IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. DAVID BRYCE JONES, Defendant/Appellant.	Case No. 20170815 -CA

Brief of Appellant

Appeal from convictions for abuse, neglect or exploitation of a vulnerable adult, and unlawful dealing of property by a fiduciary, both second degree felonies, in the Third Judicial District, Salt Lake County, the Honorable James T. Blanch presiding.

Deborah L. Bulkeley (13653)
CARR | WOODALL, PLLC
10808 S. River Front Pkwy., Ste. 175
South Jordan, UT 84095
Telephone: 801-254-9450
Email: deborah@carrwoodall.com

Counsel for Appellant

Sean D. Reyes, Esq.
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Counsel for Appellee

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e).

INTRODUCTION

David O. Jones ("David") and his son, David Bryce Jones ("Bryce"), always had a close relationship, and they formed multiple businesses together over the years. Bryce wanted nothing more than for those businesses to be profitable for his father. Unfortunately, their most recent venture—a restaurant—was not successful, despite Bryce working full time to make it work while also caring for his father. While Bryce worked to open the restaurant, David became unable to care for himself, so Bryce moved him to an assisted living facility. During that time, following his father's wishes and an assurance from the assisted living facility that he could defer payments, Bryce took out loans from David to try to

salvage the business. In doing so, he did not knowingly misuse his father's assets or put his father at risk.

STATEMENT OF THE ISSUES

1. Did trial counsel render ineffective assistance of counsel by not objecting to improper expert testimony by lay witnesses, and not objecting to improper other acts evidence, and in stipulating to erroneous jury instructions,?

Standard of Review. Ineffective assistance of counsel is a question of law. *See, e.g.*, *State v. Clark,* 2004 UT 25, ¶ 6, 89 P.3d 162. To the extent any of these issues were not invited error, they may also be reviewed for plain error.

Preservation. Ineffective assistance of counsel may be raised for the first time on appeal.

2. Is the exploitation of a vulnerable adult statute unconstitutionally vague?

Standard of Review. "A statute's constitutionality is a question of law" reviewed "for correctness, giving no deference to the district court." *State v. Tulley*, 2018 UT 35, ¶ 29, 870 Utah Adv. Rep. 29.

Preservation. This issue was preserved by written and oral argument. R174-184, R282-300, R304-311, R950-960.

3. Did the trial court err in finding sufficient evidence to send the case to the jury?

Standard of Review. The Court gives deference to the jury's verdict and will reverse for insufficient evidence only if it determines that "'reasonable minds

could not have reached the verdict.'" *State v. Workman*, 2005 UT 66, ¶ 29, 122 P.3d 639 (quoting *State v. Widdison*, 2001 UT 60, P 74, 28 P.3d 1278).

Preservation. This issue was preserved at R753, 957-58. To the extent that it was not preserved, the issue may be reviewed for ineffective assistance of counsel and plain error. *See, e.g.,* S*tate v. Holgate,* 2000 UT 74, ¶ 17, 10 P.3d 346.

4. Was it ineffective assistance of counsel to not seek to merge Bryce's convictions where he was convicted of two crimes for just one act?

Standard of Review. "If trial counsel fails to request the consolidation of charges under the merger doctrine, and consolidation would be in order, trial counsel has failed to provide effective assistance of counsel." *State v. Perez-Avila*, 2006 UT App 71, ¶ 9, 131 P.3d 864.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rules are reproduced in Addendum A:

Utah Code Ann. § 76-1-402;
Utah Code Ann. § 76-5-111;
Utah Code Ann. § 76-6-513;[1]
Utah R. Evid. 404;
Utah R. Evid. 701;
Utah R. Evid. 702.

[1] Unless otherwise indicated, all references to the Utah Code are to LexisNexis, Lexis Advance through the 2018 Second Special Session.

STATEMENT OF THE CASE

A. Statement of Facts.

David Bryce Jones ("Bryce") and his father David Jones ("David") had a close relationship. R802. Bryce is an only child and is devoted to his father. R787-88, R802, 806. Bryce "loved his dad. He wanted to make him proud." R787, 788.

Bryce wanted to make sure David was well cared for. R785. Although David had eight siblings, he was not very close to them, seeing them only once a year or so at family gatherings. R599, 803. David had lost two wives to dementia. R802-803. After David second wife died, Bryce became his main companion. R802-803.

Bryce lived in Salt Lake City and would visit his father who lived in St. George every month. R609, 804. The two also travelled together often. R802-803. Over the years, David freely gave money to Bryce and partnered with his son in several businesses. R804, R811. David "was always looking for the big score." R811.

In 2010, David—who was then 86-years-old and worried that he may develop dementia—executed a general durable power of attorney that named Bryce as his agent. R806; State's Ex. 24. Around that time, David and Bryce decided open a restaurant together. R806. The two formed an LLC and they eventually found a location in Sugarhouse for a neighborhood pub and restaurant they called "Brewhaha." R806. Although David had started to show early signs

of dementia sometime in 2011, he was still living independently in St. George. R808. He would travel to Salt Lake to check on the progress in getting the restaurant going. R769, R784-85, 809. He went shopping, attended biweekly temple sessions, and cooked and cleaned for himself. R813. In addition to investing in the business, David gave Bryce money for his living expenses so that Bryce could dedicate all his time to the restaurant. R811.

For much of 2013, Bryce was working full-time trying to get Brewhaha open and operational. R810-811. David would visit to check on the progress. R769, 809. Mike Davis spoke with David "on numerous occasions" in 2013 while helping to remodel the restaurant, and also a couple times at Bryce's house when he had dinner there. R768-69. David would visit the construction site and would inquire about work being done.[2] R769-70, 774-75. Mr. Davis testified that David was "coherent and lucid." R770. Robert Eagle also met David five to ten times while helping remodel the restaurant. R777-78. David was "supportive" of the project and seemed "just fine" cognitively. R778. John Ross, an investor in Brewhaha, spoke with David occasionally in fall 2013. R756-57. Mr. Ross testified that David seemed coherent and interested in the restaurant. R756-57. Tiffany Holcomb, Bryce's friend who helped at Brewhaha before and after it opened, saw David at the restaurant "[a]bout half a dozen times," including once

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[2] Although Mr. Davis' testimony did not provide an exact time frame he appeared to be referring to David visiting the site in 2013, both before and after he moved to Salt Lake. *See* R769-70, 774-75, 809.

before he moved up from St. George. R784-85. She also visited David at Highland Cove. R784.

In late September 2013, after driving home from a vacation, David became severely dehydrated and disoriented. R812. David was checked into the emergency room and Bryce immediately went to see him. R812. After that incident, David was no longer able to live independently. R813. Bryce made arrangements for David to move to Highland Cove, an assisted living facility in Salt Lake County. R813. He was checked in at "level A," the least amount of care for residents, which included medication management, and other living assistance as needed. R525-26. After moving to Highland Cove, David remained very interested in Brewhaha, and Bryce would take him on visits to the site. R769-70, 774-75, 756-57, 784-85, 809, 815-816.

Brewhaha opened in mid-December, 2013, but although the DABC had previously told Bryce that the restaurant would receive a liquor license on Tuesday, December 16, 2013, the board instead voted to postpone the approval for three months. R817. The partners knew that without a liquor license, the restaurant would almost certainly fail and had to decide whether to move forward. R817-818. In a final effort to salvage the business, Bryce spoke with Cody Tower, Highland Cove's general manager, who agreed to allow David to

defer his approximately $3,000.00 monthly payments.[3] R818. But in March, the liquor license was again denied. R819. During this time, Bryce updated Mr. Tower on the business and finances every month. R546, 825. Bryce spoke with Mr. Tower on May 1, 2014 "per schedule." R820. On May 23, 2014, Highland Cove sent Bryce an eviction notice. R521, 544, 820; State's Ex. 4.

Bryce was surprised because of his arrangement with Mr. Tower. R820-21. He asked if starting to make payments would cancel the eviction, and was told "yes." R820-21. Bryce contacted Mr. Tower and made a $3,000 payment. R521, 820-21; State's Ex. 3. He also looked into other arrangements in case his father needed to be moved, which included daily care by certified nurse assistants. R786, 823. However, when Bryce told Mr. Tower that he could move David out, Mr. Tower said there would be no need to do that because Highland Cove work with him on the arrearages. R824.

In July 2014, the partners moved Brewhaha to a new location and changed the name to Gusto. R822. However, Bryce was ultimately unable to save the business or his father's investment; Gusto closed in early 2015. R826. Before then, Bryce had started to make regular payments. R826.

Bryce's actions were based on his understanding that his father wanted the business to succeed and that Highland Cove was willing to work with him on the

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[3] Mr. Tower testified that although he recalled speaking to Bryce about the bills and the business, he did not recall any agreement to defer payments. R541-42, 546, 553.

arrearages. R819, 826. It was also based on his understanding that David had authorized him, in the power of attorney, to manage his finances, and that David approved of his actions. R828, 844; State's Ex. 24.

A public guardian was appointed in October 2014. R567. Bryce provided the guardian with David's financial information. R570. Bryce unsuccessfully tried to get the guardian to pay certain bills and the guardian refused. R571-72, 575-76, 828. David told Bryce that he wanted him to remain in control. R828. For that reason, Bryce attempted to regain control of David's finances to ensure his bills were paid. R828. The State presented no evidence that David's standard of living actually suffered. David's bills were brought current and he continued to live at Highland Cove. R969. B

B. Summary of Procedings.

On December 5, 2015, David was charged with two counts of abuse, neglect, or exploitation of a vulnerable adult, and two counts of unlawful dealing of property by a fiduciary, all second degree felonies from October 31, 2013—the date David checked into Highland Cove—to October 31, 2014. R1-5. The information was amended to one count of abuse, neglect, or exploitation of a vulnerable adult, and one count of unlawful dealing of property by a fiduciary, both second degree felonies from October 31, 2013 to February 1, 2015. R89-93, R135-37, 163-64.

Motion to Dismiss. Before trial, trial counsel moved to have the charge dismissed on the basis that Section 76-5-111(4)(a)(iii) was unconstitutionally vague. R174-184. *See* Utah Code Ann. § 76-5-111(4)(a)(iii) ("A person commits the offense of exploitation of a vulnerable adult when the person: *unjustly or improperly* uses or manages the resources of a vulnerable adult for the profit or advantage of someone other than the vulnerable adult."). Trial counsel argued that, like a similar Florida law declared unconstitutional, Utah's use of the words "unjustly or improperly" to describe prohibited conduct was too vague to give defendants notice. R175-83; R304-311. The trial court deferred ruling on that motion until after trial. R324; R950-960. After trial, the State argued that Bryce could not show the statute was unconstitutionally vague as applied to him. R282-300. The trial court ruled that the statute was constitutional "under the facts and circumstances of this case" as applied to Bryce and facially. R959.

Expert Testimony. The State provided notice of just one expert witness—Perrine Anderson, a nurse practitioner, who the State expected to testify to David's treatment plan and mental health. R152-56. Two of the State's lay witnesses—Kimberly Mack and Cory Tower—also provided expert testimony to that effect at trial. R152-56. Mr. Tower's testimony came after the trial court instructed him that he could only testify as to his personal knowledge. R534. Trial counsel objected to Mr. Tower's opinion testimony but withdrew that objection based on his psychology degree. R538-39. No objection was raised to

Ms. Mack's opinion testimony as to David's mental capacity, including on dates on which she did not observe him, which was based on her training and experience. R668, 678-79, 682-83.

404(b) Evidence. The State did not provide Bryce notice of any 404(b) evidence. R41. Although the probable cause statement and preliminary hearing did not mention it, the State planned to introduce evidence that Bryce spent $20,000 on his father's credit card in fall 2014 and other evidence. R374. Before trial, counsel argued that the information alleged "only the non-payment of money to the assisted living home" and other evidence of where Bryce used the money should be excluded because the State failed to provide the requisite Rule 404(b) notice. R365-66. The State argued that none of the evidence related to the charged conduct from October 31, 2013 to February 1, 2015 was 404(b) evidence. R169-70, R367. The trial court ruled that the State would be limited to evidence within the scope of discovery and the amended information:

> "Anything that was not turned over in discovery is not going to be admissible.... If it's relevant to what's charged in the information, then it's admissible. *If it is ... evidence of other bad acts outside the scope of what's charged in the information, then I will hear an argument that it's not admissible because you didn't give the 404(b) notice that you were required to do because the defense asked for it and they were entitled to it.*"

R375 (emphasis added). During trial, the State introduced two key pieces of evidence of Bryce's conduct that feel outside the scope of what was charged in the information.

First, the State introduced evidence from an eviction proceeding in which Bryce asserted that David lacked capacity to sign a lease in March 2013—roughly six months before the charged conduct occured. R735-38; State's Ex. 23. Bryce and David both signed the lease for the building where Brewhaha would be located. State's Ex. 23. To protect David from the eviction proceeding, Bryce took David's name off of the LLC, and asserted that David was not a proper defendant because he lacked capacity to sign the lease. R735-38, 807-08. Although David's signature was required on the lease, he was not an owner of the LLC that was formed to rent the building. R735-38, 838.

The State used this evidence of a prior act to assert in opening and closing arguments that Bryce was dishonest: "The judge has instructed you. If he lies on one occasion … whether he's competent or incompetent six months later, you can disregard all of his testimony." R877; R501-502. The State also used the lease to argue that Bryce knew he was not acting in David's best interest: "Was he really looking out for his dad's interest when he had his dad sign the lease and was he competent? …. Having his father sign the Brewhaha lease, which is described as a horrible lease." R877-879.

Next, trial counsel stipulated to the State's introduction of unauthenticated hearsay evidence of a ledger sheet titled "Loans to David Bryce Jones" purportedly denoting loans made from 1998 to 2000 but no payments made on

them. R685-86; State's Ex. 20. There was no limiting instruction given. R228-246.

C. Disposition.

Mr. Jones was tried by a jury on June 27 and June 28, 2017. He was convicted of abuse, exploitation, or neglect of a vulnerable adult and of unlawful dealing of property by a fiduciary, both second degree felonies. R252-253, R265. He was sentenced on September 14, 2018. R324-26. He timely appealed. R328.[4]

SUMMARY OF ARGUMENT

Ineffective Assistance of Counsel. Trial counsel was constitutionally ineffective in failing to object to improper expert opinion testimony by lay witness, 404(b) evidence that was introduced despite the trial court's pretrial ruling, and in stipulating to a jury instruction that lowered the State's burden of proof. Individually, or collectively, these objectively unreasonable actions by trial counsel prejudiced Bryce by allowing the State to unfairly bolster its case with evidence that played up David's incapacity, while strongly suggesting that Bryce was dishonest and had a propensity to take out loans without paying them back. It also allowed the State to lessen its burden of proof from knowing to reckless on the element of Bryce's awareness of the purported substantial risk of loss.

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[4] The verdict form, sentencing minutes, and notice of appeal are reproduced in Addendum B.

Unconstitutionally Vague Statute. The trial court erred in its ruling that the exploitation of a vulnerable adult statute is not unconstitutionally vague on its face or as applied to Bryce. The statute uses the vague terms "improper" and "unjust" to define when it is illegal to use a vulnerable adult's resources for someone other than a vulnerable adult. Because of the subjective meaning of those terms, the statute provides virtually no notice of what conduct might be barred. It also did not fairly apprise Bryce of what conduct of his the State considered to be unjust or improper.

Insufficient Evidence. Bryce also believes the evidence was insufficient to convict him because he did not know that he breached his duty to David or otherwise managed his resources unjustly or improperly, or that he knew of a substantial risk of loss.

