up-front with you
2 and tell you what we're trying to do, what our goal is here.
3 You heard, uh, the 911 call, um, in the State's opening.

4 Normally they don't present evidence in an opening
5 argument. They asked us if we would stipulate to that coming
6 in in an opening argument. And I told them I would stipulate
7 to it. And here's the reason why, they are going to be able
8 to prove that Tracy killed his wife Teresa. Right now I'm
9 telling you that. They have enough evidence to prove that
10 that happened. Okay.

11 The real issue here is what crime is it, what
12 should it be. Okay? And that's what we are here for.

13 You'll hear later and you probably know just from
14 your personal knowledge from being alive in the world, it's
15 more serious for somebody to think about, plan out, coldly
16 and calmly kill somebody. And it is less serious if somebody
17 does it under what is called extreme emotional distress.

18 You've probably heard of it - in common law it's
19 referred to as manslaughter. Most people know what that is.
20 What that means is that - the most obvious situation is where
21 a spouse comes home and finds their spouse in bed with
22 somebody else, gets upset, and kills their spouse or kills
23 the other person. Then under common law, the law has said,
24 Well, that's not as serious because this person was under
25 extreme emotional distress or did it in the heat of passion.

1 This wasn't a calm, calculated, planned-out thing, but it was
2 something that was done in the heat of passion.

3 And so Utah is a little different. The Judge is
4 responsible for telling you what the law is. I'm just trying
5 to give you a preview. But in Utah it's a little different.
6 We don't have anything called manslaughter. What we have is
7 extreme emotional distress murder which says that if somebody
8 commits murder but they're under the influence of extreme
9 emotional distress, okay, then it is a lesser crime. It's a
10 lower crime, less serious. It's still a crime, still
11 something that people go to prison for, but a less serious
12 crime.

13 Now, the reason Mr. Bastian told you to think about
14 was it him, was it her, was it them is because the law only
15 allows extreme emotional distress to be used as a defense if
16 the person who is using that did not substantially contribute
17 to his own extreme emotional distress. So that's what is
18 going to be an issue.

19 And Mr. Bastian said it may or may not be an issue.
20 And here is why, is because the Judge is sort of like a
21 gatekeeper. He gets to - you guys get to decide what you
22 think happened. Okay. The Judge doesn't get to decide that,
23 but the Judge gets to decide what evidence you hear. And he
24 gets to decide - like you have all heard of hearsay. There
25 are some things that cannot be allowed in court that you guys

1 don't get to hear. There are some things that aren't relevant
2 like somebody says, Well, Tracy is a bad guy because he beat
3 up a kid in second grade. The Judge is going to say, Well,
4 that was too long ago, the fact that he beat somebody up in
5 second grade is not relevant to this so I am not going to let
6 that in. And so there are certain things that the Judge does
7 not let you hear, certain things that he does let you hear.

8 And one of the things that the Judge can do is that
9 the Judge can say, Well, I don't think there has been enough
10 evidence presented for the jury to be able to decide that it
11 was extreme emotional distress, okay? And so we could get to
12 the end of the case and you could be thinking, Well, am I
13 going to decide whether this is murder or manslaughter, and
14 you won't have that choice, okay?

15 Now, we're hoping that you will, that we can
16 present enough evidence that you will have that choice, but
17 that's the issue. That's what we have going on here.

18 Now, let me tell you a little bit about what you
19 are going to hear from the witnesses. Okay, this was a 25-
20 year relationship. Tracy and Teresa had known each other for
21 25 years. They were married for 18 years. They had two
22 kids. Like any marriage, it had its up and downs. They had
23 times where they loved each other, where they got along well
24 and they had times where they got along terribly.

25 And I think that you will hear that there are times

1 that they got along much worse than most married couples,
2 where most married couples would have thrown in the towel.
3 In fact, I think that you'll probably hear that both of them
4 had been advised by all their family members, Look, you guys
5 have got to give it up. You guys ought to just - you guys
6 ought to just get divorced. They had even been told by their
7 bishop, You guys just ought to get divorced - because they
8 fought so much.

9 You'll hear that everybody that knew them knew
10 that's just what they do, they fight. Tracy's co-workers,
11 the guys that worked with him at work, they said, Well, when
12 we work with Tracy, he was always on the phone fighting with
13 Teresa. I car pooled with him. He was on the phone in the
14 morning driving to work, fighting with Teresa. He would get
15 to work. He would be on the phone at work fighting with
16 Teresa. If he didn't answer his phone when he was driving to
17 work or answer his cell phone, she would call the work phone
18 and talk to him on the work phone. If he didn't answer the
19 work phone, she would come down to the shop and fight with
20 him. So this is the type of thing that was going on between
21 the two of them.

22 He worked at the Alpine School District bus shop.
23 You'll hear about that. I think we had somebody that - I
24 don't know if the person made it on the jury that was a bus
25 mechanic. But that is what Tracy did. And he actually works

1 with Teresa's father there, who actually works in the same
2 shop. And then there were a couple of other co-workers that
3 we're hoping that you will hear from that will talk about
4 what was going on when Tracy was working there.

5 So this was going on for a number of years. You'll
6 hear about incidents that - there were some incidents that
7 happened over the years. But, like I say, there were times
8 they got along well. There were times that they got along
9 terribly.

10 There was probably - I think in 2006, you will hear
11 that there was an incident that happened with them where the
12 police got called; that Tracy got charged with domestic
13 violence. There was a protective order that the two - he was
14 - the allegation is that he punched or hit Teresa. And he -
15 they were separated for a while. That was in 2006. You will
16 hear that they got back together after that, that they tried
17 to work things out, that they went through the temple
18 together, and everybody thought, Well, they've been getting
19 along pretty good the last few years.

20 But sometime in 2013 - and maybe at the end of 2012
21 - there were some issues that were causing the two of them
22 problems. When they got their taxes back - it would have
23 been 2011 taxes, but it would have been in the calendar year
24 2012 - they had an argument that Tracy used the money that
25 they got the taxes back to buy a gun. And Teresa did not

1 like the fact that he used the taxes to buy a gun. She said,
2 Well, we need a roof on the house. We need some other
3 things. You shouldn't have used that to buy a gun.

4 There were arguments over a car. He had an old
5 car, a Chevelle - I don't know what year it is. You will
6 hear the witnesses talk about it. He had spent money and
7 fixed up this car and given it to his 17-year-old son
8 Thayne - or 16-year-old son Thayne.

9 They were having arguments about that. They were
10 having lots of financial issues. Teresa had been working at
11 the end of 2012 over the holiday season, the beginning of
12 2013, she had been working at Wal-Mart and had worked as
13 holiday help. She had lost that job or been laid off after
14 the holidays and was not working. Tracy kept telling her,
15 Well, you need to get a job. You need to work. So there
16 were arguments about finances.

17 And so this escalated and the two of them were
18 again at each other's throats, fighting. Everybody who knew
19 them said, Well, we knew that they were fighting again
20 because Tracy was always on the phone. They were fighting
21 again.

22 So the day before this happened - this happened on
23 Saturday the 13th of March, I think. You'll hear the dates.
24 But on Friday you'll hear that Tracy was off of work, that he
25 had some things to do, that some time during the day on

1 Friday he called his mother. And you'll hear the testimony
2 about this - that he called his mother. And he said, Mom -
3 and you'll hear that Tracy had a gun collection. He had a
4 bunch of guns. A lot of people in this community do - and he
5 called his mom and he said, "Mom, I'm afraid. The gun safe
6 is open and a gun is missing. And I think Teresa is going to
7 kill me." That was the day before, on Friday.

8 And Saturday he gets up in the morning. He has a
9 friend that needs some help with a car that lives on the same
10 street as Tracy. Tracy goes over there, spends about an hour
11 with the friend. He looks at his car and then leaves. He
12 has some tires that - there was a family car, a Honda, that
13 they had. And he had purchased some tires for the Honda and
14 decided he was going to go to his shop up in American Fork,
15 the Alpine School District shop, and put the tires on the
16 car. And so he went up - took the car up there and was
17 putting the tires on.

18 He called his supervisor from work. His
19 supervisor's name is Troy Fackrell and Troy has known Tracy
20 for 15 years. And Tracy asked him if he could use the shop
21 so that he could put the tires on the car. And then Tracy
22 found out the tires were the wrong size. He needed to take
23 them back to the tire shop. He asked him if he could use a
24 truck to take the tires back to the tire shop - because the
25 car was sitting up there without any tires on - and get the

1 right size.

