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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,	)	
	)	
Plaintiff / Appellee,	)	Case No. 20171011-CA
	)	
v.	)	
	)	
JACQUAN DAVID WILSON,	)	
	)	
Defendant / Appellant.	)	Rule 23B Motion Filed

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**BRIEF OF APPELLANT**

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Appeal from Sentence, Judgment, Commitment entered on November 16, 2017, in the  
Second District Court, Davis County, the Honorable Robert J. Dale, presiding

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## INTRODUCTION

This appeal involves the failure of trial counsel to render effective assistance of counsel by failing to object to and request that the court preclude the State from playing jail phone call recordings for the jury's consideration. Mr. Wilson should prevail on appeal because trial counsel's failure allowed the jury to consider statements that had little or no relevance to the central issues and any relevance was outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.<sup>1</sup>

Further, this appeal involves trial counsel's failure to request a jury instruction on the lesser included offense of attempted manslaughter. Mr. Wilson should prevail on this issue because trial counsel's failure precluded the jury from considering the warranted lesser included offense under the facts and circumstances of this case.

## STATEMENT OF ISSUES

1. Whether trial counsel rendered ineffective assistance of counsel by failing to object to and request that the State be precluded from playing the jail calls between Mr. Wilson and V.N. for the jury's consideration.

*Standard of Review:* To make such a showing, a defendant must show, first, that counsel rendered a deficient performance, falling below an objective standard of reasonable professional judgment, and, second, that counsel's performance was prejudicial. *Bundy v.*

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<sup>1</sup>Jurisdiction is proper with this Court pursuant to Utah Code Ann. § 78A-4-103(2)(j).



*DeLand*, 763 P.2d 803 (Utah 1988). The appellate court reviews such a claim as a matter of law. *State v. Robertson*, 2005 UT App 419, ¶ 5, 122 P.3d 895; *State v. Maestas*, 1999 UT 32, ¶ 20, 984 P.2d 376; *State v. Strain*, 885 P.2d 810, 814 (Utah Ct. App. 1994).

*Preservation of Issue Citation or Statement of Grounds for Review*: Issues involving claims of ineffective assistance of counsel constitute an exception to the preservation rule and as such may be raised for the first time on appeal.

2. Whether trial counsel rendered ineffective assistance of counsel by failing to request a jury instruction on the lesser included offense of attempted manslaughter.

*Standard of Review*: See Standard of Review for Issue #1 above.

*Preservation of Issue Citation or Statement of Grounds for Review*: Issues involving claims of ineffective assistance of counsel constitute an exception to the preservation rule and as such may be raised for the first time on appeal.

## **STATEMENT OF THE CASE**

### A. *The Charges*

By Information filed November 25, 2015, Jacquan David Wilson was charged with Attempted Murder, a first-degree felony, in violation of Utah Code Ann. § 76-5-203 (R. 1-

2). The Probable Cause Statement of the Information stated the following:

1. On November 24, 2015, the defendant went to a residence in Layton, Utah. The defendant had previously resided at that residence for a couple of months with the victim. The defendant and victim had a verbal altercation that escalated. They went outside during the argument.

2. The victim's father heard the argument, and then heard the victim cry out that he had been stabbed. The father went to where the victim was lying on the ground and saw the defendant leaving the area in a vehicle.
3. The victim had been stabbed six times with a sharp object. He was transported to the hospital. The victim suffered severe injuries from the stabbing and required life-saving measures at the hospital.

*(Id.)*.

On February 5, 2016, the parties appeared for a preliminary hearing (R. 25). Following that hearing, the court found probable and bound the case over for trial (R. 192:14-18). Mr. Wilson pleaded not guilty (R. 399:20-22; R. 30).

By Amended Information filed February 10, 2017, the State – in addition to Attempted Murder – charged Mr. Wilson with Obstructing Justice, a second-degree felony, in violation Utah Code Ann. § 76-8-306 (R. 210-11).

B. *A Friendship Gone Awry*

On November 21, 2015, Mr. Wilson and A.P., a female acquaintance, visited D.H. at D.H.'s house, and informed him that T.D., Mr. Wilson's girlfriend, was pregnant with his child (R. 715-16). During the visit, D.H. asked Mr. Wilson to return the jeans he had borrowed (R. 718:19-20).

The next day, D.H. went to T.D.'s house to retrieve his jeans (R. 718-19). T.D.'s roommate informed D.H. that T.D. might be at work (R. 719:13-14).