Merger. Bryce's two convictions should merge because he was convicted of two second degree felonies for just one crime. The only evidence presented to the jury supported just one conviction and the State did not argue that there were any independent elements for either crime.

ARGUMENT

I. TRIAL COUNSEL WAS CONSTITUIONALLY INEFFECTIVE

"The sixth amendment to the United States Constitution" guarantees the accused "'the right to effective assistance of counsel.'" *State v. Templin*, 805 P.2d

182, 186 (Utah 1990) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970) (additional citation omitted). A defendant's right to effective assistance is denied when counsel's performance falls "below an objective standard of reasonableness" and there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" when considering the "totality of the evidence [and] taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." *Id.* at 694-96. It does not require a defendant to show that counsel's deficient representation "more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693-94. Rather, the standard is met if counsel's ineffective assistance can render the proceeding "unreliable, and hence the proceeding itself unfair." *Id.* at 694.

"'An error is prejudicial if it tends to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advise[s] the jury on the law.'" *State v. O'Bannon*, 2012 UT App 71, ¶ 41, 274 P.3d 992 (quoting *State v. Penn*, 2004 UT App 212, ¶ 28, 94 P.3d 308). "A court must 'consider the totality of the evidence before the judge or jury' and then 'ask if the defendant has met the burden of showing that the decision reached would reasonably likely have

been different absent the errors.'" *State v. Garcia*, 2017 UT 53, ¶ 42 (quoting *Strickland*, 466 U.S. at at 695-96).

Bryce received ineffective assistance of counsel at trial and was prejudiced as a result. His trial counsel stipulated to erroneous jury instructions, failed to object to the admission of other acts evidence despite a pre-trial ruling that it would be excluded, and did not object to two expert testimony by two State lay witnesses.

A. It was ineffective assistance of counsel and plain error to not object to the expert testimony of Kimberly Mack and Cody Tower.

A lay witness may only give an opinion if it is "rationally based on the witness's perception;" "helpful to clearly understanding the witness's testimony or to determining a fact in issue;" and "not based on scientific, technical, other specialized knowledge within the scope of Rule 702." Utah R. Evid. 701. It is well-settled that if "testimony, 'opinion or otherwise,' is based on 'scientific, technical, or other specialized knowledge,' it is within the scope of rule 702 of the Utah Rules of Evidence and may not be admitted as lay fact testimony." *State v. Rothlisberger*, 2006 UT 49, ¶ 20, 147 P.3d 1176 (quoting Utah R. Evid. 702); *accord Ladd v. Bowers Trucking, Inc.*, 2011 UT App 355, ¶ 13, 264 P.3d 752 ("Lay witnesses can testify only to matters of which they have personal knowledge."). The State must give defendant notice of expert testimony. *See* Utah Code Ann § 77-17-13(1). Failure to do so, entitles the defendant to a

continuance, or appropriate sanctions including excluding the testimony "if a party deliberately violated" the notice requirement. *Id.* § 77-17-13(5). Generally speaking, expert testimony is not admissible unless the proponent can show that it "will assist the trier of fact and that the expert is qualified in the methods employed," and that "the principles or methods employed are reliable, have been reliably applied, and are based upon sufficient facts or data." *State v. Thompson*, 2014 UT App 14, ¶ 35, 318 P.3d 1221 (citing Utah R. Evid. 702; *Haupt v. Heaps*, 2005 UT App 436, ¶ 25, 131 P. 3d 252).

The State gave Bryce pretrial notice as to only one expert witness, Perrine Anderson, a nurse practitioner, who the State expected to testify to David's treatment plan and mental health. R152-56. Yet, at trial, the State also introduced expert opinion testimony as to David's mental capacity through two lay witnesses—Kimberly Mack and Cory Tower. Trial counsel unreasonably failed to hold the state to its burden "to establish that the testimony will assist the trier of fact and that the expert is qualified in the methods employed." *Thompson*, 2014 UT App 14, ¶ 35.

This improper use of lay witnesses to provide expert opinion testimony improperly bolstered the State's position that David lacked the mental capacity to agree to fund the restaurant or knowingly sign documents, and was harmful to Bryce because it tended to discredit Bryce and other witnesses who based on their

own observations believed David to be engaged and supportive of Bryce and the restaurant.[5]

1. It was objectively unreasonable to not object to Kimberly Mack's improper opinion testimony.

The State called Kimberly Mack, a social worker for Adult Protective Services, to testify as a lay witness. Ms. Mack met David Jones only once, on September 26, 2014, and conducted a cognitive assessment. R668, 686. Based on that one meeting, Ms. Mack testified that David had "significant memory impairment." R668. Despite having only met David once, Ms. Mack also testified that, based on her experience, David "did not have the capacity" to sign a letter authorizing Bryce to take out loans on November 26, 2013—nearly a year before she met him. R678-79. She also testified that David lacked capacity to sign a document on January 9, 2015. R682-83.

Ms. Mack's opinion as to the results of David's cognitive test were almost certainly based on her specialized training. Moreover, her opinions as to David's capacity on two occasions when she did not see him are not reasonably based on her own personal observations, but was by her own admission based on her knowledge and experience in her field. R678-79.

As stated, lay witnesses cannot give opinions that are not based on their personal observations. *See* Utah R. Evid. 701 (requiring lay witness opinion

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[5] The transcripts relevant to this argument are reproduced in Addendum C.

testimony to be "rationally based on the witness's perception"); *State v. Sellers*, 2011 UT App 38, ¶ 27, 248 P.3d 70 (lay witness's testimony as to defendant's level of intoxication on a certain date was improper because it was "not based on her own personal observation of him"); *State v. Rothlisberger*, 2004 UT App 226, ¶ 26 n. 5.

It was objectively unreasonable for trial counsel to not object to this testimony, first because failing to hold the State to its burden in introducing expert testimony was a failure "to make reasonable investigation or inquiry." *Thompson* 2014 UT App 14, ¶¶ 36-37 (objectively unreasonable to not inquire into expert's qualifications or report foundation where testimony hurt defendant's case). And, "the failure to object to inadmissible evidence may constitute deficient performance under some circumstances." *Id.* ¶ 36; *accord State v. Ott*, 2010 UT 1, ¶¶ 24, 33, 247 P.3d 344 (objectively unreasonable to not object to introduction of portions of victim impact statement at capital sentencing hearing). Here, trial counsel's failure to object to Ms. Mack's unqualified expert opinion testimony cannot be said to be a reasonable strategic decision because the testimony bolstered the State's position that David was incompetent while offering additional testimony that tended to discredit Bryce's testimony that David wanted to invest in the restaurant. Moreover, "trial counsel was not in a position to weigh the relative risks of objecting against the need to object without at least investigating whether [Ms. Mack] was qualified and

whether there was adequate foundation for" her opinion as to David's capacity. *See Thompson*, 2014 UT App 14, ¶ 42 (citing *State v. Hales*, 2007 UT 14, ¶ 83, 152 P.3d 321; *Wiggins v. Smith*, 539 U.S. 510, 536 (2003)).[6]

2. It was objectively unreasonable to stipulate to Cody Tower's improper opinion testimony.

Likewise, there was no reasonable strategic reason to concede to Cody Tower's expert opinion testimony as to David's ability to understand a document in which he gave Bryce permission to take out loans simply because had "psychology training."[7] R561-62. Like Ms. Mack, Mr. Tower's was listed as a lay witness, and his preliminary hearing testimony focused solely on the financial evidence, providing Bryce with no notice that he could be called as an expert.

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[6] The failure by the trial court to intervene constituted plain error, which requires showing obvious, harmful error. *See State v. Bond*, 2015 UT 88, ¶15, 361 P.3d 104. As a lay witness, Ms. Mack could not offer expert opinion, unless "qualified as an expert under rule 702 of the Utah Rules of Evidence, and all reliability, reporting, or otherwise applicable statutory commands must then be followed with respect to that testimony." *State v. Rothlisberger*, 2004 UT App 226, ¶ 20, 95 P.3d 1193 (quoting Utah R. Evid. 702). A trial court should intervene only where there is no "conceivable strategic purpose … to support the use of the evidence." *State v. Bedell*, 2014 UT 1, ¶ 26, 322 P.3d 697. Because it is well-settled that lay witnesses cannot provide expert opinion, and because there is no conceivable strategic basis why trial counsel would not object it should have been obvious to the trial court to intervene and exclude the evidence.

[7] Neither trial counsel nor Mr. Tower corrected the prosecutor's calling him a psychiatrist, which unlike psychology requires a medical degree.

As with Ms. Mack's testimony, trial counsel's stipulation to Mr. Tower's expert opinion relieved the State of its burden to show that his opinion would be helpful to the jury, that he was qualified in the methods employed, and that those methods are reliable. *See Thompson*, 2014 UT App 14 ¶ 35. As there was no evidence presented as to whether Mr. Tower had any specialized training into whether a patient such as David could understand certain things, trial counsel waived all ability to investigate and also allowed damaging testimony to be introduced without objection. *See, e.g., Thompson*, 2014 UT App 14, ¶ 36. It was therefore objectively unreasonable to stipulate to the unqualified expert opinion of Mr. Tower.

3. The expert testimony presented by Ms. Mack and Mr. Tower prejudiced Bryce.

To show prejudice, Bryce must show that there is a reasonable probability that the deficient performance is "sufficient to undermine confidence in the outcome" considering the entire evidentiary picture. *See Strickland*, 466 U.S. at 688, 694. The plain error harmfulness test is equivalent to the prejudice test for ineffective assistance of counsel. *State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1993)).

Here, the State had already introduced detailed evidence through the epert testimony of Perrine Anderson as to David's capacity. The additional improper expert opinion testimony by two lay witnesses as to David's capacity prejudiced

Bryce by lending credibility to the State's position that David lacked capacity due to progressive dementia during the entire period in question, including by providing Ms. Mack's unqualified expert opinion that David lacked capacity to sign a letter authorizing Bryce to take out loans on November 26, 2013—nearly a year before Ms. Mack met him. R678-79. She also testified that David lacked capacity to sign a document on January 9, 2015. R682-83. Mr. Tower's unqualified expert opinion that David would have a hard time understanding a document was likewise damaging. R561-62. These two opinions bolstered the State's argument that Bryce was able to used David's dementia to his advantage. In closing rebuttal, the State pointed to the testimony of "professionals" to argue that "[t]here's no question that this man had significant, significant dementia." R896, 899. The State added: "[T]here's a lot of evidence, maybe too much, and maybe we did a little overkill, but I don't think there's any question about his level of dementia." R899.

Because the State used the improper expert opinion testimony to bolster its case that, despite Bryce and his witness's lay testimony, it was undisputed by "professionals" that David lacked capacity. This is "sufficient to undermine confidence in the outcome" considering the entire evidentiary picture." *See Strickland*, 466 U.S. at 688, 694.

B. It was ineffective to not object to 404(b) evidence despite the trial court's ruling on the matter.

The State did not provide Bryce notice of 404(b) evidence as required by Rule 404(b)(2), Utah Rules of Evidence. R41; R375. The trial court ruled that because the State did not provide notice of the 404(b) evidence, "If it is … evidence of other bad acts outside the scope of what's charged in the information, then I will hear an argument that it's not admissible because you didn't give the 404(b) notice that you were required to do because the defense asked for it and they were entitled to it." R375.

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." Utah R. Evid. 404(b)(1). Although such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident," the prosecutor must give notice of such evidence to the defendant on request. *See id.* R. 404(b)(2). Thus, although bad act evidence is admissible "to show any element of the alleged crime," it should be excluded if "the *sole* reason it is being offered is to prove bad character or to show that a person acted in conformity with that character." *State v. O'Neil*, 848 P.2d 694, 700 (Utah Ct. App. 1993).

As stated, the State introduced two key pieces of evidence of Bryce's prior bad acts at trial:

- From December of 1998 to March of 2000, Bryce apparently took out loans, and there is no record of repayment. R685-86; State's Ex. 20. Trial counsel stated he had no objection. R686.

- In March 2013, Bryce and David both signed the lease for the building where Brewhaha would be located. R735-38. As a result of eviction proceedings, Bryce took David's name off of the LLC to protect him and asserted that David lacked capacity to sign the lease. R735-38, 807-08; *supra* pp. 10-11.[8]

These examples of Bryce's other acts went unchallenged by trial counsel despite the trial court's ruling that it would evaluate such evidence under Rule 404(b) and would be inclined to exclude evidence of Bryce's other acts that fell outside of the timeframe for the charged conduct due to the State's failure to give notice.[9]

1. It was objectively unreasonable for trial counsel to not object to the evidence of purported prior unpaid loans.

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[8] The relevant transcript pages and exhibit are reproduced in Addendum D.

[9] Given the trial court's pretrial ruling related to the 404(b) evidence, trial counsel should have at least held the State to its burden to show that it should be admitted despite not providing rule 404(b) notice, and that it would otherwise be admissible for a non-character purpose under the rule 403 balancing. *See, e.g., State v. Corona,* 2018 UT App 154, ¶ 26.

The evidence of apparently unpaid loans from David to Bryce from 1998 to 2000—a decade before the charged conduct—is a quintessential example of an unproven allegation of prior similar conduct that is inadmissible.[10] *See* Utah R. Evid. 404(b); *Huddleston v. United States*, 485 U.S. 681, 686 (1988) ("The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character."); *State v. Goodliffe*, 578 P.2d 1288, 1290 (Utah 1978) ("The rules of evidence require rejection of evidence of specific behavior to prove a character trait except evidence of conviction of crime."); *State v. Jamison*, 767 P.2d 134, 137 (Utah App. 1989) ("Evidence which goes to general disposition or that is unfairly prejudicial is not admissible."). Here, despite the trial court's pretrial ruling, defense counsel inexplicably stated he had no objection to the admission of an unauthenticated ledger.

There is no conceivable reason why trial counsel would argue that 404(b) evidence should be excluded, then stipulate to its admission particularly where the evidence served only to portray Bryce as having a propensity to not pay back his loans. This is not a case where "defense counsel made an affirmative decision

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[10] The ledger sheet titled "Loans to David Bryce Jones" is also an unauthenticated hearsay statement. *See* Utah R. Evid. 901 (requiring authentication of evidence). Although it is strongly insinuated from the testimony that the ledger was a notation of David's loans to Bryce, there was no testimony from anyone as to who wrote the ledger, let alone as to whether it actually represented loans from David to Bryce.

from the outset to utilize the 404(b) evidence to attack the State's case. *See, e.g,. State v. Bedell*, 2014 UT 1, ¶ 24, 322 P.3d 697. Rather, it is a case where trial counsel failed argue against the admission of damaging evidence of the same nature that he sought before trial to exclude. This cannot be said to be a "sound" trial strategy. *See e.g. State v. Larrabee*, 2013 UT 70, ¶ 22, 321 P.3d 1136 (objectively unreasonable to not object to argument based on previously excluded "inflammatory and prejudicial" evidence).

2. It was objectively unreasonable to not object to admission of the lease agreement.

This evidence was another example of a prior act that should have been subject to the trial court's 404(b) ruling. The State used evidence of Bryce's specific behavior some six months before the charged conduct allegedly occurred to show that Bryce was dishonest and to generally show his bad character.

Given the trial court's pretrial ruling as to 404(b) evidence there was no conceivable basis to not object under Rules 404(b) and 608, Utah Rules of Evidence.[11] The evidence that Bryce had previously testified that David lacked capacity to sign a lease well before the charged conduct occurred was particularly damaging to Bryce's credibility while also allowing the State to again attack Bryce's character. Again, this cannot be said to be a reasonable trial strategy

[11] Rule 608 prohibits the use of "extrinsic evidence … to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness."

where trial counsel had previously sought to exclude this evidence. *See e.g*. *Larrabee*, 2013 UT 70, ¶ 22.