2 And while he is on the phone with Troy, he says,
3 Troy, things are getting bad at home. Do you think I could
4 come stay with you? Troy says, Well, yeah. Text me later
5 and I'll get you a key. And Troy says, I've known Tracy for
6 15 years and I have never known him - he has never asked me
7 ever before to stay at my house or anything. So Tracy knew
8 that things were getting bad at home. He made the phone call
9 to his mom, made the phone call and talked to Troy. And then
10 he goes home and that's when this happens.

11 Now, you'll hear - I think Mr. Bastian said that
12 you would hear about the phone call with Teresa's mom.
13 Teresa's parents probably - I know now they have very hard
14 feelings towards Tracy now. Okay. I think that they - and
15 obviously and rightfully so. I think even back at this time
16 - I don't think that they had good feelings towards Tracy
17 because they felt like, he's always arguing with our
18 daughter. He has abused her in the past.

19 So Teresa is on the phone with her mom and talking
20 to her mom. Tracy's at the house pacing back and forth in
21 front of Teresa. I think Mr. Bastian told you about this,
22 that Teresa's mom would say that she heard Tracy in the
23 background. And she was interviewed by the police later.
24 And in her interview, she said, Well, we were talking about
25 what was going on, that they were fighting again. And we

1 knew that Tracy was listening to us, so we hammed it up, is
2 what she said, We hammed it up and we talked about mental
3 health, that he had to get counseling.

4 And so she is on the phone with her mom. They're
5 fighting. He's all worked up about what he called his mom
6 about and everything. And so they hammed it up and decide,
7 Okay, we're going - and they can't get inside his head. They
8 don't know where he was at that point. But they decided,
9 Let's twist the screws and antagonize him a little bit. And
10 Marsha Jarrett, Teresa's mom, admitted to the police that
11 they did that, on the phone right before the shooting.

12 And then at some point Tracy gets a - just gets to
13 the end of his rope, loses it, and shoots Teresa.

14 Now, the State is going to present evidence and try
15 to present evidence, including the 911 phone call and say, He
16 wasn't under extreme emotional distress. Did you see how
17 calm he sounded?

18 I've been through a lot of, you know, fairly
19 traumatic events in my life and usually I - I don't think it
20 is unusual for somebody to be able to keep it together until
21 they see somebody that they love or somebody that they care
22 about. And what the State is going to say is, Well, he was
23 calm. He wasn't under extreme emotional distress.

24 You're going to hear the officers when he was
25 upset, when he was crying, when he was inconsolable. You'll

1 hear from his friend, the police officer Doug Howell, who
2 showed up and he started crying, that he was inconsolable.
3 Just the fact that he was calm and kept his composure enough
4 to call 911 and tell them where he lived does not mean that
5 he was not under extreme emotional distress. And you'll hear
6 testimony about his emotions and the distress that he was
7 under.

8 You're going to hear the testimony from these young
9 boys. It's a tragedy. It's horrible that these boys are
10 without a mother, that they're without a father now, that
11 their father killed their mother. I mean, it's going to
12 affect them for the rest of their lives.

13 I think you are going to hear testimony about them
14 - they are going to say things about their dad; well, he was
15 ornery. He was mean. I want you to keep your common sense.
16 I've been to funerals. I know you have probably all been to
17 funerals. People have a tendency after somebody is gone to
18 not focus on the negative things. And I don't want to speak
19 ill of Teresa, either. But in determining Tracy's fate and
20 what he is guilty of and what should happen to him, we have
21 to look at the whole situation. And we have to decide who
22 was responsible, how responsible they are. And so that's
23 what we are doing here. And that's what I would like you to
24 listen to. And I'll have a chance to talk to you again at
25 the end.

1 Thank you.

2 THE COURT: Thank you.

3 If State would take down your placards, you may
4 call your first witness.

5 MR. BASTIAN: State calls April Robbins.

6 THE COURT: Ms. Robbins, if you'd come up to the
7 front here and stand before my clerk, please. Raise your
8 right hand and be sworn.

9 APRIL ROBBINS,
10 having been duly sworn, testified
11 upon her oath as follows:

12 THE COURT: Thank you, ma'am. Please be seated on
13 the witness stand. You don't need to be overly close, but
14 the microphone does need to be essentially straight.
15 Perfect, thank you.

16 You may proceed.

17 MR. BASTIAN: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. BASTIAN:

20 Q Ms. Robbins, thank you for being here. Could you go
21 ahead and state your full name and spell your last, please?

22 A April Robbins, R-O-B-B-I-N-S.

23 Q And what do you do for a living?

24 A I'm a dispatcher with Utah Valley Dispatch.

25 Q How long have you been with Utah Valley?

1 that about 90% of the time the answer that will come back to
2 you is that it is already in the instructions that I've
3 already given you. But nevertheless, that is the procedure
4 for asking a question.

5 With that, we'll go to the closing arguments of
6 counsel. Turn first to the state.

7 MR. STURGILL: Thank you, Judge.

8 I like to wander.

9 First of all, thank you, ladies and gentlemen.
10 It's time that you spent this week with us, for your
11 patience, for your attention. I've watched - I haven't
12 looked over here very much, but every now and then I'll look
13 over and I'll try to see what you folks are doing, and from
14 what I can tell throughout the week you've all been very
15 attentive. You've all been listening and it appears to me -
16 and I can tell that you realize how important this
17 responsibility is; how important your role is in this
18 process. It is essential. It is critical. You are the
19 finders of fact. You will determine whether or not Mr. Scott
20 is guilty of murder or, in this case, guilty of manslaughter.
21 You've heard some difficult things. You've seen some
22 difficult things. And it's truly unfortunate that that had
23 to be presented, but it had to be presented. And again, I
24 appreciate your patience you had throughout the week. And in
25 fact, you've had - you did endure those things. I don't

1 imagine it's been easy or even convenient. But again, I
2 think on behalf of the State, I certainly would like to thank
3 you on behalf of all parties involved, we sincerely,
4 sincerely appreciate it.

5 I'm going to try to be brief. I know that's hard to
6 believe coming from a lawyer, but I'm going to my very best
7 to be brief in this argument or in this first argument,
8 because I will be able to address you again. And I certainly
9 don't want to slow things down or bore you. But what I have
10 to say I'm going to try to limit to what I think are the most
11 important points and part of this case. And I'm not going to
12 relate all of the details. I'm not going to relate and go
13 through every single jury instruction because you - you folks
14 - you're bright people. We looked at your questionnaires and
15 there's a reason why you ended up on this jury. It's because
16 you're bright, you're smart, you're intelligent, you can
17 read, you're collective memory is one of the biggest benefits
18 that we have. So I'm going to be careful about limiting my
19 arguments or my statements to just what I think is important.

20 Now, having said that, if I misspeak, if I make a
21 mistake, it's not intentional. If you remember things
22 differently, if you heard something differently from the
23 stand or saw something different in the piece of evidence
24 that was presented, go with your collective memory. That's -
25 that is what you need to do. That's what you've been

1 instructed to do. That's the beauty of a jury of a number of
2 people is you have that collective memory that you can all
3 rely on.

4 Now at the very beginning of the week, the judge
5 read to you a preliminary jury instruction. And that jury
6 instruction had something to do with the presumption of
7 innocence. And that instruction basically read you are to
8 presume the defendant innocent and that innocence or that
9 presumption of innocence must continue to prevail in your
10 minds unless and until the jury is satisfied beyond a
11 reasonable doubt of the guilt of the defendant.

12 Ladies and gentlemen, that presumption, it is time
13 now, or at least it is very close at hand that you are to
14 drop that presumption. You can drop that presumption and you
15 can find the defendant guilty of murder, of killing his wife,
16 Teresa Scott.

17 The State has clearly met its burden. It has
18 proven it's case, it has completed its puzzle, so to speak,
19 as Mr. Bastian told you about in his opening statement. The
20 picture should be clear to you now. You have all of the
21 evidence. You've heard all of the testimony. The picture
22 should be clear that on March 23rd, 2013, the defendant shot
23 and killed his wife in cold blood.

24 Now, in my mind, when you go back to deliberate,
25 there's basically two things - the two steps that you have to

1 go through. And I think the first step is going to be pretty
2 quick. Okay?