On Monday, November 23, 2015, T.D. initiated a text with D.H. in response to his dropping by her house and – in the process – they discussed her pregnancy (R. 721-22). D.H. congratulated her on the pregnancy and encouraged her not to get an abortion (*Id.*; R. 641:13-21). In addition, D.H. informed her that Mr. Wilson may not be the person that she thinks he is (R. 651-52).

On November 24, 2015, D.H. communicated with T.D. and expressed frustration that Mr. Wilson had not returned the jeans – stating that he was “[h]otter than hell’s flames.” (R. 727:14-18). Within the hour, T.D. communicated to D.H. that she and Mr. Wilson would come by D.H.’s house and return the pants (R. 728:4-12).

Mr. Wilson arrived at the front door of D.H.’s house about 5:00 p.m. that day to return the jeans (R. 629-33; R. 728:15-21). Mr. Wilson handed D.H. a plastic bag with the pants, which D.H. dropped on the floor (R. 729:5-20). An argument – laced with profanity ensued – at which point they moved outside to the porch (R. 730-31).

Mr. Wilson looked at D.H. and said, “fuck you” (R. 732:7). D.H. responded by saying that he was “going to be a real fuck nigga right then and there” and show T.D. every “bit of validation” of what he had been doing with other women for the last two months (R. 732:7-18).

D.H. pushed Mr. Wilson out of the way and moved quickly and aggressively from the porch to the car where T.D. sat in the driver’s seat (R. 654:6-13; 657:13-18). Watching the heated exchange, T.D. became afraid as the argument quickly moved from the porch to

the car (R. 657:22-24). T.D. – who froze with fear as D.H. entered the car through the open passenger door – “thought [D.H.] was reaching for [her], like he was going to hurt [her] or something.” (R. 657:3-6; R. 656:20-22; R. 688:20-24; R. 699:1-4).

As D.H. entered the car, Mr. Wilson stabbed him on the left shoulder, back area (R. 735-36). Mr. Wilson then reached over D.H. with his left hand, stood him up, and continued to stab him (R. 736-37). After being stabbed four times, D.H. slammed Jacquan against the car and as they rotated, Mr. Wilson stabbed D.H. again in the right arm (R. 737-40). D.H. turned and faced Mr. Wilson and then crossed his hands and kicked Mr. Wilson as he fell on his back (R. 740-41). Mr. Wilson – at about the same time – stabbed D.H. in the face on the left cheek below the eye (R. 742-43).

Mr. Wilson froze with the knife in hand, looking in the direction of the house (R. 744:9-18). After D.H. cried out two times, D.H.’s father exited the garage, seeing Mr. Wilson standing next to D.H. (R. 745-46). Mr. Wilson then jumped in the car and they drove away (R. 744-45).

D.H.’s father attended to D.H., discovering that he had been stabbed in the back (R. 638-39; R. 745-46). While retrieving his keys and wallet from the house, he picked up a taser that was located on the concrete not far from D.H. (R. 639:17-22). He recognized that

the taser belonged to D.H. (R. 644:2-8).<sup>2</sup> D.H.'s father loaded D.H. in the car and transported him to the hospital (R. 746-47).

C. *Jury Trial*

The parties appeared for the four-day trial on September 25, 2017 (R. 405). During opening statements, the State told the jury that they would hear a jail phone call that Mr. Wilson made on January 18, 2015 – about two and a half months after the stabbing (R. 611:18-20). The prosecutor told the jury they would hear Mr. Wilson in that phone call

tell a friend that [D.H.] had texted [T.D.] and told her that she should keep the baby and there were things that she needed to know about Jacquan. You'll hear the defendant say, quote, so I'm already in my mind like okay I'm not going to let him F me up because I'm not about to let that happen. He wants confrontation, I'm hoping I can drop off his shit. I already know how I am. If he touches me, I'm going to try to kill him.

(R. 611-12). The prosecutor informed the jury that they would also hear Mr. Wilson in a jail phone call state, "I'm not him. I really put people down, y'all. I have the capacity to kill somebody, you understand, and think nothing of it." (R. 613:20-23).

At trial, T.D., Mr. Wilson's girlfriend, testified on behalf of the State that she provided both an oral and written statement to police (R. 670-75). According to her oral statement, D.H. pushed Mr. Wilson and "started running towards the car, towards me. And

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<sup>2</sup>D.H.'s father saw D.H. sitting on the couch playing with the taser before Mr. Wilson arrived (R. 644:10-25). Before Mr. Wilson came to the house, D.H. pulled the taser off the charger and put it in his hoodie pocket (R. 111:10-12).