3. Trial counsel's deficient performance prejudiced Bryce.

To show prejudice from the 404(b) evidence, Bryce must show that there is a reasonable probability that the deficient performance is "sufficient to undermine confidence in the outcome" considering the entire evidentiary picture. *See Strickland*, 466 U.S. at 688, 694. [12]

Here, not only did the State elicit 404(b) evidence despite the trial court's pretrial ruling, it also argued in closing that Bryce had a habit of violating his duties to David, for example by signing a lease while incompetent: "Was he really looking out for his dad's interest when he had his dad sign the lease and was he competent?" R876; R879 ("Having his father sign the Brewhaha lease, which is described as a horrible lease.") The State also used this evidence to attack Bryce's credibility. "The judge has instructed you. If he lies on one occasion … whether he's competent or incompetent six months later, you can disregard all of his testimony." R877. The prosecutor went on to argue that by previously arguing

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[12] Given the pretrial rule 404(b) ruling, the failure by the trial court to intervene constituted plain error, which requires showing obvious, harmful error. *See Bond*, 2015 UT 88, ¶15. A trial court should intervene only where there is no "'conceivable strategic purpose' … to support the use of the evidence." *State v. Bedell*, 2014 UT 1, ¶ 26, 322 P.3d 697. And the test for harm is the same as the test for prejudice under *Strickland*.

that David was incompetent to sign the lease, Bryce had intentionally deceived the court—This was an intentional act to draft a pleading to tell the court of law that his father was incompetent. Six months later … he testifies under oath at the APS hearing saying he is competent." R877. In rebuttal the State again used this evidence, "we know he lied, at least on one occasion, and that was he either lied when he said his father couldn't even understand the eviction proceedings … or he was completely competent at the time he signed these letters in January of 2015." R895. In addition there was no limiting instruction given to direct the jury as to how to consider the 404(b) evidence.

These were not "fleeting statements" and no curative instruction was given. *See State v. Wach*, 2001 UT 35, ¶ 46, 24 P.3d 948 (testimony that victim always wore alarm when defendant was around was "an isolated, off-hand remark"); *State v. Yalowski*, 2017 UT App 177, ¶¶ 18, 22 (victim's statement that defendant was "just constantly fighting with [her]. Getting violent" was fleeting and lacked detail). Rather, the testimony was intentionally elicited by the State and changed the entire evidentiary picture by painting Bryce as dishonest, and by showing that he had a propensity to take advantage of his father through conduct that was virtually identical to the charged conduct. *See State v. Landon*, 2014 UT App 91, ¶ 6 (no prejudice from prior "warrant arrest, without additional information about the general character of the crime or the existence of a conviction"). Here, the other acts evidence strongly favored the State's version of events and painted

Bryce as not credible. "[T]he possibility that [Bryce's] conviction reflected the jury's assessment of his character, rather than the evidence of the crime he was charged with, is not insubstantial." *Rackham*, 2016 UT App 167, ¶ 24. Its admission therefore undermines confidence in the verdict. *See id.*; *accord State v. Leber*, 2010 UT App 387, ¶ 19, 246 P.3d 163 (other acts evidence prejudicial where it undermined defendant's credibility and "the evidence presented at trial was not clearly supportive of either [the State's or defendant's] version of events"). In sum "'in the absence of the evidentiary errors, there is a reasonable likelihood of a more favorable outcome for" Bryce. *See State v. Rackham*, 2016 UT App 167, ¶ 24, 381 P.3d 1161 (quoting *State v. Harmon*, 956 P.2d 262, 271 (Utah 1998).

C. Trial counsel was ineffective for stipulating to an erroneous jury instruction.

Where counsel stipulates to erroneous instructions, this Court will review them "under the ineffective assistance of counsel doctrine." *State v. Malaga*, 2006 UT App 103, ¶ 7, 132 P.3d 703; *accord State v. Garcia*, 2017 UT 53, ¶ 48 (same). To show deficient performance, Bryce must show that the jury instruction erroneously lowered the State's burden of proof. *See State v. Apodaca*, 2018 UT App 131, ¶ 78 (citing *Barela*, 2015 UT 22, ¶ 27) (holding failure to object to instruction that "effectively lowered the State's burden of proof

… cannot be considered reasonable trial strategy"). To show prejudice, Bryce must show that considering "the totality of the evidence at trial," the "'jury could reasonably have found' the facts in [Bryce's] favor 'such that a failure to instruct the jury properly undermines confidence in the verdict.'" *See Apodaca*, 2018 UT App 131, ¶ 78 (quoting *Garcia*, 2017 UT 53, ¶ 42).

1. It was unreasonable to stipulate to Jury Instruction 31 because it improperly lowered the State's burden of proof.

This Court reviews "jury instructions in their entirety to determine whether the instructions, taken as a whole, fairly instruct the jury on the applicable law." [13] *State v. O'Bannon*, 2012 UT App 71, ¶ 15, 274 P.3d 992 (quoting *State v. Malaga*, 2006 UT App 103, ¶ 18, 132 P.3d 703). It is axiomatic that "our criminal code requires proof of mens rea for each element of a non-strict liability crime." *State v. Barela*, 2015 UT 22, ¶ 26, 349 P.3d 676. Thus, to accurately instruct on the law, jury instructions must state the mens rea that is required for each element. For example, a rape instruction must state the mens rea required for the element of sexual intercourse and for the element of nonconsent. *Barela*, 2015 UT 22, ¶ 26 (quoting *State v. Marchet*, 2009 UT App 262, ¶ 23, 219 P.3d 75). Likewise, an instruction on second degree felony child abuse must require that the jury find a defendant "had the requisite intent or knowledge to cause the victim serious physical injury." *See O'Bannon*, 2012 UT App 71, ¶ 41.

[13] The jury instructions are reproduced in Exhibit E.

Instruction No. 31 did not instruct the jury on the appropriate mental state because it allowed the jury to convict Bryce if it believed he acted recklessly, which is a lesser mental state than the knowing mental state required by statute. *See id.* A "knowing" mental state requires that a person "is aware of the nature of his conduct or the existing circumstances" and "when he is aware that his conduct is reasonably certain to cause the result." Utah Code Ann. § 76-2-103(2). A "reckless" mental state requires only that a person "is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur," i.e. "a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as view from the actor's standpoint." *Id.* § 76-2-103(3).

As charged, the unlawful dealing of property by a fiduciary statute requires that to be guilty, a person must:

> deal[] with property that has been entrusted to him as a fiduciary, or property of a governmental entity, public money, or of a financial institution, in a manner which the person *knows* is a violation of the person's duty *and* which involves substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted.

Utah Code Ann. § 76-6-513(2) (emphasis added). Jury Instruction 31 however only required the knowing mental state be attached to one element: the "violation of the person's duty." R238. It allowed Bryce to be convicted based on mere reckless as to whether the alleged conduct "involves substantial risk of loss or detriment to the owner or to a person for whose benefit the property was

entrusted." *Id.* As will be shown, a plain reading of the statute in context, along with the legislative intent, show that to be guilty a defendant must know that he is in violation of his duty and must know that his actions involve a substantial risk of loss to the owner or person for whose benefit the property was entrusted.

"'When interpreting a statute, this court's paramount concern is to give effect to the legislative intent, manifested by the plain language of the statute.'" *Utah State Eng'r v. Johnson (In re Gen. Determination)*, 2018 UT App 109, ¶ 22 (quoting *Green River Canal Co. v. Olds*, 2004 UT 106, ¶ 18, 110 P.3d 666 (quotation simplified)). The Court assumes, "'absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning,' and [it presumes] 'that the expression of one term should be interpreted as the exclusion of another" and "seek to give effect to omissions in statutory language by presuming all omissions to be purposeful.'" *Id.* (quoting *Aequitas Enters., LLC v. Interstate Inv. Group, LLC*, 2011 UT 82, ¶ 15, 267 P.3d 923 (quotation simplified)). The Court also reads "'the plain language of a statute as a whole and interpret its provisions in harmony with other provisions in the same statute and with other statutes under the same and related chapters.'" *Id.* (quoting *H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 32, 203 P.3d 943).

Here, the plain language of Section 76-6-513, when read in harmony with other provisions of the statute and related chapters is that the legislature intended for the knowing mental state to attach to the element of "involves a

substantial risk of loss…." As stated, a fiduciary cannot be charged unless he handles property in such a way that he "*knows* is a violation of the person's duty *and* which involves substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted." Utah Code Ann. § 76-6-513.

The "and" connects the "substantial risk of loss" element to the "violation of duty" element, including the knowing mental state. When taken in the broader context, it becomes more clear that the legislature intended for the knowledge element to be imparted to the "substantial risk of loss." Unlawful dealing by a fiduciary" appears in Part 5 —the "fraud" section—of Chapter 6 of the Utah Criminal Code. *See* § 76-6-412. It is punished according to the theft statute, Utah Code Section 76-6-412. *See id.* Fraud and theft both implicate purposeful deprivations of property, i.e., that a defendant must know that his conduct results in a loss (or substantial risk of loss) to the owner. *See, e.g., State v. Stevens,* 2011 UT App 366, ¶ 10 (acknowledging theft by receiving requires a defendant knows or believes property to be stolen); *State v. Gabaldon*, 735 P.2d 410, 412 (Utah Ct. App. 1987) ("The evidence must show that the defendant knew or believed the property was stolen and that he acted purposely to deprive the owner of possession of the property."); *State v. Andreason*, 2001 UT App 395, ¶ 8, 38 P.3d 982 (reversing forgery conviction where the evidence was insufficient to show defendant had purpose to defraud or knowledge of facilitating fraud). Indeed,

the first definition for fraud in Black's Law Dictionary is "A knowing misrepresentation of the truth to induce another to act to his or her detriment." Blacks Law Dict. Eighth Ed. 685 (2004) and the first definition of "theft" is "[t]he felonious taking and removing of another's personal property with the intent of depriving the true owner of it." *Id.* at 1516. That the statute does not actually require any loss suggests that the legislature intended a more culpable mental state. *See, e.g., State v. Pappas*, 705 P.2d 1169, 1173 (Utah 1985) (upholding theft by receiving statute's "belief" that property is probably stolen as an element, in part because the statute "proscribes a higher degree of misconduct. It requires the union of the culpable mental state and *all* the steps within the actor's power to complete the intended theft.).

In addition, at least one state has interpreted a statute with the same language to require the defendant know the substantial risk of loss be knowing. The New Hampshire misapplication statute to require three elements: "(1) the property was entrusted to the defendant as a fiduciary; (2) the defendant dealt with the entrusted property in a manner which he knew constituted a breach of his fiduciary duty; and (3) the defendant dealt with the entrusted property in a manner which he knew involved a substantial risk of loss to the owner of the

property or to a person for whose benefit the property was entrusted. State v. Merski, 123 NH 564, 568 (NH 1983) (interpreting NH Rev. Stat. § 638:11[14]).

Finally, Utah's statute was modeled after the Model Penal Code's parallel statute, section 224.13. Although the Utah statute does not follow the Model Penal Code verbatim, it "remains very similar to Model Penal Code section 224.13."[15] *State v. Winward*, 904 P.2d 1188, 1192 (Utah Ct. App. 1995);*accord State v. Frampton*, 737 P.2d 183, 195 (Utah 1987) (analyzing Model Penal Code commentaries where "there exists no meaningful legislative history concerning" the Utah Code section that was "modeled after a similar provision" of the Model Penal Code). The commentary to Section 224.13 of the Model Penal Code stresses that it applies only to a fiduciary "who applies or disposes of entrusted property in a manner known to be unlawful and to involve substantial risk of loss or detriment to the beneficiary," i.e. knows that the conduct is both unlawful and involving a substantial risk of loss.

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[14] "A person is guilty of a misdemeanor if he deals with property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is a violation of his duty and which involves substantial risk of loss to the owner or to a person for whose benefit the property was entrusted." NH Rev. Stat. § 638:11.

[15] "A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted." Model Penal Code of American Law Institute section 224.13.

In sum, the Unlawful Dealing by a Fiduciary Statute requires a knowing mental state as to the element of substantial risk of loss, and Jury Instruction 31 lowered the State's burden of proof. It was therefore objectively unreasonable for trial counsel to stipulate to that instruction. *See Apodaca,* 2018 UT App 131, ¶ 76.

2. There is a reasonable probability that the erroneous jury instruction impacted the outcome.

To show prejudice, Bryce must show that had a proper instruction been given, in the context of the "evidence before the jury and whether the jury could have found [that Bryce did not know of a substantial risk of loss] such that a failure to instruct the jury properly undermines confidence in the verdict." *See Garcia*, 2017 UT 53, ¶ 42.

Bryce was convicted of Unlawful dealing by a fiduciary based on evidence that he used his father's funds to open and run a business, rather than using those funds to pay for the assisted living facility. In the context of the totality of the evidence, the jury could have improperly convicted Bryce based on a finding of mere recklessness as to whether his actions cased a "substantial risk of loss or detriment" to David. For example, Bryce testified that he and David both planned to open a restaurant together. R806. When the restaurant suffered a setback due to not getting a liquor license, Bryce attempted to salvage his father's investment. R817-18, 820-21. Bryce's testimony that he only did so after reaching an agreement with Mr. Tower for deferred payments also supported that

he did not know of a substantial risk of loss. R706, 823-24. In light of these actions, a reasonable jury could have found that Bryce acted recklessly, but not knowingly. The error therefore undermines confidence in the verdict. *See Apodaca*, 2018 UT App 131, ¶ 78 (quoting Garcia, 2017 UT 53, ¶ 42).

D. Cumulative Error.

This Court will reverse under the cumulative error doctrine "if the cumulative effect of the several errors undermines our confidence … that a fair trial was had." *State v. Thompson*, 2014 UT App 14, ¶ 73, 318 P.3d 1221 (quoting *State v. Dunn,* 850 P.2d 1201, 1229 (Utah 1993)) (omission in original). As stated, prejudice is shown if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 688, 694 (1984). Courts are more likely to reverse "'when a conviction is based on comparatively thin evidence'" and when "the pivotal issue at trial was credibility of the witnesses and the errors went to that central issue." *Thompson*, 2014 UT App 14, ¶ 73 (quoting *State v. King,* 2010 UT App 396, ¶ 35, 248 P.3d 984) (additional citations omitted); *accord State v. Havatone*, 2008 UT App 133, ¶ 8, 183 P.3d 257 ("[W]hen taking [the errors] together, we cannot say that a fair trial was had.").

Here, the multiple instances of trial counsel's ineffective assistance of, should undermine this Court's confidence in the jury's verdict and require reversal. The jury was required to decide whether there was evidence to support

a conviction beyond a reasonable doubt that Bryce's use of David's money to start their joint business constituted knowingly using David's finances for the benefit of someone else, and whether in doing so, he knew there was a substantial risk of loss or detriment to David. It also had to decide whether that same use was an unjust and improper use of David's money for the benefit of someone other than David. That decision came down to whether the jury believed Bryce—that David wanted to invest in the restaurant and wanted it to succeed, and that Bryce did everything he could to make the restaurant profitable for David, and did not intentionally, knowingly or recklessly place his father in risk.

Trial counsel unreasonably either stipulated to or failed to object to evidence that corroborated the State's case. Despite the trial court's ruling as to 404(b) evidence, trial counsel failed to object to the admission of the eviction proceedings, and Bryce's claims in that proceeding that his father lacked capacity to sign a lease. Counsel also stipulated to the admission of a ledger sheet that appeared to be evidence that Bryce had taken out loans from his father in the past without paying them back.