3 Before I relate to those two steps to you, I agree
4 with Mr. Gale when he assessed your role during his opening
5 statements. If you remember, he basically told you that you
6 have to make a choice. You have two choices basically in
7 this case. Is the defendant guilty of murder or is he guilty
8 of manslaughter? I completely agree with that assessment.
9 And that I think would help you in these two steps that
10 you're going to go through when you go back and deliberate.

11 The first step you have to do is you must decide
12 whether Mr. Scott is essentially guilty of murder. Whether
13 you believe that we, the State, has proven the elements
14 beyond a reasonable doubt of murder. The second step that
15 you're going to have to follow - and you only have to proceed
16 to the second step as the judge has instructed you and as is
17 evident on that special verdict form, you only have to
18 proceed to that second step if you find the first step has
19 been completed, it has been met, the defendant did, in fact,
20 kill his wife, did murder her.

21 I want to address each one of those steps now in a
22 little bit more detail. The - I'm going to address the first
23 step. The judge at the beginning before we even got started
24 read you some preliminary jury instructions. He's read you
25 some additional jury instructions just now. I don't mean to

1 minimize any one of those instructions' importance. They are
2 all important. They all must be considered. They all must
3 be followed by you during your deliberation. However, I do
4 believe that there are several that are particularly helpful.
5 And I'm going to point those out and I'm going to highlight
6 those and I'm going to walk through those.

7 The first jury instruction - actually there's two,
8 and I think you have to consider them together. You have to
9 consider them together. The elements instruction, which is
10 number 3, and the definition of proof beyond a reasonable
11 doubt, which is instruction number 17.

12 Before we talk about the elements instruction, let
13 me first outline or highlight what I believe is the most
14 important language in that proof beyond a reasonable doubt
15 jury instruction, number 17. This is the burden by which the
16 State must prove the defendant is guilty of murder. What
17 does that mean? Proof beyond a reasonable doubt. Well, I
18 can tell you what it doesn't mean. It doesn't mean that you
19 have to have absolute certainty that the defendant murdered
20 his wife. That's not required. The jury instruction so
21 says. It says, proof beyond a reasonable doubt is a proof
22 that leaves you firmly convinced, firmly convinced of the
23 defendant's guilt. There are very few things in this world
24 that we know with absolute certainty, and in criminal cases,
25 the law does not require that overcomes, it doesn't require

1 that absolutely certainty. It doesn't require you to
2 overcome every possible doubt. If based on your
3 consideration of the evidence you are firmly convinced the
4 defendant is guilty of the crime charged, you must find him
5 guilty. Okay? That's the standard that you're going to
6 apply as you go through the elements instruction. It says so
7 right at the very top. To convict the defendant of count 1,
8 murder, you must believe from all of the evidence and beyond
9 a reasonable doubt each of the following elements. See how
10 they kind of how to be read? They have to read together.
11 They have to be considered together. The elements
12 instruction. That's the next instruction I want to talk to
13 you about. That's number 3. Okay?

14 This defines the crime of murder. And it outlines
15 several elements. And I've noticed that mine's actually
16 mislabeled. It's 1 through 5, not 1 through 4. I don't know
17 if that's the same on yours. I rewrote that last 4 as a 5.
18 There are five elements. Five possible elements. Well, five
19 elements that you must be satisfied have been proven by the
20 State beyond a reasonable doubt. And you have to find all of
21 these unanimously and beyond a reasonable doubt. Ladies and
22 gentlemen, I submit to you that has happened throughout the
23 course of this trial. Let me just go through them briefly
24 and explain to you why I believe they've been proven beyond a
25 reasonable doubt.

1 First element is the that defendant. Is there any
2 dispute it was Mr. Scott that shot and killed his wife,
3 Teresa? You've heard from every witness that has identified
4 the defendant as Tracy Scott, that he is the one. They have
5 pointed him out. They've described something that he is
6 wearing, and there has been no question that he is the one
7 that we're talking about today, that is the subject of this
8 crime. He himself, ladies and gentleman, admits that
9 element. He's told you himself that he's the one that
10 murdered his wife. That fact has been proven not only beyond
11 a reasonable doubt, but I would submit to an absolute
12 certainty. There's no evidence to the contrary. It's
13 undisputed. It's been admitted to by the defendant himself.
14 You can check that off. So that's the nice thing about this
15 elements instruction. It's almost like a checklist. That
16 one I believe you can check off without any reservation or
17 hesitation.

18 Second element. On or about March 23, 2013, again
19 this fact has been related over and over and over from the
20 witness stand. It was even acknowledged and admitted to by
21 the defendant. Is there any dispute? Is there any question
22 that this event took place on March 23, 2013? I submit to
23 you there is not. No evidence to the contrary. Defendant
24 admits it himself. The next element - you can check that one
25 off, number 2.

1 Number 3, in Utah County. We've heard witnesses
2 testify from the stand, we heard the defendant admit himself
3 that this occurred at his home in Salem. Again, no question,
4 no dispute, no evidence to the contrary, the defendant admits
5 himself that this murder took place in Utah County, at his
6 residence in Salem, Utah.

7 Number 4. Okay, this is really the meat of the
8 elements instruction. This is the meat of the murder charge.
9 And if you'll notice under that element, there's actually
10 three possibilities. I need to make that very clear. I'm
11 sure you understand that, you see that. There are three
12 possibilities. These are not "ands." The State doesn't have
13 to prove each and every one of these three subelements. It
14 only has to prove one of them. They are "either/ors." And I
15 submit to you that the evidence - and I'll outline it here in
16 just a moment, the same evidence that I'm going to outline or
17 that I'm going to outline satisfies all three of those
18 possible elements or subelements of four.

19 Let's first talk about (a). That the defendant did
20 intentionally or knowingly cause the death of another. Now,
21 if there's any question about what intentional or knowingly
22 means, and if there is, those are defined, and you can find
23 them as you just heard, you can relate or you can go back to
24 those, refer to those in your set of jury instructions if
25 there's any question about what that language might mean.

1 What intent or knowingly might mean is defined, I submit to
2 you, ladies and gentlemen, you don't check your common sense
3 or your human experience at the door when you leave this
4 room. Okay? Did the defendant intentionally or knowingly
5 cause the death of another, specifically Teresa Scott.
6 Absolutely. What evidence is there that supports that
7 element? Ladies and gentlemen, the defendant himself told us
8 twice, on two different occasions he explained that he killed
9 his wife. The first time was during the 911 call. He calls
10 911, what does he tell them? "My wife has been shot and
11 killed."

12 Who did it?

13 "I did it."

14 How did you do it?

15 "Forty-five pistol, hand gun."

16 He went in to a much more graphic detail when he
17 testified from the stand. It's a lot more detail. What did
18 he tell you from the stand? He told you that he walked back
19 into the bedroom, he removed the gun, his gun, the 45 from
20 the gun safe. He pointed that gun directly at Teresa, cocked
21 it back, pulled the slide back. Pointed it directly at
22 Teresa and he pulled the trigger. And he related to you how
23 he saw the slide come back, he saw the shell casing go out in
24 the air, he saw smoke, and he knew he hit her. He knew he
25 had shot her.

1 And then what does he do? He starts to walk around
2 the end of that bed, maintaining that gun pointed at Teresa,
3 directly at her, and when she moved, ladies and gentlemen, he
4 shot her two more times. And then he went out and he called
5 911. Could he be bothered to go back in and check on her and
6 see if she was okay? No. Couldn't be bothered to do that.
7 He knew she was dead. He intended for her to be dead. If
8 you don't believe that from the evidence that's been directly
9 presented, you can certainly infer that from his actions.
10 His intent was that Teresa die that day. At least in that
11 moment that he shot and killed her. There's no evidence to
12 the contrary. It's been admitted to by the defendant
13 himself. That element, ladies and gentlemen, has been met
14 beyond a reasonable doubt.

15 The second subelement to 4 is (b), intended to
16 cause serious bodily injury to another, committed an act
17 clearly dangerous to human life that caused the death of
18 another. Same facts that I just related satisfy that
19 element. Is there any question that when you point a gun at
20 someone and you pull that trigger, at the very least you
21 intend to cause serious bodily injury, especially if you're
22 aiming to the face and directly to the chest. Keep in mind
23 where she was shot. Two to the face, one to the heart.
24 There's no question he intended death. Is there any question
25 that when he did that at the very least he intended to cause

1 her serious bodily injury. And in addition to that, is that
2 not an act clearly dangerous to human life? Absolutely.
3 Shooting someone with a 45 three times, twice to the face and
4 one to the chest, is clearly an act dangerous to human life.
5 And did it ultimately cause Teresa's death? Absolutely.
6 You've heard from the medical examiner that the combination
7 of those three gunshot wounds was absolutely and
8 categorically unsurvivable. That bullet to the chest blew
9 her heart apart. No one could have saved her. She was dead.