I just like froze.” (R. 673-3-4). According to her testimony on direct, that was not an honest statement (R. 674-75).

T.D.’s written statement indicated that D.H. had jumped in the car as if he was going to hurt her (R. 675:23-24). She testified on direct that she didn’t think that “now” (675-76). However, on cross-examination, T.D. testified that she still considered the written statement to be “a correct statement.” (R. 698:17-19). T.D. further testified that she was also frightened because D.H. had previously shown up at her place unannounced and entered her room without permission (R. 699:12-15). According to T.D., she had “no idea what [D.H.] was capable of.” (*Id.* at 16-17). Finally, she testified that the police “didn’t like the first story [she] told them and thought she was lying to them” (R. 706:10-16). The police then told her she needed to tell them the “correct story” – which she then provided (R. 706:11-22).

On day three of the jury trial, Craig Webb, Chief of Investigations, testified concerning the Davis County Jail system for inmate calls (R. 1153 *et seq.*). He also testified concerning numerous calls between Mr. Wilson and his friend, V.N. (R. 1157:19-21). When – in the course of his testimony – Chief Webb mentioned that Mr. Wilson had made statements about “eliminating people” during a particular call, defense counsel objected and the following sidebar occurred:

COUNSEL: In thinking about these phone calls, and I have heard them, it dawns on me if this individual is not going to be called to testify, I think that what is going to be

played is highly prejudicial to the jury. It shows character of my client in such that he hasn't put himself out there at this point to testify as to his own character. We think that they're unduly prejudicial at this point for the jury to hear a phone conversation between my client and another individual who is not a party to this proceeding. At this point that would be my objection to any call involving this individual.

THE COURT: I don't think that's specific enough for me to be able to sustain an objection. I think I heard him say some of this, talk about eliminating people. Is that correct?

THE STATE: That's correct, uh-huh.

THE COURT: What is the relevance to this case about that? It doesn't completely bear, does it, on the facts on what occurred?

THE STATE: It goes to the fact that he, in this case he makes a comparison to himself and the victim and he's upset with the fact that the victim went to the police and the defendant –

THE COURT: The fact that who went to the police?

THE STATE: The victim, [D.H.] went to the police.

THE COURT: Okay.

THE STATE: And that he – because if he went to the police, he has no problem eliminating individuals who go to the police because he's upset. So, you know, and I think it shows that the defendant knew that – it

shows kind of his state of mind during this time where he's talking about comparing himself to the defendant.

THE COURT: I just don't see what relevance, candidly, that has. And I'm just going to be frank with you at this point. I'm not ruling, I'm just telling you I don't see the relevance of that to what occurred here, which is what this [is] about. And it does seem to be really highly prejudicial in term of interjecting maybe some other later comment that he may have had which he's not charged with that. That's my only concern. Will you address that for me from the State, Mr. Lyon?

THE STATE: I mean, honestly, this is something that we would have liked to address during the motion in limine. We talked to Mr. Bushell. He said he was fine with these calls. I mean, this is the first time I'm –

THE COURT: You're saying you're surprised?

THE STATE: This is the first time I'm hearing there's an objection. We provided these calls two weeks ago.

THE COURT: Well, you may have provided them. But whether they're provided or not, are you saying that he's missed some rule, some time limit. I mean, I have to rule at this point based on this objection when it's presented.

THE STATE: Well, then maybe we'd better take a –

THE COURT: [Inaudible] waived. Are you saying it's been waived?



THE STATE: No. Maybe we better just excuse the jury and play the call and let Your Honor decide.

COUNSEL: I wouldn't mind doing that.

THE COURT: Okay.

COUNSEL: I think we probably ought to – wait, before you go, I would like each of the calls played. I mean, they're all relatively short.

THE STATE: With the exception of those two calls on the 18<sup>th</sup>.

THE COURT: Well, let's talk about that outside the jury?

THE STATE: Okay,

SIDEBAR CONCLUDES.

THE COURT: Well, come back just one second?

THE COURT: How long is it going to take to hear this outside the presence of the jury?

THE STATE: I think most of the calls are pretty short.

THE COURT: I mean, how long?

THE STATE: Two or three, four, minutes. There's one that's about – no, probably ten or fifteen minutes.

THE COURT: What I'm talking about is whether we should adjourn. Is this a time to break for lunch or can we get this through fairly quickly and finish up with this?