Counsel also either stipulated to or failed to object to two lay witness' opinion testimony that David lacked capacity—one of whom who met David only once offered an expert opinion as to his capacity a year before she met him and a few months later.

Finally, the erroneous jury instruction could well have misled the jury into convicting Bryce based on a reduced burden of proof.

The individual and cumulative effect of the ineffective assistance of Bryce's trial counsel requires a reversal for a new trial.

II. THE TRIAL COURT ERRED IN DETERMINING THAT THE ABUSE OF A VULNDERABLE ADULT STATUTE IS NOT UNOCONSTITUTIONALLY VAGUE

"To survive a vagueness challenge, a criminal statute must '(1) "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," and (2) "establish minimal guidelines" that sufficiently instruct law enforcement [so] as to avoid arbitrary and discriminatory enforcement."'" *State v. Tulley*, 2018 UT 35, ¶ 54, 870 Utah Adv. Rep. 29 (alteration in original) (quoting *State v. Holm*, 2006 UT 31, ¶ 77, 137 P.3d 726; *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)); *accord State v. MacGuire*, 2004 UT 4, ¶ 13, 84 P.3d 1171; *State v. State v. Honie*, 2002 UT 4, P31, 57 P.3d 977. "A statute may be unconstitutional either on its face or as applied to the facts of a given case." *State v. Herrera*, 1999 UT 64, ¶ 4 n. 2, 993 P.2d 854 (emphasis added). "Where, as here, a statute 'implicates no constitutionally protected conduct,' a court will uphold a facial vagueness challenge 'only if the [statute] is impermissibly vague in all of its applications.'" *MacGuire*, 2004 UT 4, ¶ 12 (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982)).

"[W]hen a party raises both facial and as-applied vagueness challenges, "[a] court should . . . examine the complainant's conduct before analyzing other hypothetical applications of the law." *Tulley*, 2018 UT 35, ¶ 55[16] (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)) (second alteration in original). "This is because '[a] plaintiff who engages in some conduct that is clearly proscribed [by statute] cannot complain of the vagueness of the law as applied to the conduct of others.'" *Id.* (alterations in original); *accord United States v. Williams*, 128 S.Ct. 1830, 1845 (2008) (same).

In reviewing such a challenge, this Court "'presume[s] that the statute is valid and resolve any reasonable doubts in favor of constitutionality.'" *Murray City Corp. v. Robinson*, 2014 UT App 107, ¶ 4, 326 P.3d 683 (quoting *State v. Willis*, 2004 UT 93, ¶ 4, 100 P.3d 1218). "It is not sufficient for the challenger to merely 'inject doubt as to the meaning of words where no doubt would be felt by

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[16] This issue is preserved because after briefing and argument, the trial court ruled that the statute was constitutional on both as applied and facial grounds. *See Kell v. State*, 2012 UT 25, ¶¶10-12, 285 P.3d 1133 (issue preserved even though appellant did not fully develop it because court had opportunity to address it); *State v. Valenzuela*, 2001 UT App 332, ¶25 n.4, 37 P.3d 260 (addressing identity issue even though not specifically preserved because it was part of the preserved probable cause issue). In the event that this Court deems any part of Bryce's challenge to the constitutionality of the statute to be unpreserved, it may address constitutional issues not raised in the trial court where the defendant's liberty is at stake. *See, e.g., State v. Breckenridge*, 688 P.2d 440, 442 (Utah 1983). Finally, if trial counsel did not preserve these arguments, counsel's performance falls "below an objective standard of reasonableness" and there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 688, 694 (1984).

the normal reader.'" *Id.* (quoting C*learfield City v. Hoyer,* 2008 UT App 226, ¶ 8, 189 P.3d 94).

As charged, to be found guilty of abuse, neglect, or exploitation of a vulnerable adult, the jury had to find that Bryce "*unjustly or improperly* used or managed the resources of a vulnerable adult for the profit or benefit of someone other than the vulnerable adult." Utah Code Ann. § 76-5-111(4)(iii) (emphasis added); R237.

The trial court ruled that subsection (iii) of the exploitation statute was not unconstitutionally vague on its face or as applied to Bryce because a defendant could raise the defense that "it's not a criminal act if you do it in a just or proper way." R954. The trial court next ruled that the terms "improper or unjust" were not unconstitutionally vague because they are "terms of ordinary and common usage, juries understand those terms," and because there was a *mens rea* requirement–recklessness would not rise to the level of a second degree felony. R955-56.

The trial court erred in its ruling that "unjust" and "improper" limited the scope of who could be held culpable because the terms "unjust" and "improper" are subjective terms, which in the context of the broad scope of subsection (iii) of the statute could lead to charges against virtually anyone who uses a vulnerable adult's resources for the use of anyone other than the vulnerable adult. The common meaning of "improper" is "not proper; not strictly belonging, applicable,

correct, etc.; erroneous"; "not in accordance with propriety of behavior, manners, etc."; or "unsuitable or inappropriate, as for the purpose or occasion." Dictionary.com, *available at* www.dictionary.com/browse/improper; *accord* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/improper (defining "improper" as "not in accord with fact, truth, or right procedure: INCORRECT"). And unjust means "characterized by injustice: UNFAIR." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/unjust. Both of these terms have very subjective meanings. For example, if a jury found mere criminal negligence in a single poor investment decision, it could convict a defendant based on that conduct. Or, if one child asked a vulnerable adult child for help with paying college tuition or purchasing a home from a vulnerable adult where that child's sibling had received no such assistance, such conduct could be seen as unfair or unjust use of the vulnerable adult's resources.

Other states have found similar language to be problematic. For example, the Mississippi Supreme Court noted that the definition of exploitation as "the illegal or improper use of a vulnerable person or his resources for another's profit or advantage, with or without the consent of the vulnerable adult" was problematic, in part because of the undefined term "improper use." *Colburn v. State*, 201 So. 3d 462, 466-67 (Miss. 2016) (quoting *Decker v. State*, 66 So.3d 654 (Miss. 2011)). The Court reasoned that "a vulnerable adult cannot give a spouse

permission to withdraw money from a checking account to buy herself a birthday present; or give one of her children or grandchildren permission to withdraw money to pay college tuition. … [B]oth these actions would constitute crimes." *Id.* (quoting *Decker*, 66 So.3d 654). A statutory amendment that defined both "illegal use" and "improper use" cured the facial vagueness problem with the statute. *Id.* at 469. Likewise the Florida Supreme Court ruled that Fla. Code § 415.111(5), which bars knowingly or willfully "exploit[ing] an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit," was unconstituationally vague. *Cuda v. State*, 639 So. 2d 22, 23 & n.1 (Fla. 1994). This was because the statue provided "no clear explanation of the proscribed conduct, no explicit definition of terms, nor any good faith defense." *Id.* at 25.

In contrast, Delaware's similar statute which defined exploitation as "the illegal or improper use or abuse of an infirm person, his resources or his rights, by another person, whether for profit or other advantage" was not deemed unconstitutional. *See State v. Sailer,* 684 A.2d 1247, 1249 (Del.1994) (quoting 31 Del.C. § 3902(5) (1974)). That Court ruled that the exploitation statute had clear intent language that recognized adults with physical or mental infirmity were "'subject to psychological or physical injury or exploitation'" and that the "General Assembly, therefore, intends through this chapter to establish a system

of services for impaired adults designed to protect their health, safety and welfare.'" *Id.* (quoting Del. Code. Ann. Title 1250, § 3901).

As with the Mississippi and Florida statutes, Utah's statute could be read so broadly as to criminalize gifts from a vulnerable adult's spouse to their child because such gift would not be used for the vulnerable adult's benefit and could also be seen as improper, particularly if one sibling does not agree with a gift to another sibling. Likewise, a good faith investment decision that turns out to be unwise in retrospect could easily be seen as "improper," and would also not benefit the vulnerable adult. Unlike the Delaware statute, Utah's has no clear legislative intent. Also, unlike the Delaware statute, it does not modify "improper" with "illegal," a term with a more definite common meaning, which when read in conjunction with "improper" and the indictment put defendants on notice as to what conduct was proscribed. *See Sailer*, 684 A.2d at 1250 (quoting Black's Law Dictionary, 747 (6th ed. 1990) as defining "illegal" as "against or not authorized by law," and quoting the American Heritage Dictionary 909 (3rd ed. 1992) as defining "improper" as "not in keeping with accepted standards of what is right . . . often referring to unethical conduct").

The trial court erred in its reasoning because it found that by including the terms "improper" and "unjust" as a perquisite for making a person's conduct illegal, the legislature provided a defense. The problem with this reasoning is that–as the Mississippi and Florida courts noted—the limiting words are highly

subjective. Indeed, subsection (iii) under which Bryce was charged appears to be a catch-all, as unlike the other subsections, it does not require the person charged to have any position of trust, any legal authority to act on behalf of the vulnerable adult or any knowledge of the vulnerable adult's incapacity to consent. *See generally* Utah Code Ann. § 76-5-111(4)(a)(i)-(v). Although other terns such as "position of trust" are defined, unjustly and unknowingly are not. *Id*. §76-5-111(1). Indeed, even subsection (iv) at least limits the exploitation to misuse to someone with legal authority and subsection (i) to require a "position of trust."[17] The failure to provide any limits to what conduct is prohibited fails to provide notice as to what conduct is prohibited, and could lead to arbitrary enforcement. For example, a spouse could become liable, even if acting without any knowledge as to the vulnerable adult's capacity, based only on criminal negligence. *See id*. § 76-5-111(4)(b). Thus, not only could the spouse of a vulnerable adult find herself guilty for using "resources" of the vulnerable adult to pay college tuition for her child, the child who receives the gift, i.e. the person who "uses" the resources could also face criminal culpability. If a vulnerable adult purchased a car for his child, the salesperson could face criminal culpability.

The statute is also vague as applied to Bryce because he was not put on notice as to what conduct of his was prohibited as a lay person rather than as a

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[17] Bryce was originally charged under subsection (4)(a)(i), but the information was later amended to subsection 4(a)(iii).

fiduciary, nor was he put on notice with regard to any lay activity what conduct constituted "improper or unjust" use or management of David's resources. As a result, this Court should reverse Bryce's conviction on the basis that the exploitation of a vulnerable adult statute is unconstitutionally vague both as applied to him and facially.

III. THERE WAS INSUFFICIENT EVIDENCE OF INTENT TO CONVICT MR. JONES OF INTENTIONAL CONDUCT

"A defendant must overcome a substantial burden on appeal to show that the trial court erred in denying a motion for directed verdict." *State v. Gonzalez*, 2015 UT 10, ¶27, 345 P.3d 1168. When reviewing the sufficiency of the evidence, this Court does "'not sit as a second fact finder.'" *SSalt Lake City v. Miles*, 2014 UT 47, ¶ 10, 342 P.3d 212 (quoting *State v. Warden*, 813 P.2d 1146, 1150 (Utah 1991)). This Court views "the evidence and all reasonable inferences that may be drawn therefrom … 'in the light most favorable to the jury verdict.'" *Id.* (quoting *Warden*, 813 P.2d at 1150). This Court "will overturn a conviction only if the evidence 'is so inconclusive or inherently improbable that a jury must have entertained a reasonable doubt as to the defendant's guilt.'" *Id.* (quoting *Warden*, 813 P.2d at 1150); *accord State v. Thompson*, 2017 UT App 183, ¶ 33, 405 P.3d 892 (quoting *State v. Ring*, 2013 UT App 98, ¶ 2, 300 P.3d 1291) ("'So long as there is some evidence, including reasonable inferences, from

which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.'").[18]

As charged, to convict Bryce of unlawful dealing by a fiduciary, the jury had to find that he knew the he had violated his fiduciary duty and that the breach involved a substantial risk of loss. To convict Bryce of exploitation of a vulnerable adult, the State had to prove that Bryce unjustly or improperly used or managed the resources of a vulnerable adult for the profit or advantage of someone other than the vulnerable adult. To carry his burden of persuasion on a claim of insufficient evidence, Bryce may marshal the evidence that supports the verdict, and then demonstrate that the evidence is insufficient when viewed in a light most favorable to the verdict. *See* Utah R. App. P. 24 2017 advisory committee note (citing *State v. Nielsen*, 2014 UT 10, 326 P.3d 645). The evidence presented at trial that supported the State's case as to Bryce's knowledge that he breached his duty and/or that he improperly used or managed David's resources for the benefit of someone else, is as follows:

1. Bryce used David's money to fund the restaurant and did not make regular payments to Highland Cove from December 2013 to May 2014.
2. Cody Tower did not recall the arrangement with Bryce to defer payments.

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[18] This issue was preserved. *See Gonzalez v. State*, 2015 UT 10, ¶ 26, 345 P.3d 1168 ("When the specific ground for an objection is clear from its context, the issue is preserved for appeal."). To the extent it was not preserved, it may be reviewed for plain error or ineffective assistance of counsel. *See supra* p. 39 n. 16.

3. Heather Knight testified that she left messages for Bryce about payment once a month. R523.
4. Highland Cove sent Bryce an eviction notice on May 23, 2014. R521.

Even if all the marshaled facts are true they do not support that Bryce knew he was breaching his duty or otherwise improperly or unjustly managing his father's finances. Nor does it support that he knowingly created a substantial risk of loss. Instead, ample evidence supports that Bryce was trying to help his father have a successful and profitable restaurant business, and while doing so believed that his actions were authorized by the power of attorney and by David's desire for the restaurant to succeed. In doing so, Bryce was not acting in the interest of anyone but his father.

There is also no evidence that there was ever an actual substantial risk of loss. Although the retirement home threatened eviction, testified that the home could not evict David. R523. Thus, there was no substantial risk that David would actually be evicted, i.e. suffer actual loss.

The evidence is therefore insufficient to support the jury's verdict on this count. *See Miles*, 2014 UT 47, ¶ 28 (The evidence presented on the first factor did not demonstrate, nor did it give rise to a reasonable inference, that Mr. Miles's knife bore the character of a dangerous weapon as evidenced by any inherent and uniquely weapon-like traits.").

IV. TRIAL COUNSEL PERFORMED DEFICIENTLY BY NOT ARGUING FOR MERGER OF BRYCE'S CONVICTIONS

Both the United States and Utah Constitutions protect against twice punishing a person for the same offense. U.S. Const. amend. V; Utah Const. art. I., sec. 12. "The doctrine of merger seeks to avoid a circumstance where 'a criminal defendant could be punished twice for conduct that amounts to only one offense'" by requiring the court to merge two convictions for the same offense into one. *sec. 12. "The doctrine of merger seeks to avoid a circumstance where 'a criminal defendant could be punished twice for conduct that amounts to only one offense'" by requiring the Court to merge two convictions for the same offense into one. sec. 12. "The doctrine of merger seeks to avoid a circumstance where 'a criminal defendant could be punished twice for conduct that amounts to only one offense'" by requiring the Court to merge two convictions for the same offense into one. State v. Sanchez*, 2015 UT App 27, ¶ 8, 344 P.3d 191 (quoting *State v. Lee*, 2006 UT 5, ¶ 31, 128 P.3d 1179).[19] Thus, "when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision." Utah Code Ann. § 76-1-402(1). "If trial counsel fails to request the consolidation of charges under the merger doctrine, and consolidation would be in order, trial counsel has failed

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[19] *State v. Wilder*, 2018 UT 17, 420 P.3d 1064, overruled the common law merger doctrine, including the *Finlayson-Lee* test.

to provide effective assistance of counsel." *State v. Perez-Avila*, 2006 UT App 71, ¶ 9, 131 P.3d 864 (citing *State v. Finlayson*, 2000 UT 10, ¶¶ 24-26, 994 P.2d 1243; *State v. Crosby*, 927 P.2d 638, 645-46 (Utah 1996); *State v. Ross*, 951 P.2d 236, 246 (Utah Ct. App. 1997)).