10 The third subelement of 4 is what we like to call
11 the depraved indifference element. This is acting under
12 circumstances evidencing a depraved indifference to human
13 life, knowingly engaged in conduct which created a great risk
14 of death to another, and thereby caused the death of another.
15 Again, depraved indifference is defined in the jury
16 instructions. That is jury instruction number 8. Okay?
17 Even if you find the defendant didn't intentionally cause her
18 death, didn't knowingly cause her death, or didn't intend to
19 cause her serious bodily injury, consider the depraved
20 indifference element. Depraved indifference to human life
21 means an utter callousness towards the value of human life,
22 and a complete indifference as to whether the actor's conduct
23 would create a grave risk of death to another. To act with
24 depraved indifference, the instruction says, the actor must
25 do more than act recklessly, however - and this is the

1 important language - however, he does not have to have a
2 conscious desire to cause death, nor does he need to be aware
3 the conduct is reasonably certain to cause death. It means
4 that he knew the nature of his conduct and that that conduct
5 created a risk of death, and that risk of death was great.
6 At the very least that, ladies and gentlemen, at the very
7 least that. Again, pointing a 45 at someone at such close
8 range and pulling that trigger and striking that person in
9 the face twice and once in the heart, that is depraved
10 indifference to human life. And that's what he did. At the
11 end of the day, he devalued her. He just said as much. She
12 was worthless. In his mind she had no value. That's why it
13 was easy for him to pull the trigger. At the very least,
14 depraved indifference, don't you think?

15 And that's not all the facts that support the
16 finding of murder or established this guilty beyond a
17 reasonable doubt with regards to murder. Also consider the
18 gunshot residue. They found it on his person. Also consider
19 the ballistics evidence, matched his gun. His gun matched
20 the bullets that were removed from Teresa and that were found
21 at the scene and they matched the shell casings that were
22 removed from the scene. Additional evidence that supports
23 that he intentionally - he killed his wife. And there's
24 more, ladies and gentlemen, but I'm not going to go through
25 all of the facts and all of the details. But consider

1 everything when you're determining whether or not those
2 elements, at least up to that point, have been met.

3 The last element again, I don't think it's not a
4 hard one to check off on your list. It is that the defendant
5 was an adult cohabitant with the victim. Again, cohabitant
6 is defined and it's simply is someone that you're married to
7 or you cohabitant with, you have to be over a certain age and
8 that's been met. Husband and wife living together at the
9 time. They'd been married for 18, 19 years, sure they've
10 been separated. But it had been years before and at this
11 particular moment when he shot and killed her, they were
12 living under the same roof. Had kids together. Ladies and
13 gentlemen, there's no question that that fifth element had
14 been met, that they were cohabitants. There is no evidence
15 to the contrary. There is nothing to the contrary. And
16 defendant himself admitted on the stand basically that he was
17 a cohabitant of Teresa when he shot and killed her.

18 Ladies and gentlemen, the elements of murder have
19 been proven beyond a reasonable doubt. As I stated earlier,
20 I submit to you, not just beyond a reasonable doubt, but
21 beyond any doubt. And that's due in large part to the
22 evidence the defendant has himself provided to us. Not only
23 the day that he murdered, shot and killed his wife in cold
24 blood, but from what he told you on the witness stand just
25 the other day, yesterday. Having said - well, that being the

1 case, you move on to step two.

2 The special mitigation. All right? And the jury
3 instruction that I believe that is particularly helpful is
4 jury instruction number 10. And again, this is only to find
5 that he's basically guilty of murder. You move on to this
6 step two and you consider the special mitigation. This
7 instruction says - and I hate to repeat it, but I think it
8 bears repeating. This is a very, very important jury
9 instruction. It says, murder may be reduced to manslaughter
10 when there is what we call special mitigation. And in this
11 case, extreme emotional distress may provide special
12 mitigation if you find the defendant caused the death of
13 Teresa Scott - and here's the really important language,
14 okay? - under the influence of extreme emotional distress for
15 which, again super important language, there is a reasonable
16 explanation or excuse. Okay? Extreme emotional distress for
17 which there is a reasonable explanation or excuse.

18 Now, the jury instructions that follow further
19 define and they elaborate on this idea of extreme emotional
20 distress. Eleven, 12 and 13, okay? Instruction number 11
21 explains that you are to consider the reasonableness or when
22 you're determining whether or not Mr. Scott acted reasonably,
23 it's from the viewpoint of a reasonable person under the then
24 existing circumstances. And what that means is basically you
25 put yourself in his shoes. And you decide that whether at

1 that point that he pulled the gun, under those circumstances
2 he was under the influence of extreme emotional distress for
3 which there is a reasonable explanation or excuse. And
4 that's going to be really important and I'm going to discuss
5 that here in a moment a little bit further. You essentially
6 have to put yourself in his shoes and ask yourself if I was -
7 if he was reasonable at that time under those circumstances.

8 Number 12, this actually defines what extreme
9 emotional distress is. And again, I think this is a super
10 important jury instruction. And it talks about the then
11 existing circumstances. And it says that a person acts under
12 the influence of extreme emotional distress when the then
13 existing circumstances expose him to extremely - again that
14 language extremely - and here we go - unusual and
15 overwhelming stress that would cause the average reasonable
16 person under that stress to have an extreme emotional
17 reaction. He has to be - he has to lose self control and
18 have his reason overborne in order for him to benefit from
19 this special mitigation.

20 Lastly, instruction number 13, and I think this
21 instruction, again not to minimize any of the other
22 instructions, but this instruction is critical. Okay?
23 Because it limits this idea of extreme emotional distress.
24 It limits it. And basically what it tells you is that you're
25 not to consider distress that is substantially caused by the

1 defendant's own conduct. So if the distress, the alleged
2 distress that Mr. Scott claims he was under was substantially
3 caused by him, then you're not to consider that. You're to
4 set that aside because he can't benefit from distress or
5 stress that he creates, or at least has a substantial role in
6 creating. And we're going to talk more about that here in
7 just a moment.

8 As I see it, defendant wants - or Mr. Scott wants
9 you to believe that he suffered extreme emotional distress as
10 a result of two things primarily. Okay? And I'm going to
11 address each one of those in turn, but I'm going to tell you
12 what they are really quick. One is is that it was the result
13 of this year's long fighting between he and Teresa. That's
14 the first thing I want to talk about. The other thing is is
15 this gun. The gun that he introduced, that he talked to or
16 that he talked about while he was on the witness stand. But
17 let me go back and first address this year's long fighting
18 that he wants you to believe resulted in extreme emotional
19 distress.

20 There's just no denying that they fought. I'm not
21 going to dispute that. The evidence was clear. We heard
22 from quite a number of people including family, neighbors,
23 friends, these two fought. And we all heard they fought over
24 silly things; cell phone holders, car parts, you know, things
25 like that, garage doors, whether they open or not. But they

1 also fought about finances and about spending. Now I'll let
2 you assess the reasonableness of these fights. But I would
3 submit to you - and again, I'm asking you to rely on your
4 common sense and your human experience, and I'm going to do a
5 little bit of that to kind of illustrate the point that I
6 want to make, but isn't that what most couples fight about
7 when they do fight? A lot of times it's about finances and
8 it's about spending and what money should be spent on,
9 especially when times and money are tight. Even normal
10 healthy relationships I believe often times fight over
11 finances. It's a normal thing.

12 In this case, they fought over guns versus roof;
13 car parts rather than bills. What we didn't hear from the
14 stand from most of the people, however, we heard a lot of
15 them say, hey, look, we heard - we heard them fighting, we
16 knew they fought in general about finances and this or that,
17 but we didn't get much detail about those fights, how they
18 started, who instigated it, who ended it. We didn't really
19 get a good idea how violent or aggressive they were until we
20 heard from the three people who witnessed most of the fights
21 first hand; Mr. Scott and his two boys. What did they tell
22 you about those fights? They told you that they fought.