COUNSEL: I think if we're going to listen to most of the clips, it's probably going to take us about ten minutes.

THE COURT: That's about noon. How long do you think with this witness beyond that?

THE STATE: It's about 15 minutes.

THE COURT: If I allow it. If I allow it.

THE STATE: It's probably about that much time. Another ten minutes and then –

THE COURT: We'll just take a break and try to determine if –

COUNSEL: And I won't have any questions.

THE COURT: We'll get through it quickly?

COUNSEL: Yeah.

SIDEBAR CONCLUDES.

THE COURT: We're going to recess at this time.

THE BAILIFF: All rise for the jury.

(JURY EXITS THE COURTROOM)

(R. 1158-63).

At that point, the prosecutor apparently experienced some type of illness (R. 1163:7-9). After a recess, the court – upon speaking with the prosecutor – decided to proceed (R. 1163-64). The following colloquy then occurred:

COUNSEL: Judge, before the jury comes, I made a motion at the bench to have these in-camera type of reviews.

THE COURT: We are on the record, correct?

COURT CLERK: We are.

MR. BUSHELL: At this point I'm going to withdraw that objection.

THE COURT: All right.

MR. BUSHELL: I think I've been able to fix the objection I had and so we can go forward as planned.

THE COURT: All right. So you are planning on playing some tapes without objection. Is that right?

MR. BUSHELL: Correct. And then I have some witnesses included on those tapes coming in to testify afterwards.

THE COURT: All right.

THE STATE: And just for the record, we have provided these calls to Mr. Bushell.

MR. BUSHELL: Uh-huh. Part of my objection was that I had anticipated this individual being called by the State to be here. So I had to follow up on that. But she is going to come.

THE COURT: All right.

(R. 1164:3-22).

The State, through Chief Webb, played recordings of various jail phone calls between Mr. Wilson and V.N. (R. 1164 *et seq.*). After playing the jail phone call recordings, the State rested (R. 1175:13).

The defense called V.N. as its only witness (R. 1175:20-22). V.N. testified that Mr. Wilson is “a very vivacious, motivated, a very unique individual.” (R. 1177:6-12). V.N. also described Mr. Wilson as “very put together and eloquent.” (*Id.* at 17-18). When asked if Mr. Wilson made any threats during the jail conversations, V.N. responded, “Nothing that I took serious.” (R. 1178:7-9).

After both sides rested, counsel agreed on the jury instructions (R. 1183:3-12). Upon deliberating, the jury returned the following verdict: guilty of attempted murder (Count 1); and guilty of obstruction of justice (Count 2) (R. 1058:17-22).<sup>3</sup> In addition, the jury found that Mr. Wilson used a dangerous weapon in the commission of the attempted murder (R. 1059:11-16). The court set the matter for sentencing (R. 1061:17-20).

#### D. *Sentencing and Appeal*

At sentencing on November 16, 2017, trial counsel asked the court to run the convictions concurrent (R. 1077:6-8). The State – in contrast – asked that the court sentence Mr. Wilson consecutively (R. 1079:14-15). Additionally, the State argued that the jail phone calls are “demonstrative of the defendant’s true character” (R. 1082:17-18).

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<sup>3</sup>See Verdict (R. 245-46) and Special Verdict (R. 247), a true and correct copy of which is attached to this Brief as Addendum A.

The court imposed the following sentence:

Mr. Wilson the, as to the finding of guilt by the jury of attempted murder, which is a first-degree felony, the Court is sentencing you to serve a three year to life, indeterminate period in the Utah State Prison. I am enhancing that by one year due to the use of a dangerous weapon, and that is pursuant to Section 76-3-203.8 of the Utah Code.

As to your finding of guilt, the jury finding you guilty to obstructing justice as a second-degree felony, I am sentencing you also to serve an indeterminate period of one to fifteen years in the Utah State Prison. I am running that consecutive to the four years to life for the attempted murder and the enhancement.

(R. 1087:2-14). The Sentence, Judgment, Commitment was entered on November 16, 2017

(R. 972-73).<sup>4</sup> Mr. Wilson filed a timely Notice of Appeal on December 15, 2017 (R. 360-62).

### **SUMMARY OF THE ARGUMENTS**

1. Trial counsel rendered ineffective assistance of counsel by failing to object to and request that the State be precluded from playing the jail calls between Mr. Wilson and V.N. for the jury's consideration. Notwithstanding portions of the jail phone call recordings that might be interpreted as reflecting Mr. Wilson's mental state at the time of the stabbing, the balance of the recordings were likely highly inflammatory in the eyes of the jury.