Generally, the merger doctrine applies to prevent punishment for both lesser included offenses and greater offenses. Under this analysis, the Court first determines "whether the lesser offense is 'established by proof of the same or less than all the facts required to establish the commission of the offense charged.'" *State v. Ross*, 951 P.2d 236, 241 (Utah Ct. App. 1997) (quoting *State v. Hill*, 674 P.2d 96, 98 (Utah 1983)) "If the the two crimes are 'such that the greater cannot be committed without necessarily having committed the lesser,' then the lesser offense 'merges into the greater crime and the State cannot convict and punish the defendant for both offenses.'" *Id.* (quoting *Hill*, 674 P.2d at 98) (additional citation omitted); *accord State v. Chukes*, 2003 UT App 155, ¶ 10, 71 P.3d 624. Although "comparison of the statutory elements" is generally sufficient, in cases where "the two crimes have multiple variations," the Court looks beyond the statutory elements to "consider the evidence to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial." *Id.* (quoting *Baker,* 674 P.2d at 97).

For example, in *Ross,* the defendant was convicted of both communications fraud and forgery for a single course of conduct that involved cashing forged

checks. R237. This Court determined that Ross's forgery convictions merged with his communications fraud conviction under Utah Code Section 76-1-402(3) because there was no separate factual basis for the convictions, particularly where the jury was never asked to find a "communication" separate from passing a forged check. *See Ross*, 951 P.2d at 245. "On the facts of this case, only element two of communications fraud ("communication" to another person) and element two of forgery ("utterance" of a forged check) are potentially independent of each other" requiring merger "unless the jury was instructed on and the State proved separate factual bases for the elements of 'utterance' and 'communication.'" *Id.* at 242. This Court therefore ruled merger was appropriate because "the only theory the State actually put before the jury" did not distinguish between "communication" and "utterance," instead arguing that "the communication is the check itself." *Id.* at 245. *Likewise, in State v. Hopkins*, 1999 UT 98, ¶ 27, 989 P.2d 1065, the Supreme Court ruled that possession of controlled substance was a lesser included offense of operating a methamphetamine laboratory where "no special verdict form was employed" and it was possible the jury relied on overlapping elements to convict. In contrast, merger is not required where there is independent evidence to support both convictions. *See, e.g., State v. Yanez*, 2002 UT App 50, ¶ 21, (convictions for witness tampering and discharge of firearm did not merge where there "was evidence other than the discharge of the

firearm upon which the jury could base defendant's conviction for witness tampering").

Here, although the two statutes under which Bryce was convicted are typically separate offenses, the State's theory of the case provided no factual distinction between the two charges. Bryce was charged with two separate felonies for one course of conduct, both of which have multiple variations. Under Section 76-6-513(2), "[a] person is guilty of unlawfully dealing with property by a fiduciary if the person deals with property that has been entrusted to him as a fiduciary … in a manner which the person knows is a violation of the person's duty and which involves substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted." Under Utah Code Section 76-5-111(4)(iii), "[a] person commits the offense of exploitation of a vulnerable adult when the person … unjustly or improperly uses or manages the resources of a vulnerable adult for the profit or advantage of someone other than the vulnerable adult."

Although the State charged Bryce with violating both statutes, the elements overlap, particularly under the only theory advanced by the State—that Bryce purportedly used his fiduciary position to use his father's money for a purpose other than caring for his father. *See Ross*, 951 P.2d at 285. There was no separate factual basis for each either conviction. *See id*. The State apparently originally charged Bryce under subsection (4)(a)(i) of the exploitation of a

vulnerable adult statute, which required a "position of trust" but later amended to subsection (4)(a)(iii). *See* R135 (Third amended information incorrectly stating that a "position of trust and confidence" is required under subsection 4(a)(iii)). The information did not differentiate between what conduct constituted unlawful dealing by a fiduciary but not exploitation of a vulnerable adult or vice versa. R169-70 (Fourth Amended Information). In arguing for a conviction on both counts the State never argued that any of Bryce's conduct violated only one of the charged crimes. *See, e.g.,* R897 (arguing that the power of attorney created "a legal duty … a fiduciary duty" and tying that duty to David's capacity). The elements in this case thus overlap under the only theory advanced by the State.

The first element of Section 76-6-513, dealing "with property that has been entrusted to him as a fiduciary in a manner which the person knows deals with property that has been entrusted to him as a fiduciary … in a manner which the person knows is a violation of the person's duty" overlaps with "unjustly or improperly us[ing] or manag[ing] the resources of a vulnerable adult." Because the mismanagement alleged involved Bryce's fiduciary duty to David, once the jury determined that Bryce had knowingly violated his duty, it would necessarily determine that he unjustly or improperly used or managed David's resources. Likewise, once the jury determined there was a "substantial risk of loss" to David, it would necessarily determine that the resources were managed for the advantage of someone else. The only independent elements were the finding of

"vulnerable adult" and "fiduciary duty" but as stated, the State's theory tied the fiduciary duty to managing the resources, and it argued that Bryce was only able to breach his duties because David was a vulnerable adult. *See id.*

Thus, as in *Ross*, Bryce's convictions should be merged because the State alleged just one course of conduct and did not argue that any of Bryce's conduct violated one statute but not the other. Trial counsel's failure to argue for merger was objectively unreasonable and prejudicial.

CONCLUSION

For the above reasons, Bryce respectfully requests that his convictions be reversed and the charges against him dismissed with prejudice. Bryce alternatively Bryce requests that the convictions against him be reversed and that this Court remand his case for a new trial. Alternatively, Bryce requests that that Court remand with an order to the trial court to merge his convictions.

Respectfully submitted on October 5, 2018.

/s/ Deborah L. Bulkeley
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(a)(11),Utah Rules of Appellate Procedure, this brief contains 12,226 words, excluding the table of contents, table of authorities and addenda, and it complies with rule 21, Utah Rules of Appellate Procedure, governing private records. I further certify that in compliance with rule 27(b) of the Utah Rules of Appellate Procedure, this brief has been prepared using the proportionally spaced Georgia 13-point font.

/s/ Deborah L. Bulkeley
Counsel for Appellant

CERTIFICATE OF SERVICE

In accordance with Utah Supreme Court Standing Order 11, I certify that on October 5, 2018, I caused electronic copies of the Brief of Appellant to be delivered by email to the following:

Utah Court of Appeals
450 South State Street, 5th Floor
Salt Lake City, Utah 84114

Courtofappeals@utcourts.gov;

Sean D. Reyes, Esq.
Utah Attorney General-Criminal Appeals Division
P.O. Box 140854
Salt Lake City, UT 84114-0854

Criminalappeals@agutah.gov.

Within seven days, six printed copies of the Brief of Appellant, including one with original signatures will be delivered by hand or U.S. Mail first-class postage prepaid to the Court, and two printed copies will be to Appellee at the above addresses.

/s/ Deborah L. Bulkeley

Addendum A

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

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

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

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

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

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

Amended by Chapter 32, 1974 General Session

76-5-111 Abuse, neglect, or exploitation of a vulnerable adult -- Penalties.

(1) As used in this section:

(a) "Abandonment" means a knowing or intentional action or inaction, including desertion, by a person or entity acting as a caretaker for a vulnerable adult that leaves the vulnerable adult without the means or ability to obtain necessary food, clothing, shelter, or medical or other health care.

(b) "Abuse" means:

(i) attempting to cause harm, intentionally or knowingly causing harm, or intentionally or knowingly placing another in fear of imminent harm;

(ii) causing physical injury by knowing or intentional acts or omissions;

(iii) unreasonable or inappropriate use of physical restraint, medication, or isolation that causes or is likely to cause harm to a vulnerable adult that is in conflict with a physician's orders or used as an unauthorized substitute for treatment, unless that conduct furthers the health and safety of the adult; or

(iv) deprivation of life-sustaining treatment, except:

(A) as provided in Title 75, Chapter 2a, Advance Health Care Directive Act; or

(B) when informed consent, as defined in this section, has been obtained.

(c) "Business relationship" means a relationship between two or more individuals or entities where there exists an oral or written agreement for the exchange of goods or services.

(d)

(i) "Caretaker" means any person, entity, corporation, or public institution that assumes the responsibility to provide a vulnerable adult with care, food, shelter, clothing, supervision, medical or other health care, or other necessities.

(ii) "Caretaker" includes a relative by blood or marriage, a household member, a person who is employed or who provides volunteer work, or a person who contracts or is under court order to provide care.

(e) "Deception" means:

(i) a misrepresentation or concealment:

(A) of a material fact relating to services rendered, disposition of property, or use of property intended to benefit a vulnerable adult;

(B) of the terms of a contract or agreement entered into with a vulnerable adult; or

(C) relating to the existing or preexisting condition of any property involved in a contract or agreement entered into with a vulnerable adult; or

(ii) the use or employment of any misrepresentation, false pretense, or false promise in order to induce, encourage, or solicit a vulnerable adult to enter into a contract or agreement.

(f) "Elder adult" means a person 65 years of age or older.

(g) "Endeavor" means to attempt or try.

(h) "Exploitation" means an offense described in Subsection (4) or Section 76-5b-202.

(i) "Harm" means pain, mental anguish, emotional distress, hurt, physical or psychological damage, physical injury, suffering, or distress inflicted knowingly or intentionally.

(j) "Informed consent" means:

(i) a written expression by the person or authorized by the person, stating that the person fully understands the potential risks and benefits of the withdrawal of food, water, medication, medical services, shelter, cooling, heating, or other services necessary to maintain minimum physical or mental health, and that the person desires that the services be withdrawn. A written expression is valid only if the person is of sound mind when the consent is given, and the consent is witnessed by at least two individuals who do not benefit from the withdrawal of services; or

(ii) consent to withdraw food, water, medication, medical services, shelter, cooling, heating, or other services necessary to maintain minimum physical or mental health, as permitted by court order.

(k) "Intimidation" means communication conveyed through verbal or nonverbal conduct which threatens deprivation of money, food, clothing, medicine, shelter, social interaction, supervision, health care, or companionship, or which threatens isolation or harm.

(l)

(i) "Isolation" means knowingly or intentionally preventing a vulnerable adult from having contact with another person by:

(A) preventing the vulnerable adult from receiving visitors, mail, or telephone calls, contrary to the express wishes of the vulnerable adult, including communicating to a visitor that the vulnerable adult is not present or does not want to meet with or talk to the visitor, knowing that communication to be false;

(B) physically restraining the vulnerable adult in order to prevent the vulnerable adult from meeting with a visitor; or

(C) making false or misleading statements to the vulnerable adult in order to induce the vulnerable adult to refuse to receive communication from visitors or other family members.

(ii) The term "isolation" does not include an act intended to protect the physical or mental welfare of the vulnerable adult or an act performed pursuant to the treatment plan or instructions of a physician or other professional advisor of the vulnerable adult.

(m) "Lacks capacity to consent" means an impairment by reason of mental illness, developmental disability, organic brain disorder, physical illness or disability, chronic use of drugs, chronic intoxication, short-term memory loss, or other cause to the extent that a vulnerable adult lacks sufficient understanding of the nature or consequences of decisions concerning the adult's person or property.

(n) "Neglect" means:

(i) failure of a caretaker to provide nutrition, clothing, shelter, supervision, personal care, or dental or other health care, or failure to provide protection from health and safety hazards or maltreatment;

(ii) failure of a caretaker to provide care to a vulnerable adult in a timely manner and with the degree of care that a reasonable person in a like position would exercise;

(iii) a pattern of conduct by a caretaker, without the vulnerable adult's informed consent, resulting in deprivation of food, water, medication, health care, shelter, cooling, heating, or other services necessary to maintain the vulnerable adult's well being;

(iv) intentional failure by a caretaker to carry out a prescribed treatment plan that results or could result in physical injury or physical harm; or

(v) abandonment by a caretaker.

(o) "Physical injury" includes damage to any bodily tissue caused by nontherapeutic conduct, to the extent that the tissue must undergo a healing process in order to be restored to a sound and healthy condition, or damage to any bodily tissue to the extent that the tissue cannot be restored to a sound and healthy condition. "Physical injury" includes skin bruising, a dislocation, physical pain, illness, impairment of physical function, a pressure sore, bleeding, malnutrition, dehydration, a burn, a bone fracture, a subdural hematoma, soft tissue swelling, injury to any internal organ, or any other physical condition that imperils the health or welfare of the vulnerable adult and is not a serious physical injury as defined in this section.

(p) "Position of trust and confidence" means the position of a person who:

(i) is a parent, spouse, adult child, or other relative by blood or marriage of a vulnerable adult;

(ii) is a joint tenant or tenant in common with a vulnerable adult;

(iii) has a legal or fiduciary relationship with a vulnerable adult, including a court-appointed or voluntary guardian, trustee, attorney, or conservator; or

(iv) is a caretaker of a vulnerable adult.

(q) "Serious physical injury" means any physical injury or set of physical injuries that:

(i) seriously impairs a vulnerable adult's health;

(ii) was caused by use of a dangerous weapon as defined in Section 76-1-601;

(iii) involves physical torture or causes serious emotional harm to a vulnerable adult; or

(iv) creates a reasonable risk of death.

(r) "Undue influence" occurs when a person uses the person's role, relationship, or power to exploit, or knowingly assist or cause another to exploit, the trust, dependency, or fear of a vulnerable adult, or uses the person's role, relationship, or power to gain control deceptively over the decision making of the vulnerable adult.

(s) "Vulnerable adult" means an elder adult, or an adult 18 years of age or older who has a mental or physical impairment which substantially affects that person's ability to:

(i) provide personal protection;

(ii) provide necessities such as food, shelter, clothing, or medical or other health care;

(iii) obtain services necessary for health, safety, or welfare;

(iv) carry out the activities of daily living;

(v) manage the adult's own resources; or

(vi) comprehend the nature and consequences of remaining in a situation of abuse, neglect, or exploitation.

(2) Under any circumstances likely to produce death or serious physical injury, any person, including a caretaker, who causes a vulnerable adult to suffer serious physical injury or, having the care or custody of a vulnerable adult, causes or permits that adult's person or health to be injured, or causes or permits a vulnerable adult to be placed in a situation where the adult's person or health is endangered, is guilty of the offense of aggravated abuse of a vulnerable adult as follows:

(a) if done intentionally or knowingly, the offense is a second degree felony;

(b) if done recklessly, the offense is third degree felony; and

(c) if done with criminal negligence, the offense is a class A misdemeanor.

(3) Under circumstances other than those likely to produce death or serious physical injury any person, including a caretaker, who causes a vulnerable adult to suffer harm, abuse, or neglect; or, having the care or custody of a vulnerable adult, causes or permits that adult's person or health to be injured, abused, or neglected, or causes or permits a vulnerable adult to be placed in a situation where the adult's person or health is endangered, is guilty of the offense of abuse of a vulnerable adult as follows:

(a) if done intentionally or knowingly, the offense is a class A misdemeanor;

(b) if done recklessly, the offense is a class B misdemeanor; and

(c) if done with criminal negligence, the offense is a class C misdemeanor.