23 Mr. Scott admits that he would fight with his wife,
24 and the way that he characterizes it it was constant.
25 Happened all the time. The boys kinda the same thing. But I

1 want you to consider this. The fighting, if it is to be
2 believed, if you believe this - and I don't necessarily
3 disbelieve it myself - but if it is to be believed that this
4 couple fought from the moment they met, it sounds like,
5 throughout all the years of their marriage, what it sounds
6 like to me is a love/hate relationship, they loved each other
7 and then they'd fight. They'd get back together. They'd
8 love each other; they'd fight. They'd get back together.
9 And sometimes it was worse than others. They got to the
10 point that they even separated on two occasions. There was
11 discussions of divorce throughout the years. But that seemed
12 to be the pattern. Fight, get back together. Fight, get
13 back together. Fight, get back together. Ladies and
14 gentlemen, that became their norm. That became their usual.
15 That was life and business as usual in the Scott home it
16 happened so often.

17 Consider that here in just a moment when I talk
18 about whether or not this was an overwhelming, those last two
19 weeks became overwhelming and extreme because you have to
20 consider that in the context of Mr. Scott's. Mr. Scott's
21 being in his shoes. That was the norm it sounds like to me.

22 Consider what the boys also said about the fights,
23 the nature of the fights. Who started them? You know, the
24 defendant himself told you that, yeah, I - I started as many
25 fights as, you know, I - that she started. I was in there

1 just as much as she was. I was in her face. I was spitting
2 in her face. I gave as good as I got is basically what he
3 said.

4 The boys had a little bit different picture. They
5 felt like dad gave quite a bit more than he got. And the way
6 they describe it is those fights, if anyone experienced
7 emotional distress, it sounds like it should have been
8 Teresa. He insulted her. He degraded her. Called her
9 worthless. Had a name for her. Even included it on his
10 phone contact; Teresa bitch. He doesn't hesitate to call her
11 that. He didn't hesitate to bring up a very, very sensitive
12 part of her past, the fact that she had been sexually abused
13 and rubbed her face in it; telling her she liked to do it
14 with her family members. How callous is that?

15 He threatened to kill her. Not just once, and it
16 wasn't just one of the boys that heard it, both of them.
17 They heard him threaten it again and again. And ladies and
18 gentlemen, he finally made good on that threat. He shot and
19 killed his wife.

20 Now, consider that the boys told you, you consider
21 that because if he substantially caused this distress that he
22 alleges from these fights that had gone on over the years,
23 ladies and gentlemen, he substantially, if not mostly
24 contributed to that stress, not with just the way he carried
25 himself during the fights, but with what they fought about.

1 He himself told you that most of the fights were over
2 finances and spending. And what did he do to aggravate that
3 problem? He spent carelessly. He bought guns when they
4 needed a roof. He bought car parts when they needed to pay
5 bills. His sons saw it. They recognize it. His young sons
6 recognized that there was more responsible ways to spend the
7 money that he ignored. And when that caused friction between
8 Mr. Scott and his wife, that's when things got brutal.
9 That's when the fights got violent to the point that he even
10 physically assaulted her. Now he denies that. He denied
11 that he ever punched her. The boys had a different story.
12 Both of them witnessed it, saw it. He punched her, ladies
13 and gentlemen. He plead guilty to domestic violence assault.
14 It's an important point because his credibility is an issue.
15 And the boys directly contradict it, his version of that
16 event. Keep that in mind.

17 I've already talked about this a little bit, but
18 even if you believe Mr. Scott, those last two weeks were
19 horrible, they were worse than usual, again, consider -
20 consider the history. Remember, the then existing
21 circumstances. Put yourself in his shoes. Consider the
22 history, folks. Fighting, getting back together; fighting,
23 getting back together. That was the usual. That was the
24 norm. So how much more overwhelming could it possibly have
25 been those last two weeks and what he's already experienced,

1 what he's lived through. Not, just the normal, that was the
2 normal thing. The only thing that changed is the defendant
3 finally just got tired of it. Got tired of it, chose not to
4 divorce his wife like they discussed. But instead he shot
5 and killed her and that's how he got her out of his life.

6 Now, the second step with regards to the extreme
7 emotional distress, this gun. Let's talk about that gun for
8 a moment. And you heard Mr. Scott tell the story about the
9 gun. The silver gun. Okay? And you saw where it was
10 located ultimately, on the edge of that bed, towards the
11 corner. Just feet away from the same safe, incidentally,
12 that Mr. Scott removed his black 45. What he told you about
13 that gun, is it credible? Is it believable? Ladies and
14 gentlemen, it is not. It is self-serving and it is too
15 incredible to believe.

16 The most telling evidence to the contrary, contrary
17 to his story, is that 911 call. Soon after he'd shot and
18 killed his wife, picks up the phone, calls 911. Now you
19 assess his demeanor. And not just how he testified in court
20 today, but you assess his demeanor when he placed that phone
21 call. In my opinion, he was relatively calm and collected,
22 had his wits about him. What did he do? Calls up,
23 accurately gives his name, accurately gives his address,
24 accurately gives his phone number, and then accurately
25 relates exactly what he did, that he had shot and killed his

1 wife. And then he goes on and he tells the dispatcher,
2 "We've been fighting this week or for the last two weeks. I
3 overheard my wife complaining about me on the phone to my
4 mother-in-law. And then she was going to take a picture of
5 me." And he lost it. Shot. He killed her. Not one word,
6 folks, about a gun. No mention that he feared for his life.
7 Is it reasonable to believe that if the circumstances were as
8 he described them on the witness stand that he would have
9 mentioned either the gun or the fact that he feared for his
10 life. The reason he didn't mention those things, the gun,
11 the fear for his life, is because it didn't happen.

12 Now, I can't explain how the gun got there on the
13 bed. I don't think anybody knows that except for Mr. Scott.
14 And he certainly didn't tell you how the gun got there
15 yesterday. He didn't tell you how it really got there
16 yesterday.

17 Folks, if he truly feared that gun when he saw the
18 safe open the day before and saw that it was missing, why
19 didn't he later inquire about that gun when he saw the safe
20 was shut when he felt safe? Why, if he really feared that
21 gun, did he not open the safe to check and see if it was
22 still there, and if it was still there remove it from the
23 home? Why didn't he do that? The next day when he saw the
24 safe was open, he walked into the bedroom the first time, at
25 least the first time that he noticed it was open. The safe

1 was open, gun was missing. Same condition as what he
2 explained the day before. Again, Teresa over next to the bed
3 doing whatever. If he truly feared that gun and he was in
4 fear for his life, and suspected that Teresa was going to
5 shoot and kill him, why didn't he remove himself from the
6 residence? Why didn't he get in his car and drive away?
7 More importantly, why did he walk back into that room? The
8 reason is, folks, because it didn't happen the way he
9 explained it to you on the witness stand. That's why.

10 He walked into the room and there sat Teresa. And
11 I'm not going to pull that picture out and show you, but
12 you'll have it back in the back.

13 Actually, do we have those pictures?

14 I will show you one. He walked back into that room
15 where he found Teresa sitting on the bed, semi-reclined, feet
16 crossed, crocheting. That's the condition he found her. She
17 wasn't pointing a gun at him. She was no threat. She didn't
18 provoke him. Position of her body speaks volumes. She was
19 crocheting and she was shot and killed in cold blood.

20 Even if you - even if you were to believe Mr.
21 Scott's story about the gun, consider this, he walked back
22 into the room, he hadn't seen the gun, he didn't know where
23 the gun was. We heard that that gun - that guns had been
24 removed from the home, they'd been pawned, they'd been sold.
25 He doesn't know where that gun is. He doesn't see it. Not

1 until after he has shot and killed Teresa. Shot her three
2 times and killed Teresa. Is it reasonable under those
3 circumstances to believe that Teresa was preparing to kill
4 him? He didn't see a gun, a gun had never been introduced
5 into any one of the fights. What reasonable basis does he
6 have to believe at that point when he hasn't seen the gun,
7 doesn't know where it is, doesn't know what's been done with
8 it. At that point, what reasonable basis does he have to
9 make that claim that simply the absence of that gun from the
10 safe creates extreme emotional distress such that justifies
11 what he did. None, or at least not enough to rise to that
12 level of extreme emotional distress.