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<sup>4</sup>See Sentence, Judgment, Commitment, R. 344-45, a true and correct copy of which is attached to this Brief as Addendum B.

Based on the statements made during the jail phone calls, it would be difficult to imagine expressions that would be more repulsive to the notion of the value of human life than those made by Mr. Wilson in the jail phone calls. The balance of the jail recordings contained little or no relevance to the central issues and any relevance that could be found therein was greatly and clearly outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. The overwhelming weight of this danger is underscored by the fact that the State had other evidence available to prove Mr. Wilson's state of mind and to rebut his defense of others argument.

Trial counsel's failure to ultimately pursue an objection and request that the State be precluded from playing the recordings for the jury's consideration constituted ineffective assistance of counsel. Trial counsel had ample opportunity to determine that the prejudicial content of the jail recordings were in direct conflict with the primary defense theory that the stabbing occurred in the defense of others. Under the circumstances, reasonable trial counsel would have objected and moved to preclude the recordings from being heard and considered by the jury. There is no reasonable trial strategy that could explain trial counsel's performance in failing to object and request that the State be precluded from playing the recordings.

Trial counsel essentially promised the jury a presentation of evidence that would demonstrate Mr. Wilson's statements made in the jail recordings "are absolutely not true." However, trial counsel failed to present any evidence that addressed Mr. Wilson's

callousness towards the stabbing, lack of remorse for the victims, or his repulsive treatment of V.N., a nonparty to the proceedings. Moreover, counsel never presented any evidence to disprove Mr. Wilson's statement that he needed to make up a good defense.

If trial counsel had objected and moved to preclude the State from playing the jail phone call recordings for the jury, the court – in light of the *Maurer* decision – would have precluded the recordings from being considered by the jury. Further, trial counsel's failure to object and request that the recordings be precluded from the jury's consideration, substantially – if not totally – undermined the primary defense theory at trial.

Trial counsel's failure to object and request that the State be precluded from playing the jail recordings created what the jury might have considered as bearing the defense's imprimatur. Mr. Wilson was also prejudiced by trial counsel's failure to present evidence that Mr. Wilson's statements in the jail recordings "are absolutely not true."

The jail phone call statements painted Mr. Wilson with an extraordinary amount of callousness towards the tragic event, a shocking lack of remorse for D.H., and an almost psychopathic repulsive treatment of D.H. and V.N., a non party to the criminal proceedings. Perhaps, worst of all, the statement of Mr. Wilson in the jail recordings that he needed to formulate a new defense demonstrated untruthfulness as to the claim that the stabbing occurred in the defense of T.D. and his unborn child.

Upon objecting and requesting that the State be precluded from playing the jail recordings for the jury, there is a reasonable probability that the jail recordings, at least in

large part, would have been precluded from the jury's consideration. There is a reasonable probability that the recordings would have been precluded from consideration by the jury and that the outcome of the proceeding would have been different.

2. Trial counsel rendered ineffective assistance of counsel by failing to request a jury instruction on the lesser included offense of attempted manslaughter. Given the circumstances of this case, it is difficult to conceive of a sound trial strategy that would justify trial counsel's decision not to request a jury instruction on the lesser included offense of attempted manslaughter. By failing to do so, trial counsel failed to address the lesser-included offense issue under the facts and circumstances of this case. Consequently, trial counsel's failures are sufficiently egregious to support the conclusions that trial counsel's decision cannot be considered a "sound trial strategy," as required by *Strickland*, and that defense counsel's performance fell below the objective standard of reasonableness set forth in *Strickland*.

But for counsel's unprofessional failure to request a lesser included offense instruction, the result of Mr. Wilson's trial would have been different. Had trial counsel requested a lesser included offense instruction for attempted manslaughter, there is a reasonable probability that the court would have instructed the jury accordingly. By instructing the jury on the lesser included offense, the jury would have effectively been provided with the availability of a "third option" – the choice of conviction of a lesser offense rather than conviction of the greater or acquittal. The prejudice to Mr. Wilson



resulting from this critical failure is evinced by the fact that he was denied the full benefit of the reasonable doubt standard in the course of the jury arriving at his conviction for attempted murder.