(4)

(a) A person commits the offense of exploitation of a vulnerable adult when the person:

(i) is in a position of trust and confidence, or has a business relationship, with the vulnerable adult or has undue influence over the vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, credit, assets, or other property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the adult's property, for the benefit of someone other than the vulnerable adult;

(ii) knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, or assists another in obtaining or using or endeavoring to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of his property for the benefit of someone other than the vulnerable adult;

(iii) unjustly or improperly uses or manages the resources of a vulnerable adult for the profit or advantage of someone other than the vulnerable adult;

(iv) unjustly or improperly uses a vulnerable adult's power of attorney or guardianship for the profit or advantage of someone other than the vulnerable adult; or

(v) involves a vulnerable adult who lacks the capacity to consent in the facilitation or furtherance of any criminal activity.

(b) A person is guilty of the offense of exploitation of a vulnerable adult as follows:

(i) if done intentionally or knowingly and the aggregate value of the resources used or the profit made is or exceeds $5,000, the offense is a second degree felony;

(ii) if done intentionally or knowingly and the aggregate value of the resources used or the profit made is less than $5,000 or cannot be determined, the offense is a third degree felony;

(iii) if done recklessly, the offense is a class A misdemeanor; or

(iv) if done with criminal negligence, the offense is a class B misdemeanor.

(5) It does not constitute a defense to a prosecution for any violation of this section that the accused did not know the age of the victim.

(6) An adult is not considered abused, neglected, or a vulnerable adult for the reason that the adult has chosen to rely solely upon religious, nonmedical forms of healing in lieu of medical care.

Amended by Chapter 320, 2011 General Session

76-6-513 Definitions -- Unlawful dealing of property by a fiduciary -- Penalties.

(1) As used in this section:

(a) "Fiduciary" is as defined in Section 22-1-1.

(b) "Financial institution" means "depository institution" and "trust company" as defined in Section 7-1-103.

(c) "Governmental entity" is as defined in Section 63G-7-102.

(d) "Person" does not include a financial institution whose fiduciary functions are supervised by the Department of Financial Institutions or a federal regulatory agency.

(e) "Property" is as defined in Section 76-6-401.

(f) "Public money" is as defined in Section 76-8-401.

(2) A person is guilty of unlawfully dealing with property by a fiduciary if the person deals with property that has been entrusted to him as a fiduciary, or property of a governmental entity, public money, or of a financial institution, in a manner which the person knows is a violation of the person's duty and which involves substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted. A violation of this Subsection (2) is punishable under Section 76-6-412.

(3)

(a) A person acting as a fiduciary is guilty of a violation of this subsection if, without permission of the owner of the property or some other person with authority to give permission, the person pledges as collateral for a personal loan, or as collateral for the benefit of some party, other than the owner or the person for whose benefit the property was entrusted, the property that has been entrusted to the fiduciary.

(b) An offense under Subsection (3)(a) is punishable as:

(i) a felony of the second degree if the value of the property wrongfully pledged is or exceeds $5,000;

(ii) a felony of the third degree if the value of the property wrongfully pledged is or exceeds $1,500 but is less than $5,000;

(iii) a class A misdemeanor if the value of the property is or exceeds $500, but is less than $1,500 or the actor has been twice before convicted of theft, robbery, burglary with intent to commit theft, or unlawful dealing with property by a fiduciary; or

(iv) a class B misdemeanor if the value of the property is less than $500.

Amended by Chapter 193, 2010 General Session

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

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

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

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

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

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(1) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good

cause shown.

(3) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE.

Rule 404(a)-(b) is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of State v. Doporto, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

The 2008 amendment adds Rule 404(c). It applies in criminal cases where the accused is charged with a sexual offense against a child under the age of 14. Before evidence may be admitted under Rule 404(c), the trial court should conduct a hearing out of the presence of the jury to determine: (1) whether the accused committed other acts, which if committed in this State would constitute a sexual offense or an attempt to commit a sexual offense; (2) whether the evidence of other acts tends to prove the accused's propensity to commit the crime charged; and (3) whether under Rule 403 the danger of unfair prejudice substantially outweighs the probative value of the evidence, or whether for other reasons listed in Rule 403 the evidence should not be admitted. The court should consider the factors applicable as set forth in State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), which also may be applicable in determinations under Rule 404(b).

Upon the request of a party, the court may be required to provide a limiting instruction for evidence admitted under Rule 404(b) or (c).

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

Rule 702. Testimony by Experts

(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony

(1) are reliable,

(2) are based upon sufficient facts or data, and

(3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE.

Apart from its introductory clause, part (a) of the amended Rule recites verbatim Federal Rule 702 as it appeared before it was amended in 2000 to respond to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The 2007 amendment to the Rule added that introductory clause, along with parts (b) and (c). Unlike its predecessor, the amended rule does not incorporate the text of the Federal Rule. Although Utah law foreshadowed in many respects the developments in federal law that commenced with Daubert, the 2007 amendment preserves and clarifies differences between the Utah and federal approaches to expert testimony.

The amended rule embodies several general considerations. First, the rule is intended to be applied to all expert testimony. In this respect, the rule follows federal law as announced in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Next, like its federal counterpart, Utah's rule assigns to trial judges a "gatekeeper" responsibility to screen out unreliable expert testimony. In performing their gatekeeper function, trial judges should confront proposed expert testimony with rational skepticism. This degree of scrutiny is not so rigorous as to be satisfied only by scientific or other specialized principles or methods that are free of controversy or that meet any fixed set of criteria fashioned to test reliability. The rational skeptic is receptive to any plausible evidence that may bear on reliability. She is mindful that several principles, methods or techniques may be suitably reliable to merit admission into evidence for consideration by the trier of fact. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical", but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education". Finally, the gatekeeping trial judge must take care to direct her skepticism to the particular proposition that the expert testimony is offered to support. The Daubert court characterized this task as focusing on the "work at hand". The practitioner should equally take

care that the proffered expert testimony reliably addresses the "work at hand", and that the foundation of reliability presented for it reflects that consideration.

Section (c) retains limited features of the traditional Frye test for expert testimony. Generally accepted principles and methods may be admitted based on judicial notice. The nature of the "work at hand" is especially important here. It might be important in some cases for an expert to educate the factfinder about general principles, without attempting to apply these principles to the specific facts of the case. The rule recognizes that an expert on the stand may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply them to the facts. Proposed expert testimony that seeks to set out relevant principles, methods or techniques without offering an opinion about how they should be applied to a particular array of facts will be, in most instances, more eligible for admission under section (c) than case specific opinion testimony. There are, however, scientific or specialized methods or techniques applied at a level of considerable operational detail that have acquired sufficient general acceptance to merit admission under section (c).

The concept of general acceptance as used in section (c) is intended to replace the novel vs. non-novel dichotomy that has served as a central analytical tool in Utah's Rule 702 jurisprudence. The failure to show general acceptance meriting admission under section (c) does not mean the evidence is inadmissible, only that the threshold showing for reliability under section (b) must be shown by other means.

Section (b) adopts the three general categories of inquiry for expert testimony contained in the federal rule. Unlike the federal rule, however, the Utah rule notes that the proponent of the testimony is required to make only a "threshold" showing. That "threshold" requires only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion is indisputably correct. When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Contrary and inconsistent opinions may simultaneously meet the threshold; it is for the factfinder to reconcile - or choose between - the different opinions. As such, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert, and it is not contemplated that evidentiary hearings will be routinely required in order for the trial judge to fulfill his role as a rationally skeptical gatekeeper. In the typical case, admissibility under the rule may be determined based on affidavits, expert reports prepared pursuant to Utah R.Civ.P. 26, deposition testimony and memoranda of counsel.

Addendum B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **DAVID BRYCE JONES,** **Defendant.**	**VERDICT** **Case No. 151912839** **Judge James T. Blanch**

We, the jurors in the above case find the defendant, DAVID BRYCE JONES, as follows:

Count 1: ABUSE, NEGLECT OR EXPLOITATION OF A VULNERABLE ADULT

_____ **Not Guilty**

__X__ **Guilty**

Count 2: UNLAWFUL DEALING OF PROPERTY BY A FIDUCIARY

_____ **Not Guilty**

__X__ **Guilty**

Dated this 28 **day of June, 2017**

_____ **Foreperson**

Filed June 28 **2017**

By Megan Mowell
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **DAVID BRYCE JONES,** **Defendant.**	**SPECIAL VERDICT FORM** **Case No. 151912839** **Judge James T. Blanch**

We, the jurors in the above case, having found the defendant, DAVID BRYCE JONES, guilty of the offense of Abuse, Neglect or Exploitation of a Vulnerable Adult, unanimously find as follows:

The defendant, DAVID BRYCE JONES, in committing the offense of Abuse, Neglect, or Exploitation of a Vulnerable Adult, acted

_X_ Intentionally or Knowingly.

_____ Recklessly.

Dated this 28 **day of June, 2017**

Judy Baese **Foreperson**

Filed JUN 28 2017

By Rebecca Worrell **Deputy Clerk**

THIRD DISTRICT COURT SALT LAKE CITY UTAH

The Order of the Court is stated below:
Dated: September 14, 2017 11:26:54 AM /s/ JAMES BLANCH
District Court Judge

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH ATTORNEY GENERAL,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 151912839 FS
DAVID BRYCE JONES,	:	Judge: JAMES BLANCH
Defendant.	:	Date: September 14, 2017

PRESENT
Clerk: cyndiab
Prosecutor: ROBERT C MORTON
ROBERT E STEED
Defendant Present
The defendant is not in custody
Defendant's Attorney(s): MICHAEL R SIKORA
SCOTT A WILSON

DEFENDANT INFORMATION
Date of birth: May 13, 1957
Sheriff Office#: 390182
Audio
Tape Number: CR W33 Tape Count: 9:07-10:05

CHARGES
1. EXPLOITATION OF A VULNERABLE ADULT - 2nd Degree Felony
Plea: Not Guilty - Disposition: 06/28/2017 Guilty
2. UNLAWFUL DEALING WITH PROPERTY BY FIDUCIARY - 2nd Degree Felony
- Disposition: 06/28/2017 Guilty

HEARING

This matter is before the court for oral arguments of the Defendant's Motion to Declare UCA 76-5-111(4)(a)(iii) Unconstitutionally Vague. Defense counsel submits on the pleadings filed.

9:09 AM The court denies the motion. The court states its ruling on the record.
9:16 AM Mr. Wilson addresses the court.
9:20 AM The court responds.
9:21 AM Mr. Steed addresses the court.
9:23 AM The court proceeds with sentencing. Various corrections to the PSR are made. The court strikes the last sentence on page 7 of the presentence report. The court also strikes the fifth bullet point on page 3 of the report. The date of the DUI conviction on page 3 of the report is changed to 1999 from 2010. Under summary of offense on page 4, the court strikes the words for the past five years.

SENTENCE PRISON
Based on the defendant's conviction of EXPLOITATION OF A VULNERABLE ADULT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

Based on the defendant's conviction of UNLAWFUL DEALING WITH PROPERTY BY FIDUCIARY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE
Concurrent with one another, but consecutive to any other commitments.

SENTENCE JAIL
Based on the defendant's conviction of EXPLOITATION OF A VULNERABLE ADULT a 2nd Degree Felony, the defendant is sentenced to a term of 180 day(s)

Attorney Fees Amount: $150.00 Plus Interest
Pay in behalf of: SALT LAKE COUNTY TREASURER

ORDER OF PROBATION
The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation and Parole.

Defendant to serve 180 day(s) jail.

Early Termination of Probation requires Notification to Prosecutor.
Usual and ordinary conditions required by Adult Probation and Parole.
Violate no laws.
Report to probation agency within two business days of release from custody.
Comply with all standard drug and alcohol conditions imposed by probation agency.
Do not use, consume, or possess alcohol or illegal drugs; nor associate with any persons using, possessing or consuming alcohol or illegal drugs.
Do not frequent any place where drugs are used, sold or otherwise distributed illegally.
Submit to drug testing.
Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer.
No spice, ivory wave or items of the nature.
Submit to random UA's and/or ETG testing.
Refrain from the use of alcoholic beverages.
Not to possess alcohol nor frequent places where alcohol is the chief item of sale.
Defendant is to be screened by AP&P's Treatment and Resource Center (TRC) and complete any recommended programming/treatment as directed.
Submit to screening as directed by AP&P. Enter, participate in, and complete any programming, counseling, and/or treatment.
Do not handle or possess money or property of another in a fiduciary capacity.
Complete restitution is ordered in the amount of $75,000. Court ordered restitution while be determined at a later date. The parties are to meet and confer to try and resolve the court ordered amount, prior to requesting a hearing.
Pay recoupment fee (attorney fees) as ordered.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 151912839 by the method and on the date specified.

EMAIL: AP&P udc-ctservices-reg3@utah.gov

Date: 09/14/2017 /s/ CYNDIA BISHOP

Deputy Court Clerk

SCOTT A. WILSON (10486)
Attorney for Defendant/Appellant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
SALT LAKE DEPARTMENT

THE STATE OF UTAH, Plaintiff/Appellee, vs. DAVID BRYCE JONES, Defendant/Appellant.	NOTICE OF APPEAL Case No. 151912839FS JUDGE JAMES BLANCH

NOTICE IS HEREBY GIVEN that DAVID BRYCE JONES Defendant/Appellant in the above-entitled action, hereby appeals to the Utah Court of Appeals from the final judgment/order rendered against him on the 14th day of September, 2017, by the Honorable JAMES BLANCH, Judge, Third Judicial District Court in and for Salt Lake County, State of Utah.

DATED this 6th day of October, 2017.

/s/ Scott A. Wilson
SCOTT A. WILSON
Attorney for Defendant/Appellant

SCOTT A. WILSON (10486)
Attorney for Defendant/Appellant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
SALT LAKE DEPARTMENT

THE STATE OF UTAH, Plaintiff/Appellee, vs. DAVID BRYCE JONES, Defendant/Appellant.	AMENDED NOTICE OF APPEAL[1] Case No. 151912839FS JUDGE JAMES BLANCH

NOTICE IS HEREBY GIVEN that DAVID BRYCE JONES Defendant/Appellant in the above-entitled action, hereby appeals to the Utah Court of Appeals from the final judgment/order rendered against him on the 14th day of September, 2017, by the Honorable JAMES BLANCH, Judge, Third Judicial District Court in and for Salt Lake County, State of Utah.

DATED this 6th day of October, 2017.

/s/ Scott A. Wilson
SCOTT A. WILSON
Attorney for Defendant/Appellant

[1] This amended Notice of Appeal is to correct the Certificate of Delivery.

Addendum C

there is roughly, could be 50 to 60 people living there at any one time. And my office was in that building, and David -- that's where David lived. So I saw him every day, had daily interaction with him.

Q. All right. Looking at Exhibit -- where did my big boards go?

A. There's one down here.

Q. I'm going to show you what we've marked as Exhibit-3. And Exhibit-2. Are you familiar with those documents?

A. Yes, I am. This is the application for admission and then also the agreement for residency at Highland Cove.

Q. Would you have -- is there a reason why Bryce Jones signed and filled out these documents as opposed to David O. Jones?

A. Sure. In the --

MR. WILSON: If he knows, Your Honor, if he has personal knowledge.

THE COURT: Yeah. Well, I'll give you a general instruction, that when he asks you questions, you can give answers, as far as you know the answer. But if he asks you something and you don't have a basis of personal knowledge to answer the question, then you should say you don't know.

Do you understand?

THE WITNESS: I think so.

A. I -- I -- what I will say, I guess, is customary is

Content to go with who -- wherever he was to go, anybody -- if anybody cued him to go somewhere, he would be able to go oftentimes. He developed a friendship with one of the residents that lived there, Karma Brown is her name, and they spent a lot of time together. But most of his communication was pretty limited.