13 Now, ladies and gentlemen, I have argued - I've
14 argued our position, okay? I just want to remind you if I've
15 done anything throughout the course of this statement or this
16 argument that I've made, if I've misspoken, I apologize and I
17 certainly don't mean to do that. It was not my intention.
18 But I think this - what I have outlined establishes beyond a
19 reasonable doubt that Tracy Scott shot and killed his wife,
20 he did so intentionally. He did so intentionally. He knew
21 what he was doing. Okay? If you find that, you can
22 certainly find the other two possibilities under that fourth
23 element.

24 I also submit to you, ladies and gentlemen, that
25 there's no evidence to support this idea, even by a

1 preponderance of the evidence, that there are mitigating
2 circumstances that would justify convicting the defendant of
3 manslaughter. And I would invite you to read that
4 instruction about preponderance of the evidence because it is
5 lower than proof beyond a reasonable doubt. But you have to
6 be more convinced than not, basically, that he was under the
7 influence of extreme emotional distress for which there is a
8 reasonable explanation or excuse. And I would submit to you
9 that the evidence that we have presented, he is guilty beyond
10 a reasonable doubt of murder, and there's no evidence to
11 support reason, excuse, or justification to reduce this down
12 to a manslaughter. So I would ask you to go back, consider
13 the law, deliberate the facts, take your time, talk about
14 them. And when you do so, after you've done that, return a
15 verdict of guilty of murder against Mr. Scott because that is
16 precisely what he did. Thank you.

17 THE COURT: Mr. Gale?

18 MR. GALE: Mr. Sturgill is talking about what
19 happened and he's saying, Look, what happened - did I say Mr.
20 Scott or Mr. Sturgill? Anyway, the prosecutor, he's talking
21 about this and he's saying, what happened does not justify
22 what Tracy did. That absolutely true. The fighting between
23 them, everything that happened, it's not justified. And
24 that's not what special mitigation is. It doesn't justify
25 what he did. But if he was suffering from extreme emotional

1 distress, it mitigates what he did. Okay. There's a big
2 difference under the law. Okay? You've heard of self
3 defense. Self defense in Utah is called justification.
4 Okay? And the reason we call it justification is because if
5 somebody comes up to you and points a gun in your face, you
6 are justified in shooting them back because you've been
7 threatened. You can shoot them back and you're not guilty of
8 any crime. Okay?

9 But here if you find that there is special
10 mitigation, we're not saying it's justified, we're saying it
11 mitigates it, meaning he is still guilty of a crime, it's
12 just not as serious. So that's what you're being asked to
13 do. Not to say that his - that what he did was right, not to
14 say that what he did was justified, but to say because he was
15 under extreme emotion, what he did was not as serious as
16 somebody who does it in cold blood. Okay. Mr. Strugill came
17 up and told you he shot her in cold blood. Absolutely
18 untrue. Cold blood means somebody who is not feeling any
19 emotion. Okay. You heard that there was so much emotion
20 involved in this. You saw him on the stand. There was so
21 much emotion involved in this. Cold blood means something
22 that's unfeeling, and that's not what happened here.

23 Let me talk to you a little bit about what you're
24 going to do right now in the jury room. And you get some
25 instructions about that, about what you're going to do. As

1 soon as - I get to talk to you for a few minutes like I told
2 you at the beginning, and then Mr. Sturgill is going to get
3 up and talk to you again, and then you're going to go back to
4 the jury room. Let me talk about what you guys are going to
5 do when you go back to the jury room.

6 The judge told you a little bit and that's in
7 instructions 26, 27, and 28. Okay? If you want to turn to
8 those with me you can. You don't have to. Instruction
9 number 28 says that you're going to go back to the jury room
10 and you're going to chose one of the people to be a
11 foreperson. What does a foreperson do? A foreperson is not
12 an advocate. I'm an advocate. Mr. Sturgill and Mr. Bastian
13 are advocates. What that means is that we choose a side, we
14 look at everything that is favorable for our side and we talk
15 to you about that. Okay. A foreperson, all of you when you
16 go back into the jury room, you're not advocates, you're
17 judges. What you do is you decide what happened and because
18 of what happened, today we're asking that you decide what
19 crime Tracy's guilty of. And so a foreperson is somebody who
20 is going to help everybody in the jury room to discuss the
21 case and make sure that nobody is bullied or nobody is
22 ignored and that everybody in the jury room as a right to
23 have their opinion respected. It's not somebody that's going
24 to go back there and say, well, I think he's guilty of
25 murder, murder, murder, murder. Or somebody that goes back

1 there and says, I think he's not guilty, everybody needs to
2 agree with me about not guilty. A foreperson is somebody who
3 is going to help supervise and make sure everybody's opinion
4 is listened to and everybody gets respected.

5 And talking about that, the other two instructions,
6 26 and 27, talk about what you do as jurors. Now the first
7 thing it says in instruction number 26 is - I'm looking at
8 the second sentence. It says, you each must decide the case
9 for yourself. Okay? Each of you are individuals. Okay? We
10 have a psychologist, we have an HVAC repair person, we have
11 computer people, we have people that have different
12 experiences in life. Okay. What is reasonable to one of you
13 may be unreasonable to another. So what you need to do is
14 first decide for yourself what do I think about this case?
15 Do I think that there was extreme emotional distress? Do I
16 think that that extreme emotional distress was reasonable?
17 You decide for yourself, what do I think? And then when you
18 know what you think, you talk to everybody else and you see
19 if you can come to an agreement. And now there's some rules
20 about that. Okay? It says in instruction number 26 again,
21 you consult with one another with a view to reach an
22 agreement. So you talk to each other trying to come to an
23 agreement, but there's some conditions on that. It says, you
24 should not surrender your honest convictions concerning the
25 effect or weight of the evidence for the mere purpose of

1 returning a verdict or solely because the opinion of other
2 jurors. So what that means is you get back there and you
3 can't agree, then you don't agree just to agree.

4 A lot of times in our relationships then we learn
5 that look, rather than causing an argument, rather than cause
6 a fight, I will just agree and even though I know I'm right
7 and whoever I'm fight with is wrong. The jury room is not
8 the place to do that. The law forbids it. Okay? So when
9 you go back there, you're not supposed to do it, it says, if
10 you can do so without violence to your individual judgment.
11 Okay. So you get back there and there's one person against
12 everybody else, or it's half of you against the other half.
13 You don't say, well, you know, let's just agree because we
14 got to end this sometime, we've got to get out of here. It
15 doesn't matter if it's one person against everybody else and
16 that one person says, I'm sorry, I can't do it. Personally
17 it does violence to my individual opinion if I agree with you
18 guys. That's okay. If that happens - and that's on both
19 issues. It's on whether he committed the killing in the
20 first place, the murder, and it's also whether there is
21 special mitigation. Okay? And so you have to agree
22 unanimously on both of those, and it doesn't matter if it's
23 one against many or half against half. If you can't come to
24 an agreement, then what you do is you send a note to the
25 bailiff and you say, hey, we can't come to an agreement. And

1 the judge can either say, okay, go back and think about it a
2 little longer, or he can say, okay, that's a mistrial. And
3 then what happens is you all go home and then we all come
4 back another time and do it. It's happened to me before
5 several times in my career. One time it happened at 2:30 in
6 the morning. It happens, and that's okay.

7 And so when you go back to the jury room, you're
8 going to pick a foreperson, you're going to decide what you
9 think individually, and then you're going to talk to each
10 other and see if you can come to an agreement. Sometimes it
11 gets ugly back there. I've had juries crying before because
12 they're fighting with each other. It's a difficult task.

13 You may disagree on what a reasonable doubt is.
14 There isn't - people are not the same. And so one person may
15 say, well, I have a reasonable doubt, and somebody else can
16 say, how could you possibly have a reasonable doubt? But
17 people are different and what is reasonable to one person is
18 not reasonable to another. And so when you go back there,
19 then that's what you're going to be asked to decide.

20 Now let me talk a little bit about the evidence. I
21 agree with you that there's two things that you need to
22 decide. But to me there's a different two things than there
23 is to Mr. Sturgill. Mr. Sturgill said the first thing that
24 you have to decide is whether these elements have been met in
25 number 3 of your jury instructions. I don't think that's

1 really a question. I told you at the beginning that Tracy
2 killed his wife. He told you that he killed his wife. You
3 heard the 911 tape that he killed her. We stipulated to all
4 of that evidence coming in. You guys probably don't know
5 this, but in a lot of cases having all that evidence come in
6 can take twice as long because it hasn't been agreed to. But
7 it all came in real quickly in this case and the reason why
8 is because we have - we are not saying that he did not kill
9 her. He did. The question is does he deserve to have
10 mitigation because of extreme emotional distress.