## ARGUMENTS

### **I. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO AND REQUEST THAT THE STATE BE PRECLUDED FROM PLAYING THE JAIL CALLS BETWEEN MR. WILSON AND V.N. FOR THE JURY'S CONSIDERATION.**

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), the United States Supreme Court established a two-prong test for determining when a defendant's Sixth Amendment<sup>5</sup> right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 2064. The test – adopted by Utah courts – requires a defendant to show “first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant.” *State v. Martinez*, 2001 UT 12, ¶ 16, 26 P.3d 203; *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *State v. Stidham*, 2014 UT App 32, ¶ 18, 320 P.3d 696; *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995); *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). “[T]he right to the

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<sup>5</sup>The Sixth Amendment to the United States Constitution – in relevant part – states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” See *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

To satisfy the first prong of the test, a defendant must “‘identify the acts or omissions’ which, under the circumstances, ‘show that counsel’s representation fell below an objective standard of reasonableness.’” *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). A defendant must “overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment.” *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270 (1990).

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986).

“Critical to the attorney-client relationship and the integrity of judicial proceedings is an attorney’s duty to represent the interests of a client with zeal and loyalty.” *State v. Holland*, 876 P.2d 357, 359 (Utah 1994). In fact, “[t]he duty of loyalty is so essential to the

proper functioning of the judicial system that its faithful discharge is mandated not only by the Rules of Professional Conduct, but also, in criminal cases, by the Sixth Amendment right of a criminal defendant to the effective assistance of counsel.” *Id.* (citing *United States v. Cronin*, 466 U.S. 648, 656-57, 104 S.Ct. 2039, 2045-46 (1984); *Von Moltke v. Gillies*, 332 U.S. 708, 725-26 (1948) (plurality opinion)). Trial counsel’s faithful discharge of the duty “is a vital factor both in uncovering and making clear to a court the truth on which a just decision depends and in protecting the rights of persons charged with a crime.” *Id.* “In almost all cases, defendants are wholly dependent on the dedication of their attorneys to protect their interests and to ensure their fair treatment under the law.” *Id.*

Generally, relevant evidence is admissible. *See* Utah R. Evid. 402;<sup>6</sup> *see also* *State v. Dunn*, 850 P.2d 1201, 1221-22 (Utah 1993) (explaining that courts “indulge a presumption in favor of admissibility”). Rule 403 of the Utah Rules of Evidence provides an exception to the general rule of admissibility by providing the following: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>7</sup> Utah R. Evid. 403. Rule 403 “imposes . . . the heavy burden not only to show that the risk of unfair

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<sup>6</sup>Utah Rule of Evidence 401 provides that evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Utah R. Evid. 401.

<sup>7</sup>At its heart, rule 403 is a balancing test. *See State v. Maurer*, 770 P.2d 981, 984 (Utah 1989).

prejudice is greater than the probative value, but that it ‘substantially outweighs’ the probative value.” *State v. Jones*, 2015 UT 19, ¶ 29, 345 P.3d 1195 (brackets omitted). Moreover, rule 403 is an “inclusionary rule.” *State v. Kooyman*, 2005 UT App 222, ¶ 26, 112 P.3d 1252 (citation and internal quotation marks omitted). Evidence is unfairly prejudicial when it has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Maurer*, 770 P.2d 981, 984 (1989) (quoting Fed. R. Evid. 403 advisory committee’s notes). “But even if a trial court improperly admits unfairly prejudicial or cumulative evidence, [the appellate court] will not overturn a jury verdict based on that evidence if the admission of the evidence did not reasonably [affect] the likelihood of a different verdict.” *State v. Gonzalez*, 2015 UT 10, ¶ 36, 345 P.3d 1168 (citation and internal quotation marks omitted).

In *State v. Maurer*, 770 P.2d 981 (Utah 1989), the Utah Supreme Court reversed a murder conviction on the basis of the State’s introduction of an inflammatory letter at trial written by the defendant to the victim’s father. *Id.* at 987. In the letter, the defendant ridiculed and taunted the victim’s father by stating, “You might have prevented [the murder]. I hope you feel guilt over it.” *Id.* at 982. In addition, the defendant wrote, “It was a great feeling to watch her die.” *Id.*

Before trial, defense counsel filed a motion in limine to preclude the State from introducing the letter into evidence during trial. *See id.* The trial court denied the motion based on a determination that the letter was probative of defendant’s state of mind at the

time of the homicide. *See id.* Defense counsel argued that even if the letter had some relevance as to the defendant's state of mind, the prejudicial effect far exceeded its potential relevance under rule 403 of the Utah Rules of Evidence. *See id.* at 983.