Q. And can you describe that in any more detail as far as limited?

A. Just as I -- as I said earlier, his -- his ability to -- to answer a complexion question or to understand words that were -- were beyond "how are you?" or really kind of simple -- simple conversation was -- was appropriately limited. His -- his ability to express himself was very limited as well.

Q. All right. I'm going to hand you what we've marked as State's Exhibit-16.

(Conversation between counsel.)

MR. MORTON: May we approach, Your Honor?

THE COURT: Yes.

(Whereupon a bench conference was had.)

MR. MORTON: I'm showing a document that he signed in -- I mean, three weeks, four weeks afterwards. And based on his conversation and his degree in psychiatry, which he has a masters in and dealing with this guy every day, whether or not he could have understood and read and comprehended this document.

THE COURT: Okay. You don't object to that?

MR. WILSON: He's a psychologist.

THE COURT: Okay. All right.

Thank you, Mr. Wilson.

(End of bench conference.)

Q. (BY MR. MORTON:) Hand you what's been marked defendant's -- State's Exhibit No. 16. No, I -- you never saw that document until we provided it to you; is that correct?

A. Correct.

Q. Do you have -- what's the date of that document?

A. The 26th of November 2013.

Q. So this would have been three to four weeks -- three-plus weeks after he was admitted to the facility?

A. Yes.

Q. Okay. Based upon your psychiatry degree, based upon your daily interaction with David O. Jones, do you have an opinion whether or not he could read this document and comprehend it?

A. As I -- as I know David and the complexity of what is written here, I would say that it would be very difficult for him to understand what is being -- what he would be signing.

Q. Tell me what that document -- can you tell me -- describe to me what document is?

A. It's -- it looks like it's giving, David O. Jones

giving David Bryce Jones, his son and business partner, the ability to borrow funds from his retirement accounts and --

MR. WILSON: I'm assuming you're going to lay foundation for this at some point?

MR. MORTON: Yes.

A. For -- for his retirement or insurance payments or for other personal purposes as deemed necessary. So these were loans, essentially, authorizing loans to David Bryce Jones.

Q. Signed by David O. Jones?

A. Correct.

Q. Did there come a time where David Jones' account with Highland Cove became delinquent?

A. Yes, there -- there was. It was pretty much right away. We received an initial payment, which is customary when someone moves in. We ask for their first -- depending on when they move in, in the month, it could be the first months of rent or their first couple of weeks of rent, or the first 60 days, depended on where -- when they moved in, but -- so we received an initial payment, but then we almost right away stopped, there were no payments.

Q. And did you have any contact with Bryce Jones in regard to bringing that account current?

A. Yes. Initially I -- I directed Heather Knight, our business office manager, to initiate some -- initiate some of those calls and contacts, but I also had interaction with Bryce

the audio record, but...

Each side in this case was permitted five preemptory challenges. And the State started and it went back and forth as we always do, and so the State exercised its five. The last thing that happened is the master jury list went back to defense counsel for it's fifth peremptory challenge. Defense counsel elected not to use it's fifth peremptory challenge, so the record ought to just be clear that there's not any sort of an anomaly or problem with respect to that being absent from the master jury list. It was a decision that was deliberately made by defense counsel not to exercise that fifth peremptory, correct.

MR. WILSON: Yes, Your Honor.

MR. SIKORA: That's correct, Your Honor. I suppose we could have exercised it on the jury, last of the [inaudible] jurors, but we were content in the nine [inaudible].

THE COURT: Okay. And then the other thing that we talked about at the bench during Mr. Tower's testimony was, Mr. Wilson initially made an objection that Mr. Tower could not offer expert testimony about whether or not in his opinion it likely that David Jones could have understood the contents of Exhibit-16.

MR. WILSON: [inaudible].

THE COURT: And then Mr. Wilson during our side bar, withdrew that objection based upon Mr. Tower's psychology

training --

MR. WILSON: Right.

THE COURT: -- and permitted -- and stipulated that he could answer an expert -- answer questions that essentially was under Rule 702, expert testimony, regarding whether or not Mr. Jones could read Exhibits 6 -- 16. And then there was some questioning where Mr. Tower described the contents of Exhibit-16.

And Mr. Wilson, on behalf of the defense, said, "Are you going to lay foundation for this?" It was not exactly a -- an objection, but it could be, I guess characterized as such by --

MR. WILSON: Well, I only asked that if the jury be admonished not to consider that testimony if --

THE COURT: Okay.

MR. WILSON: -- the State is not usually [inaudible] --

THE COURT: Well, that -- that -- that's where I'm going. So I -- I think where we were is that -- that I will treat, and I think an appellate court would treat your question about whether foundation was going to be laid, essentially as -- as invoking Rule 104(b). That this is -- it's a relevant condition on fact, fact being foundation being laid for Exhibit-16, and Exhibit-16 being received in evidence.

If it does not come in, a foundation is not laid for

Q. On what day did you first go visit David Jones?

A. September 26th.

Q. And was that -- that was at Highland Cove?

A. Yes.

Q. All right. What was your observations. Tell me a little bit about what you do on your first visit when you're meeting with an individual like David Jones.

A. We have three main things to do on the visit. One is, of course, to make sure that the alleged victim is safe. Assess their capacity or their ability to make their own decisions or take care of their needs and then address the allegation.

Q. All right. In terms of his physical needs at that time, were they being taken care of?

A. Yes. He was in assisted living and they cared for his needs.

Q. Okay. What about his cognitive abilities, the assessment you did on that, what did find in regard to David Jones?

A. He had significant memory impairment.

Q. Can you give me some examples or tell me what tests or questions you asked that led you to that conclusion?

A. Well, first observation, as I was talking, his phone rang, which he answered, and he had some conversation that sounded business like, but he sounded confused on the phone.

And when he hung up and got back to his bed where he was sitting, he couldn't remember who had called or what the conversation was even about.

He said something about his son, Bryce, I asked for his phone number. He walked over to the counter and picked up a fingernail kit as if a phone number was going to be in it, and when he got back to me, he handed me the kit forgetting I'd asked for the phone number.

He couldn't remember his age, his birthday, how to call 911. He said he was a veteran, but he couldn't remember what branch of service, what years. He couldn't discuss where he banked, how much money he made. He couldn't even remember his siblings' names. We found a list on the counter of his siblings, and he could only remember his sister, Betty.

Q. All right. And he also remembered Bryce?

A. He did remember Bryce.

Q. Your next -- did you contact Heather at Highland Cove the -- on September 29th?

A. Yeah.

Q. Tell me about that. And why did you contact her?

A. We need to gather collateral information, and that includes documentation or whatever concerns the facility might have. So I went to get documentation from her.

Q. Are you aware how much they were charging David O. Jones to stay there?

Exhibit-16. Are you familiar with that document?

A. Um...

Q. Was that introduced at the actual APS hearing by --

A. Yes.

Q. Is this a correct copy of Exhibit -- blown-up copy of 16?

A. Yup.

Q. Okay. And this would have been --

THE COURT: Well, hang on. Before you put it there, is this something that's going to be received in evidence or not?

MR. MORTON: Yes, it is, Your Honor. We move for the admission of 16.

THE COURT: Okay. Is there an objection to it?

MR. WILSON: No, not other than previously stated.

THE COURT: All right. So Exhibit-16 is received.

(State's Exhibit 16 was received into evidence.)

Q. (BY MR. MORTON:) On Exhibit No. 16, do you recognize that document?

A. Yes.

Q. As of November 26, 2013, do you think your professional opinion and based on the thousands of -- or hundreds -- or maybe even a thousand, investigations like this that you've done, do you have an opinion as to whether or not David O. Jones had the capacity to sign that document?

A. I do have an opinion, and that would that he did not have the capacity.

Q. Okay. And that was within three weeks after he was admitted to the facility, approximately, 26 days?

A. Yeah.

Q. Excuse me, I'm making a lot of noise.

I will show you what we've marked as Exhibit-17. Do you recognize that document?

A. Yes.

Q. Is that a document that Bryce Jones brought to the APS hearing and introduced?

A. I believe so.

Q. All right. And is this, what I've marked here as Exhibit-17, a true and accurate copy of that?

A. Yes.

THE COURT: Again, are you offering?

MR. MORTON: Yes. Move for the admission of --

THE COURT: Okay. Well, don't put it up there. We need to have it received before the jury sees it.

MR. MORTON: 17, 18 and 19, which I think we've stipulated to.

THE COURT: Okay. So Exhibits 17, 18, and 19 are received and may be published to the jury.

(State's Exhibits 17-19 received into evidence.)

Q. (BY MR. MORTON:) Exhibit-17. Do you recognize that

particular document?

A. Yes.

Q. And that document is dated January 9, 2015, correct?

A. Yes.

Q. So we're now approximately 14, 15 months from the time of his admission?

A. Yes.

Q. It says after paying -- second paragraph, "After paying my monthly bills and expenses for funds are made," and then he authorizes his son to make loans for himself, correct?

A. Yes.

Q. Based on your investigation, did he pay his monthly bills and expenses?

A. No.

Q. In a -- in a timely and regular fashion?

A. No.

Q. It also says: I do not recognize the authority of any person or institution or agency to attempt to change these directions and management of his retirement funds.

A. Right.

Q. Who was this sent to, do you know? "To whom it may concern"?

A. I would assume that it was sent to the Office of Public Guardian and to Adult Protective Services.

Q. Okay. Did at that particular time, in -- January 9,

2015, who was in charge of David's finances?

A. I believe it was Office of Public Guardian by then.

Q. Okay. This is signed by David Jones, correct?

A. Yes.

Q. Are you familiar with the document -- with David Jones -- or Bryce Jones's phone number?

A. No, I wouldn't remember that.

Q. Okay. If I testified -- if I told you that in previous documents -- let me show you, where is Exhibit --

MR. WILSON: I don't understand the probable question.

MR. MORTON: I'll move -- I'll move on, Your Honor. I'm not even sure about the question now.

Q. (BY MR. MORTON:) I'll show what is Exhibit-19 -- or 18. 18. Do you recognize that document?

A. Yes.

Q. And is this the posterboard that I -- is that a true and accurate copy of what you're looking at?

A. Yes.

Q. Again, David Jones here directed -- this is addressed to the Social Security Administration?

A. Yes.

Q. What is -- what is he telling the Social Security Administration to do in regard to their payment?

A. To change the bank account and the mailing address.

Q. Okay. And it's signed by David O. Jones, correct?

A. Yes.

Q. And it says, "Please change my mailing address to 369 East 900 South." On January 9, 2015 did David O. Jones reside at 369 East 900 South?

A. As far as I know.

Q. Was he still residing in -- he was?

A. No, David, no. I don't believe so. He was still at Highland Cove.

Q. Okay. Show you what we've marked as Exhibit-19 and that's been admitted into evidence. Do you recognize that document?

A. Yes.

Q. Is this an accurate copy of Exhibit-19?

A. Yes.

Q. Okay. And who's that, that's directed to the office of personnel management retirement operations?

A. Uh-huh.

Q. And what is he instructing those people to do?

A. To change the bank account and the address.

THE COURT: Can I see that?

Q. **(BY MR. MORTON:)** Again, signed by David Jones.

A. Yes.

Q. Did he have the capacity on January 9th to sign this document?

A. No.

Q. And that would -- that also includes the other documents on January 9th?

A. Yes.

Q. It also says, "I do not recognize the authority of any other person, agency;" is that correct?

Could you read that for me?

A. "I do not recognize the authority of any person, institution, or agency that attempts to change these directions. And I direct you to refuse to recognize any changes to my deposit account or my mailing address that are not authorized under my notarized signature."

Q. And that's supposedly signed -- I mean, that's David Jones' instructions to these people, correct?

A. Yes.

Q. And then Exhibit No. 20. The fact is -- is David Jones in the courtroom? Is Bryce Jones in the courtroom here today?

A. Bryce, yes.

Q. Okay. And do you recognize him?

A. Yes.

Q. And did all the facts and circumstances you're testified to, they occurred here in Salt Lake City, Salt Lake County?

A. Yes.

Addendum D

Q. And that was as of November 26th. That was a requirement as of November 26th from David Jones of 2013?

A. Yes.

Q. At the hearing on -- in February of 2015, the APS hearing we were talking about, was he asked for those documents?

A. Yes.

Q. Did he -- did he have those documents?

A. No.

Q. Did he -- did he produce any other documents that dealt with loans that he had taken from his father?

A. No.

Q. The accounting sheets or -- or --

A. No.

Q. -- ledgers?

A. No.

Q. That you're aware of?

A. Not that I'm aware of.

Q. I'm going to hand you what again, what we've marked as Exhibit-20.

MR. MORTON: Sorry, Your Honor, I misplaced that.

Q. (BY MR. MORTON:) Exhibit-20, and I don't want to go in this in great detail, but these are -- this is a list of other loans that occurred in '99 and 2000?

A. Uh-huh.

Q. Is there any indication of any payment or interest on those?

A. There is interest charged, but nothing paid.

Q. Okay. Thank you.

MR. MORTON: Move for admission of Exhibit 20.

THE COURT: Any objection?

MR. WILSON: No.

THE COURT: All right. Without objection, Exhibit-20 is received.

(State's Exhibit 20 was received into evidence.)

MR. MORTON: I have no further questions, Your Honor.

THE COURT: Okay. Now cross-examination, Mr. Wilson.

CROSS-EXAMINATION

BY MR. WILSON:

Q. Ms. Mack, how many times did you see David Jones?

A. Once.

Q. Once. One time. He didn't know you, right?

A. Nope.

Q. He still doesn't know you, right?

A. Likely not.

Q. And, obviously, he's known Bryce for a long period of time?

A. All of -- all of Bryce's life, yeah.

Q. Yeah. And you know -- did you do any research as to how close they were, how many times they were together, what

Loans to David Bryce Jones

Date	Loaned	Description	Payment	Interest Charged	Interest Paid	Principal Paid	Principal Balance
Ch.# 2533 12/11/98	3000.00	Beginning Balance					3000.00
2615 1/4/99	700.00		24 days	16.76			3716.76
2857 5/11/99	600.00		127 days	109.89			4426.65
2879 5/26/99	1500.00		15	15.46			5942.11
6/23/99	9000.00	Wired to D.B. Jones	28	38.73			14980.84
3425 12/2/99	2000.00	To Barnes Bank for DBJ	162	392.19			17373.03
12/6/99	2000.00	To Myron Gabbert Lower Fee	4	11.23			19384.26
12/18/99	1250.00		12	37.59	527.85		20671.85
1/2/00	8750.00	Jerome Crafts Buy-out To Barnes Bank for DBJ	15	50.11			29471.96
1/2/00	500.00		0	0.00			29971.96
Wire 1/19/00	30000.00	To Jerome Crafts Buy-out	17	82.34			60054.30
3/10/00	5000.00	To Barnes Bank for DBJ	51	711.17			65765.47

6 Months Interest at 5.9% APR .0001616 Daily

8.5% APR Interest 1998 .0002328 Daily 1999 .0002322 Daily

Days 365 366

[redacted]

Q. David gave to Bryce, okay.

Did you have a chance to find out -- is there a place where when you -- you start a business, like, Brewhaha or Gusto's or Foothill Limited, is there a place that you file these documents with the state?

A. Yes. It's the Department of Commerce.

Q. And did you do a background check on -- on Bryce's businesses in regard to Gusto and to Brewhaha?

A. Yes, I did.

Q. What documents did you -- and did you find documents?

A. Yes, I -- I found registrations, yes.

Q. When -- when you found those registrations, was David Jones listed as an owner of any of these businesses?

A. Not at that time, no.

Q. And did -- did you ask David Jones -- or excuse me, Bryce Jones whether or not he was on the --

A. Yes.

Q. As an owner?

A. Yes.

Q. I mean, he told you at one point he was different percentages 35, 49 percent?

A. Right.

Q. But did you ask him why he wasn't listed?

A. Yes, I did.

Q. What was his response?

A. Because he didn't want David to become involved in a legal action that was pursuant -- that was happening at that time.