11 So I'd ask if you could turn to instruction number
12 12 with me. This is the one that talks about extreme
13 emotional distress. And it says, a person acts under extreme
14 emotional distress when the then existing circumstances -
15 what that is is that's a fancy way to say a person has
16 extreme emotional distress when a person in his shoes or
17 having experienced what he has in life is exposed to
18 extremely unusual and overwhelming stress that would cause an
19 average reasonable person under that same stress to have an
20 extreme emotional reaction and they can lose self control.
21 That his reason is overborne by intense feelings such as
22 passion, anger, distress, grief, excessive agitation. Did we
23 hear about any of those things in this case? Did we hear
24 about anger? Absolutely we did. Did we hear about stress?
25 Yes, absolutely. That there had been years of anger, years

1 of distress. How about grief? Certainly you saw some grief
2 here. Excessive agitation. Absolutely there was excessive
3 agitation. I think all the witnesses up there talked about
4 these two being agitated with each other.

5 Now the issue is it has to be extreme. It can't be
6 just the normal agitation that people have in life, or the
7 normal grief that people have in their everyday life. And
8 that the normal things, but it has to be extreme in order for
9 it to mitigate what happened, in order for it to mitigate
10 Tracy's actions. Okay.

11 And so what - what did we - so the two things that
12 I think you're going to have to determine are, number one,
13 did Tracy have extreme emotional distress for which there is
14 a reasonable explanation or excuse, okay? And number two, did
15 his action substantially cause that extreme emotional
16 distress? For me, question number one, whether there was
17 extreme emotional distress, that's an easier question. I
18 think that that question you can easily answer yes. Okay.
19 The other question, whether he substantially caused it, I
20 agree. That is a difficult question and I think that is
21 where you guys are going to - most of your discussion will
22 take place.

23 Let me talk first about the extreme emotional
24 distress. Okay. What did you hear about extreme emotional
25 distress? You heard that there was years of fighting. You

1 heard that the gun that was in the safe had never gone
2 missing before. You heard that there was an open safe on the
3 floor and that there was a gun out of it. You heard that
4 during the years of fighting, a gun had never been
5 introduced, that no matter how ugly things had gotten, even
6 the domestic violence incident, nobody had ever used a weapon
7 other than a towel. Nobody had ever used a gun. A gun had
8 never been involved. You heard that on those - the day
9 before or the day of that Tracy was out working in the garage
10 after he had seen the safe open and he saw Teresa peek her
11 head around the door like this. And you heard what he said
12 is I'm scared to death. I thought that she had a gun. I was
13 scared, I called my mom.

14 You heard that Tracy talked to his friend, Troy, at
15 work that day and that or - I guess it was Friday, the day
16 before, but it was after he had seen the safe open. And Troy
17 is somebody that he had known for 15 years. And that he
18 talked to Troy and he said, Hey, Troy, do you think I could
19 come stay at your house? That he had never asked Troy
20 anything like that before. Yeah, he had moved out before. I
21 think you heard testimony that he had lived with his mom for
22 a while. But he'd never asked do you have a place where I
23 can stay before. You heard Tracy say it was worse than it
24 had ever been. Despite the 15 years or 18 years of fighting
25 and how ugly it had gotten, it had never been this bad,

1 including it was worse than 2009 when they had broken up and
2 separated when there was the protective order, it was worse
3 than even then. You heard his people from work that had
4 talked to him, Troy, Ron, Cody that that week he seemed much
5 worse than they had ever seen him before. You heard from his
6 mom and from his brother, that they talked to him, that they
7 could tell he was distressed, that things were worse than
8 they had seen previously. And then you even heard from Cody
9 Lever that things had seemed to - that was the visiting
10 teacher, Teresa's visiting teacher, she said things seemed
11 much worse than they had been in the past. And so all of
12 these people had said this is worse now. Things were worse
13 than they had been before.

14 So things had gotten worse. There were elements
15 that had never been there before. Mr. Sturgill told you,
16 look, this was the norm. They fought all the time and this
17 was the norm. And yes, absolutely fighting was the norm for
18 the two of them. Okay. But fighting to this extent and
19 having guns introduced was not the norm. And having a gun, I
20 don't know who on the jury has guns. We didn't ask you that
21 in the jury questionnaire. I told you guys the last time I
22 shot a gun was when I was taking hunter safety when I was 14
23 years old. But having a gun, everybody knows guns are
24 dangerous. They had safes in their house. Most people who
25 have guns had safes in their house because they can kill.

1 There was a gun missing from a safe and you heard Tyson and
2 Thayne say that they had never seen mom's gun out of the safe
3 before. But Tracy tells you that there was a gun out of the
4 safe. That caused him extreme distress.

5 Now, he's not just making that up that Teresa had a
6 gun. He's not just making up that that gun was out of the
7 safe. There's evidence that that gun was out of the safe.
8 It was out of the safe when the police went there the day of
9 the homicide, when the police went into the room and that gun
10 was on the bed. There was a holster on top of it. Okay? It
11 was un-holstered, sitting on the bed, the same bed that
12 Teresa was laying on. They fingerprinted the gun. You
13 remember I asked quite a bit about fingerprints. And the
14 reason I was asking about fingerprints is because they didn't
15 find fingerprints on the gun to know whether Teresa had
16 handled that gun recently, whether Teresa had removed the gun
17 from the safe, or whether Tracy was the one who removed the
18 gun from the safe. And that would have been very helpful if
19 we would have had something like that. If Tracy's
20 fingerprints had been found on the gun and not Teresa's, that
21 would be helpful to you. If Teresa's fingerprints had been
22 found on the gun and not Tracy's that would be helpful to
23 you. That gun was loaded. It was fully loaded. You
24 remember they asked Tracy if that gun was loaded. I believe
25 it was the 911 call, and he said, I don't know. Or I

1 remember what it was - it was officer - there was Low and
2 Coble. It was Officer Coble that he told him that -
3 officer he said there's another gun in there and they asked
4 if it was loaded, and he said, I don't know.

5 The - Doug Squire, the evidence technician says,
6 well, we didn't find fingerprints. We only find one of every
7 - one out of every 10 cases I think he said it's like five
8 percent of the time, which would be maybe a half of a time
9 out of every 10 cases. But not only did they fingerprinted
10 the guns, but they fingerprinted the guns, the clips, each
11 live round which there was eight to 10 live rounds in there.
12 They fingerprinted the shell casings and they fingerprinted
13 the cell phones. And they found no fingerprints on any of
14 them. Okay? Even if we accept that they only find five
15 percent, fingerprints on five percent of the items that they
16 fingerprint, that's a whole bunch of items. By my count it's
17 probably 20-something items, and there's no fingerprints.

18 But - and so we don't know there is no evidence to
19 disprove the fact that Teresa took that out of the safe. And
20 there is evidence that that gun was out of the safe.
21 Everybody, Thayne and Tyson both told you, that's my mom's
22 gun; that nobody testified that they ever saw Tracy with that
23 gun.

24 So the fact that there is a gun out, that there is
25 an open safe, that the two of them had been fighting for

1 years, I think somebody in his situation with the history
2 which he has had with the amount of fighting that they had
3 would react in the same way and be under emotional distress,
4 would have extreme emotional distress.

5 So the second question is was that extreme
6 emotional distress caused by his own conduct? And
7 instruction number 13, you can turn to that if you want to,
8 it's a short one, it just says, emotional distress does not
9 include distress that is substantially caused by the
10 defendant's own conduct. There's an important word there,
11 and the important word is substantially because I don't think
12 anything is 100% one person, zero percent the other person.
13 But here it says it has - if his emotional distress was
14 substantially caused by his own conduct, then he doesn't
15 qualify for the mitigation. What it's sort of saying is,
16 look, you know, if you do something under extreme emotion,
17 then that makes it less serious unless it's your fault,
18 unless it is substantially your fault that you have those
19 extreme emotions. Okay?

20 So let's talk about that. Was Tracy substantially
21 responsible for the fights over the years? I think so. I
22 mean, he was at least - even in his own words, "we were at
23 each other's throats, you know, she would give and take, I
24 would give and take." So over the years the two of them, I
25 think shared fairly equally in the fights. Almost everybody

1 who testified agreed to that.