In reversing the conviction, our supreme court determined that the letter "display[ed] [Maurer's] callousness toward the killing which he expresses in profane and vulgar language and manifests his complete insensitivity to this tragedy." *Id.* The Court held that even though portions of the letter were relevant to the defendant's guilt, the trial court erred in admitting the entire letter because the "balance" of it contained "little or no relevance to the central issue and that any relevance . . . was greatly and clearly outweighed by the danger of 'unfair prejudice, confusion of the issues, [and] misleading the jury.'" *Id.* (citing Utah R. Evid. 403). The Court noted the danger of "a conviction based on a generalized assessment of character" when "the conversation includes obscenities, ethnic slurs, and otherwise coarse language, warped and suffused with an aura of nonspecific criminality . . ." *Id.* at 985; *cf. State v. Alzaga*, 2015 UT App 133, ¶¶ 44-51, 352 P.3d 107.

In the instant case, Mr. Wilson admitted stabbing D.H., leaving the jury to determine the primary issues of what his state of mind was at the time of the stabbing and whether there was justification by way of the defense of others. The State had a number of witnesses to establish its position (*See* R. 621:17-25; R. 626-27). T.D., Mr. Wilson's girlfriend, was present at the time, and she testified in detail concerning the circumstances surrounding the stabbing (*See* R. 649-50 (testifying that she was five months pregnant at

the time and that she told Mr. Wilson he was the father); R. 699:12-15 (testifying that D.H. had previously visited her place unannounced and went to her room without permission); R. 651-52 (testifying that Mr. Wilson was “pretty upset” because he thought T.D. and D.H. had “something going on”); R. 690:1-9 (testifying that it looked like Mr. Wilson and D.H. were getting more upset as the conversation on the porch progressed); R. 691:5-6 (testifying that she thought D.H. – as he approached the car – may get in the car and try to hurt her); R. 693:20-22 (testifying that “[D.H.] jumped in the car with me as if [he] was going to hurt me . . .”). The victim, D.H., also testified at trial about the events leading up to the stabbing (*See* R. 717-18 (testifying that he and Mr. Wilson had a “sibling rivalry”); R. 727:14-18 (testifying that he was “[h]otter than hell’s flames” at Mr. Wilson); R. 732-33 (testifying that he told Mr. Wilson – in the course of their argument on the porch – that he was “going to be a real fuck nigga right then and there” and going to show T.D. “every bit of validation” of what Mr. Wilson had been doing with other women for the last two months); R. 733:18-20 (testifying that he had no intention of hurting T.D.); R. 819:19-21 (testifying that he knew “every nook and cranny that [T.D.] has”).

In addition, Detective Brandon Smith testified that Mr. Wilson didn’t mention T.D. during the more relevant portion of the police interview (R. 1115:7-10). According to Detective Smith, there was maybe only one statement by Mr. Wilson during the two-and-half-hour interview about defending someone else (R. 1115:20-23). At closing, the State emphasized that Mr. Wilson did not mention T.D. during the entire police interview (R.

1228:11-25). Moreover, the State characterized Mr. Wilson's statements during the police interview as "elusive," "cagey", and "very clearly calculated" in response to the detectives' questions (R. 1229-30).

The State, through Chief Webb, played recordings of various jail phone calls between Mr. Wilson and V.N., a friend and nonparty to the proceedings (R. 1164 *et seq.*).

The first call played for the jury contained the following statement by Mr. Wilson:

I am not [D.H.]. I don't call the cops to help me out with shit. I handle shit like a man, on my own. People who fuck me, I eliminate them real quick; it's over and done with. If I was out there right now, it would be a whole different [inaudible] . . .

(State's Exhibit No. 53; R. 1166:2-5; R. 1166:14 *et seq.*). During another jail phone call played for the jury, Mr. Wilson states, "Yeah because um, I'm gonna play it cool. You know what I'm saying? And I can't do so much talking but I have no problem taking somebody's life at all. So that's not a big deal to me . . . ." (State's Exhibit No. 54; R. 1167:7-18; R. 1167:24 *et seq.*). Another recording of a jail phone call played for the jury contains the following statement from Mr. Wilson: "I'm not him. I don't go on Facebook and portray something I'm not; I really put niggers down, y'all. I really, I really have the capacity to kill somebody. You understand? And think nothing of it." (State's Exhibit Nos. 56 and 57; R. 1170-71; R. 1174 *et seq.*).