Q. I'm going to hand you what's been marked as Exhibit-22. Can you identify that document?

A. Yes. It's a court document that I received from the West Jordan District or Third District Court.

MR. MORTON: Okay. Just a housekeeping matter, Your Honor. We would move for the admission of -- 22 and 23?

THE COURT: Is there an objection?

MR. WILSON: No.

THE COURT: All right. Without objection Exhibits 22 and 23 are received.

(State's Exhibit 22 & 23 received into evidence.)

Q. (BY MR. MORTON:) Okay. You -- you indicated those -- these are some legal documents that you obtained from where?

A. From West -- West Jordan Third District Court.

Q. It was a lawsuit, correct?

A. Yes, it is.

Q. Okay. And -- and who's the lawsuit filed by and who's it filed against?

A. It's filed by KS Park IRA and it's versus David Bryce Jones, David O. Jones, Foothill Management, LLC.

Q. All right. And did Mr. Jones file any documents in regard to that particular lawsuit?

A. Yes, he did.

Q. Do you have in there what's called a -- a motion and memorandum?

A. Yes, I do.

Q. And who was that prepared by an attorney for Bryce Jones?

A. I don't believe it was.

Q. Did Bryce sign that document?

A. Yes.

Q. And he -- did he prepare that document, if he know?

A. I believe he did, I don't know for sure, but...

Q. But it's signed by him and not an attorney?

A. Right.

Q. That's what we call "pro se," right?

A. Okay. Yes.

Q. It means if you're representing yourself and not an attorney?

A. Okay. Yes.

Q. Okay. I'm going to show you what's been marked as State's Exhibit 23, two pages. Is that the motion and memorandum --

A. Yes.

Q. -- that you're talking about?

A. Yes, it is.

Q. What's the date that this document was signed and

filed, if you know?

A. It was dated the 22nd day of August 2014.

Q. Okay. So David would have been in the facility approximately ten -- eight, ten months?

A. Yes.

Q. Are these [inaudible] motion and memorandum?

A. Yes.

Q. It's a motion to have David Jones dismissed from the losses; is that correct?

A. That's correct.

Q. If you would, read paragraph 2 for me.

A. "2. As David O. Jones had no ownership in or other connection to Foothill Management, LLC, it was absolutely improper for Mr. KS Park to request that David O. Jones sign the lease for the property at 2108 East 1300 South, Salt Lake City, Utah 84108, between Foothill Management, LLC and the KS Park rollover IRA."

Q. He said that he has no ownership in it?

A. That's correct.

Q. How is that different from what he testified at the APS hearing?

A. He testified that David did have ownership.

Q. How is that -- how is that different from the statements that he made at the interview on College Drive?

A. He stated that David had interest in the business.

A. Yes.

Q. And you -- let me go back to the LLC. At one time his name was on the LLC, right?

A. Yes.

Q. Did you take his name off the LLC?

A. Eventually I did.

Q. And why did you do that?

A. We opened the business in December of 2013, and in June of 2014, we got evicted from the property. And the landlord was a real snake. He put provisions in the lease that if we were a day late on the -- the rent, that he would charge us a percentage. And it would be compounded every day, and then there were penalties on top of penalties and we were evicted over a matter of less than $10,000.

And with all of the add-ons that he had written into the lease, the judgment came out at about $120,000, I believe. I'd been warned about him from the previous tenant in the building, but I figured as long as we kept the rent current, we wouldn't have to worry. Well, when we got behind, it was impossible to ever catch up and get ahead. So we were both listed as liable for this judgment.

And I wanted to have my -- I don't -- I didn't own anything. I didn't have any possessions. I didn't have any investments, any property. And it would -- it was an easy matter for me to file bankruptcy and dispose of the judgment.

My dad, on the other hand, had assets and a large income. And I knew that they would attach that if he were still a part of the business and a part of the suit. So I removed him from the LLC to insulate him from the legal action and to protect his -- basically his income.

Q. And you filed a document stating that he was incompetent at that time or near that time?

A. Yes, I did. Shortly after he signed the power of attorney, he started to exhibit some signs of early -- early dementia. And over the next couple of years, it progressed slowly. And, you know, it was -- I stated on the intake form he had progressive dementia. And by 2013, he had been a couple of years into this progressive dementia, and it's arguable that he was incompetent at that time.

Q. So you --

A. These things are, you know, as it's been testified by some of the professionals earlier, these things are unclear as to exactly when somebody is competent, when they're not competent. And I say it's arguable that after two years of progression, you know, he was incompetent at the time.

Q. Now, when he was working -- living down in St. George, you were -- this is in 2013, you were working on getting the -- your all's business together in regard to Brewhaha; is that right?

A. Yes.

Addendum E

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **DAVID BRYCE JONES,** **Defendant.**	**JURY INSTRUCTIONS TO BE GIVEN AT CLOSE OF EVIDENCE** **Case No. 151912839** **Judge James T. Blanch**

The jury is hereby charged with the law that applies to this case in the following instructions, numbered (13) through (43), inclusive.

Dated this 28th day of June, 2017.

JAMES T. BLANCH
DISTRICT COURT JUDGE

INSTRUCTION NO. 13

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

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

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

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

INSTRUCTION NO. 14

You have two main duties as jurors.

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

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

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

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

INSTRUCTION NO. 15

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

INSTRUCTION NO. 16

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

However,

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

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

INSTRUCTION NO. 17

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

INSTRUCTION NO. 18

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

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

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

INSTRUCTION NO. 19

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

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

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

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

INSTRUCTION NO. 20

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

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

In deciding whether or not to believe a witness, you may also consider anything else you think is important. You do not have to believe everything that a witness said. You may believe

part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

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

INSTRUCTION NO. 21

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

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

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

INSTRUCTION NO. 22

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

INSTRUCTION NO. 23

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

INSTRUCTION NO. 24

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

INSTRUCTION NO. 25

As I instructed you before, proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If the evidence leaves you firmly convinced that the defendant is guilty of

the crime charged, you must find the defendant "guilty." On the other hand, if there is a real possibility that he is not guilty, you must give the defendant the benefit of the doubt and return a verdict of "not guilty."

INSTRUCTION NO. 26

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

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

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

INSTRUCTION NO. 27

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

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

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

INSTRUCTION NO. 28

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

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

INSTRUCTION NO. 29

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

INSTRUCTION NO. 30

DAVID BRYCE JONES is charged in Count 1 with committing the offense of Abuse, Neglect or Exploitation of a Vulnerable Adult on or about October 31, 2013, through February 1, 2015, in Salt Lake County, Utah. You cannot convict him of this offense unless, based on the evidence you find beyond a reasonable doubt each of the following elements:

1. That the defendant, David Bryce Jones;

2. Acting intentionally, knowingly or recklessly with respect to each and every one of the following elements;

3. Unjustly or improperly used or managed the resources of David O. Jones for the profit or benefit of someone other than David O. Jones;

4. That the alleged victim, David O. Jones, was a vulnerable adult; and

5. The aggregate value of the resources used or profit made is or exceeds $5,000.

After careful consideration of all of the evidence in this case, if you are convinced that each and every one of the foregoing elements has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 31

DAVID BRYCE JONES is charged in Count 2 with committing the offense of Unlawful Dealing of Property by a Fiduciary on or about October 31, 2013, through February 1, 2015, in Salt Lake County, Utah. You cannot convict him of this offense unless, based on the evidence you find beyond a reasonable doubt each of the following elements:

1. That the defendant, David Bryce Jones,

2. Acting intentionally, knowingly, or recklessly with respect to each and every one of the following elements;

3. Dealt with property that had been entrusted to him as a fiduciary, in a manner which the defendant knew (beyond just recklessness) was a violation of the defendant's duty; ~~and~~

4. Which involved substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted; and

5. That the total value of the property is equal to or exceeds $5,000.

After careful consideration of all of the evidence in this case, if you are convinced that each and every one of the foregoing elements has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 32

You are instructed that ~~with respect to Count I~~ of the Information that:

1. A person acts "intentionally" when his conscious objective is to engage in certain conduct.
2. A person acts "knowingly" when the person is aware of the nature of his conduct, or is aware of the particular circumstances surrounding his conduct.
3. "Conduct" means either an act or omission.

INSTRUCTION NO. 33

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

INSTRUCTION NO. 34

"V**ulnerable adult**" means an elder adult (a person 65 years of age or older), or an adult 18 years of age or older who has a mental or physical impairment which substantially affects that person's ability to:

(i) provide personal protection;

(ii) provide necessities such as food, shelter, clothing, or medical or other health care;

(iii) obtain services necessary for health, safety, or welfare;

(iv) carry out the activities of daily living;

(v) manage the adult's own resources; or

(vi) comprehend the nature and consequences of remaining in a situation of abuse, neglect, or exploitation.

INSTRUCTION NO. 35

You are instructed that under the laws of the State of Utah,

1. The word "fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, and any other person acting in a fiduciary capacity for any person, trust or estate.

2. A "fiduciary relationship" imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another. A fiduciary is in a position to have and exercise and does have and exercise influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary.

INSTRUCTION NO. 36

"Property" means anything of value.

INSTRUCTION NO. 37

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

INSTRUCTION NO. 38

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

INSTRUCTION NO. 39

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

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

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

INSTRUCTION NO. 40

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

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

There is also a "special verdict form" that you must complete if, and only if, you find the defendant guilty of count one—Abuse, Neglect or Exploitation of a Vulnerable Adult. If you find the defendant not guilty of count one, do not complete the Special Verdict Form. If you find

the defendant guilty of count one, you must complete the Special Verdict Form and check one, and only one, of the two boxes on the Special Verdict Form. Your decision about which box to check must be unanimous. The foreperson is responsible for filling out and signing the Special Verdict Form on behalf of the entire jury.

INSTRUCTION NO. 41

Transcripts, police reports, or other written, audio, or visual materials may have been referenced during the trial but not admitted as exhibits. It is common during deliberations for jurors to ask to review these materials or to have transcripts of what witnesses said during trial. These materials, other than what may have been admitted as exhibits, may not be requested as part of your deliberations.

INSTRUCTION NO. 42

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

INSTRUCTION NO. 43

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

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH ATTORNEY GENERAL,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 151912839 FS
DAVID BRYCE JONES,	:	Judge: JAMES BLANCH
Defendant.	:	Date: September 14, 2017

PRESENT
Clerk: cyndiab
Prosecutor: ROBERT C MORTON
ROBERT E STEED
Defendant Present
The defendant is not in custody
Defendant's Attorney(s): MICHAEL R SIKORA
SCOTT A WILSON

DEFENDANT INFORMATION
Date of birth: May 13, 1957
Sheriff Office#: 390182
Audio
Tape Number: CR W33 Tape Count: 9:07-10:05

CHARGES
1. EXPLOITATION OF A VULNERABLE ADULT - 2nd Degree Felony
Plea: Not Guilty - Disposition: 06/28/2017 Guilty
2. UNLAWFUL DEALING WITH PROPERTY BY FIDUCIARY - 2nd Degree Felony
- Disposition: 06/28/2017 Guilty

HEARING

This matter is before the court for oral arguments of the Defendant's Motion to Declare UCA 76-5-111(4)(a)(iii) Unconstitutionally Vague. Defense counsel submits on the pleadings filed.

9:09 AM The court denies the motion. The court states its ruling on the record.
9:16 AM Mr. Wilson addresses the court.
9:20 AM The court responds.
9:21 AM Mr. Steed addresses the court.
9:23 AM The court proceeds with sentencing. Various corrections to the PSR are made. The court strikes the last sentence on page 7 of the presentence report. The court also strikes the fifth bullet point on page 3 of the report. The date of the DUI conviction on page 3 of the report is changed to 1999 from 2010. Under summary of offense on page 4, the court strikes the words for the past five years.

SENTENCE PRISON
Based on the defendant's conviction of EXPLOITATION OF A VULNERABLE ADULT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

Based on the defendant's conviction of UNLAWFUL DEALING WITH PROPERTY BY FIDUCIARY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE
Concurrent with one another, but consecutive to any other commitments.

SENTENCE JAIL
Based on the defendant's conviction of EXPLOITATION OF A VULNERABLE ADULT a 2nd Degree Felony, the defendant is sentenced to a term of 180 day(s)

Attorney Fees Amount: $150.00 Plus Interest
Pay in behalf of: SALT LAKE COUNTY TREASURER

ORDER OF PROBATION
The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation and Parole.

Defendant to serve 180 day(s) jail.

Early Termination of Probation requires Notification to Prosecutor.
Usual and ordinary conditions required by Adult Probation and Parole.
Violate no laws.
Report to probation agency within two business days of release from custody.
Comply with all standard drug and alcohol conditions imposed by probation agency.
Do not use, consume, or possess alcohol or illegal drugs; nor associate with any persons using, possessing or consuming alcohol or illegal drugs.
Do not frequent any place where drugs are used, sold or otherwise distributed illegally.
Submit to drug testing.
Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer.
No spice, ivory wave or items of the nature.
Submit to random UA's and/or ETG testing.
Refrain from the use of alcoholic beverages.
Not to possess alcohol nor frequent places where alcohol is the chief item of sale.
Defendant is to be screened by AP&P's Treatment and Resource Center (TRC) and complete any recommended programming/treatment as directed.
Submit to screening as directed by AP&P. Enter, participate in, and complete any programming, counseling, and/or treatment.
Do not handle or possess money or property of another in a fiduciary capacity.
Complete restitution is ordered in the amount of $75,000. Court ordered restitution while be determined at a later date. The parties are to meet and confer to try and resolve the court ordered amount, prior to requesting a hearing.
Pay recoupment fee (attorney fees) as ordered.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 151912839 by the method and on the date specified.

EMAIL: AP&P udc-ctservices-reg3@utah.gov

Date: 09/14/2017 /s/ CYNDIA BISHOP

Deputy Court Clerk

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EMAIL: AP&P udc-ctservices-reg3@utah.gov

09/14/2017 /s/ CYNDIA BISHOP

Date: _____ _____

Deputy Court Clerk

SCOTT A. WILSON (10486)
Attorney for Defendant/Appellant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
SALT LAKE DEPARTMENT

THE STATE OF UTAH, Plaintiff/Appellee, vs. DAVID BRYCE JONES, Defendant/Appellant.	NOTICE OF APPEAL Case No. 151912839FS JUDGE JAMES BLANCH

NOTICE IS HEREBY GIVEN that DAVID BRYCE JONES Defendant/Appellant in the above-entitled action, hereby appeals to the Utah Court of Appeals from the final judgment/order rendered against him on the 14th day of September, 2017, by the Honorable JAMES BLANCH, Judge, Third Judicial District Court in and for Salt Lake County, State of Utah.

DATED this 6th day of October, 2017.

/s/ Scott A. Wilson
SCOTT A. WILSON
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, SCOTT A. WILSON, hereby certify that I have caused to be delivered, via the Court's electronic filing system, a copy of the foregoing to the District Attorney's Office, 111 E Broadway, Suite 400, Salt Lake City, UT 84111, and by electronic mail to criminalappeals@agutah.gov, a copy to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 6th day of October, 2017.

/s/ Scott A. Wilson
SCOTT A. WILSON

DELIVERED this 6th day of October, 2017.

/s/ MerriLyn