2 Now when you assess the credibility of witnesses,
3 okay, one of the things that you think about is does this
4 person have a bias, does this person have a motive to lie.
5 You heard from two families. Okay? You have heard from the
6 Jerretts. You heard from Teresa's mom and dad. You heard
7 from Tracy's mom. You heard from Tracy's brothers. And
8 everybody seems to say, well, yeah, they were - they were
9 both at each other's throats. Okay? You heard the guys from
10 Tracy's work - and obviously, you know, guys from Tracy's
11 work they know Tracy better than Teresa. And they said,
12 Well, we heard yelling on the phone and she would pester and
13 pester and keep calling and calling. And so those people are
14 people that know Tracy better than Teresa. Okay.

15 So what the State wants to tell you is, look,
16 there's really only three people that know about the
17 fighting, and that's Tracy and his two sons.

18 Those are good boys. It truly - it truly breaks my
19 heart, you know, what happened to those two boys. And,
20 excuse me, when they think about their dad in retrospect
21 about what happened, they're thinking about their dad who
22 killed their mother. And they're going to think about all of
23 the negative things that their dad did. The times that he
24 hurt their mother. The times that he said he was going to
25 kill their mother. And they're going to think about that,

1 they're going to remember that. When they think about their
2 mom, they're going to remember their mom fondly. I think
3 they're trying, absolutely trying to be honest with you and
4 tell you the truth. But our memories are not like
5 photographs. You don't have a memory where you take a
6 photograph in time and it's frozen. Our memories are
7 affected by events that happen subsequent to that memory.
8 And they're colored and contaminated by subsequent events.

9 Tyson said, I never heard my - I never heard my mom
10 criticize my dad. And Thayne said the same thing. And I
11 don't want to insinuate any ill will here at all. But when I
12 - when I asked Thayne about whether Teresa ever called Tracy
13 stupid, and he said, yeah, just about him not graduating from
14 high school. He admitted that Teresa had said you're dumb
15 because you're not - you didn't graduate from high school.
16 When I asked him about, well, has she ever said that you're
17 smarter than your dad? And he admitted that she had said
18 things like that too. And so these boys I think they - they
19 certainly love their mom, and you know, I'm sure they
20 struggle with loving their dad. And all the testimony was
21 that they did love their dad before this happened. But, you
22 know, they don't want to say, yeah, my mom yelled at my dad;
23 yeah, my mom said things to my dad, negative things to my
24 dad. They don't want to say that it was their mom's fault,
25 what happened. And even if you found special mitigation,

1 it's not saying it's her fault what happened and it's not
2 saying it's okay what happened. What it's saying is just
3 that because this was a crime of emotion, then Tracy is not
4 as culpable as somebody who does something when they're
5 thinking straight, when they're not overcome by emotion.

6 In the short time leading up to Teresa's death, we
7 heard about a few things that happened that week. We heard
8 about the fight about the car pool car, taking the Honda
9 instead of the Durango. We heard about the fight about the
10 oil. We heard about the gun being missing from the safe and
11 her looking around the corner. We heard about her talking on
12 the phone with her mom and then hamming it up, knowing that
13 Tracy was listening. Tracy - and so the question you have to
14 look at there is did Tracy substantially cause this extreme
15 emotional distress he was feeling on Friday and Saturday?
16 Did he - we heard - he did horrible things and there's no
17 question back in 2009 the domestic violence incident, that
18 that was a horrible thing. Some of the things that the boys
19 said about going down to Nephi and that whole thing about
20 what happened when they came back for the garage door. It
21 was an awful thing. He was angry, out of control, mean.
22 That was back in 2009. After that 2009 incident, nobody said
23 they ever saw Tracy violent with Teresa after that. It was
24 after that the two of them tried to repair their
25 relationship, that Thayne said they went through the temple

1 and that's the good time that he remembers with his parents.
2 And so all those things that happened in the past I think
3 were in the past.

4 And then during that two-week time period, they
5 started I guess earlier than the two weeks, but it really hit
6 a head that week. We didn't hear anything about Tracy
7 calling Teresa names during that time period. We didn't hear
8 about him being violent with her. We didn't hear anything
9 about him trying to hit her with a car. During that short
10 period before it happened, what we heard about is, well,
11 there was a fight over the car. What was the fight? Mom was
12 mad because whatever, too many miles on the car. Did - there
13 was a fight about the oil, that Tracy had spilled the oil.
14 What we heard about was the fights with Teresa getting angry
15 at Tracy, Tracy responding back, and then a gun.

16 He didn't substantially contribute during that time
17 period to what was going on. What made the normal fighting
18 and ratcheted it up a notch to the extreme emotional distress
19 he was experiencing on that day. Tracy contributed to his
20 extreme - to his emotional distress. There's no question.
21 But the question is did he substantially contribute to it,
22 the distress he was feeling on that day. And I don't think
23 that you can find that.

24 Let me talk a little bit about the burden of proof
25 here. A defendant when they're charged with a crime, they

1 have to be found guilty beyond a reasonable doubt. You have
2 an instruction that talks about that that says, proof beyond
3 a reasonable doubt is that they have to be firmly - you have
4 to be firmly convinced he committed the crime. Okay. And I
5 believe that the State has put on enough evidence to firmly
6 convince you that Tracy killed Teresa. But then when you're
7 talking about the special mitigation, it's a little bit
8 different. You don't have to be convinced beyond a
9 reasonable doubt that he was acting under extreme emotional
10 distress. That's not the way it works. The extreme
11 emotional distress you have to be convinced by a
12 preponderance of the evidence. Okay. And that's a little -
13 that's a little different. And you have a jury instruction
14 that talks about the preponderance of evidence and that's
15 instruction number 18. If you can turn to that.

16 This is the level of proof that you need to be
17 convinced by for the extreme emotional distress. And what it
18 says is, proof by preponderance of evidence means proof that
19 a fact is more likely to be true than not. Okay. So you
20 don't have to say, I'm firmly convinced, or I'm convinced
21 beyond a reasonable doubt that there is - that there was
22 extreme emotional distress and that Tracy did not
23 substantially cause it. Another way of saying this is proof
24 by greater weight of the evidence, however slight. And so
25 that means that if you think that it was likely, no matter

1 how slight, okay, even if it's 51% versus 49%, even if it's
2 just barely, then that's enough for you to find extreme
3 emotional distress.

4 Let me - let me make a confession to you guys and
5 tell you - tell you something about myself. I've been
6 divorced before. I'm on my second marriage. My kids were
7 with my first wife. I have three children that are now
8 adults with the exception of my 16 year old daughter with my
9 first wife. I have, you know, I've been through lots of
10 things in my life, serious injuries. I've had kids in
11 trouble. I had deaths. Traumatic accidents. In my life
12 when I have experienced the most extreme emotions, the most
13 grief, the most anger, the most distress, the most agitation,
14 is when, during the break up of my marriage. All of you have
15 been in relationships in your life. There is nobody that can
16 get you as upset as the person you love the most, your
17 spouse. There's nobody that you can have more grief about.
18 Sometimes the person you love the most is the person that can
19 get to you the most.

20 And here there - it's horrible what happened here.
21 But the law says, look, if somebody goes out and kills
22 somebody and there's no emotion involved, it's more serious
23 than when there's a lot of emotion involved because we know
24 we all do stupid things when emotions are involved. History
25 is replete with instances where the people, under emotion,

1 have done stupid things. Presidents, kings, wars have been
2 fought because somebody has emotions. People have been
3 killed because somebody is acting on emotions. We know that
4 people do stupid things from their acting under emotion, and
5 the law says if that's why somebody does something, it's not
6 as serious because we recognize that when people act
7 emotionally they do dumb things. Tracy did something stupid.
8 He regrets it. He's - we're not asking - we're not telling
9 you it's okay. We're not asking you to find him not guilty.
10 What we're asking you is to just find that because he did it
11 in an emotional state, it's not quite as serious. That's
12 what we're asking. And that's why I'm asking you to find the
13 special mitigation. That's all I have. Thank you.

14 THE COURT: Mr. Sturgill?

15 MR. STURGILL: Thank you, Judge.

16 911 tape plays

17 TAPE VOICE: March 23, 2013, 18:53:51.

18 Phone dials. Phone rings.

19 DISPATCHER: 911, what's the address of your
20 emergency?

21 TRACY: 455 East 300 South.

22 DISPATCHER: Repeat the address for verification.

23 TRACY: 455 East 300 South, Salem, Utah.

24 DISPATCHER: Salem?

25 TRACY: Yep.