The State also played a recording of a jail phone call in which Mr. Wilson stated the following:

Like you can't just talk to him and show him some screen shots. He doesn't care. A screen shot of him threatening [T.D.] is not going to get me off. A screen shot of him saying I am a faggot ass nigger is not going to get me off. It's not going to do shit. It ain't gonna – so like I don't know but I gotta think of a good reason as to why my life was in danger. Because, obviously – my story – me telling the truth doesn't sound believable.

(State's Exhibit No. 63; R. 1169:6-10; R. 1169:12 *et seq.*). Additionally, a recording of a jail phone call played for the jury contains the following statement by Mr. Wilson: "I mean you gettin poked. So, I'm like, whatever. So, and I'm not even [inaudible] or nothin and if he, and if he talks, I'm gonna put this nigger in the hospital. I don't care. So, that's how I like it." (State's Exhibit No. 64; R. 1172:15 *et seq.*).

In another jail phone call recording played for the jury, the State claimed Mr. Wilson provided "specific details" as to the events that occurred that night, which included the following:

Just talking all greasy like, like he is some kind of super gangster ass nigger like, like whatever. So, I'm already in my mind like, ok, well, don't think you bout to like fuck me up, cause I'm ain't gonna let that happen. And so, I'm like, I'm like yo, let's go to [T.D.'s] house right now – [T.D.'s] downstairs. We are on the way to your house right now. You, You, You, it's like you tell him that we already know that he's the kind of nigger that he wants confrontation. You see what I am saying? I'm hoping I can just drop off the shit, cause I'm not – I already know how I am. If he touch me, I'm a try to kill him. You see what I am saying?

(State's Exhibit No. 65; R. 1171-72). The State also played a jail phone call recording during which the following exchange took place:



WILSON: But your making me look like the bitch that needs closure and he's the one calling the cops and he's the one that ended up in the hospital.

V.N.: Jacquan, you are not happy with me. You're never happy with me.

WILSON: What the fuck does that have to do with the fucking [inaudible]? You stupid fucking cunt.

\* \* \*

WILSON: He's trying to act like I was the coward cause who I stabbed in the back. Ok, so if you hit me and push me and you turn your back to me when I attack you that's your, that's your fault. If you had kept facing me I would have stabbed you in the front; oh I did stab you in the face. I mean, what more do you want? But you're making it seem like he's [inaudible] and he would have beat me because he is bigger than me. That's what you making it seem like.

V.N.: I don't feel that way at all.

WILSON: Sure you do.

\* \* \*

WILSON: [Inaudible] . . . mother fucker handle their shit. You read the book. [Inaudible] . . . stabbed ninety times. [Inaudible] out here though, you slash somebody and they snitch, [inaudible]. So anybody looking at the fact that he snitched. That he has a question mark, that he's getting on the witness stand. [Inaudible] You know what I am saying? [Inaudible] . . . kill'em. You see the difference between that. Cause it's all so green out here. Just cause he talk like he talk doesn't mean shit. [Inaudible] . . . faggot ass

mother fuckers. Half of [inaudible] are gay, other half [inaudible] they make so much money selling coke; they'd still be selling coke. Difference between me and you and everybody else out here [inaudible]. They can call you on the phone because they know I can't get to them. They can talk all the house shit and they know I can't get to them. Do all that extra shit. But if I take a pencil and put it through the eye, that's what they wanna do, cry. That's all they get, is another charge. But you trust them. And you still think I talk from my house like I'm about it. And I'm in here because I'm about it.

V.N.: What?

WILSON: You actin like I'm just talking like, [inaudible] like a bitch or something.

(State's Exhibit No. 66; R. 1172-73).

Finally, the State played a recording of a jail phone call that included the following exchange between Mr. Wilson and V.N.:

WILSON: You don't answer my phone call you dumb bitch.

V.N.: It dropped the call.

WILSON: Shut the fuck up – you lying fucking slut.

V.N.: Jacquan, I went into the other room and it dropped the call when I picked it up. It's happened before.

WILSON: Whatever. You are still such a bitch – I'm going to cut on you when I get out.

V.N.: I'm sorry, what?

WILSON: You are still just such a bitch – I'm going to cut on you when I get out.

V.N.: Why are you acting like that?

WILSON: Because you been acting different ever since the mother fucking preliminary, dog. You really believe the hype shit, dog. You really believe mother fucker shit. If he was so tough, why was he on the ground crying like a [inaudible] dog, huh?

V.N.: Jacquan, I'm not [inaudible].

WILSON: If he was so mother fucking tough, he was acting all tough till he got that mother fucker steel put in his eyes, huh? He was acting like he was some mother fucker super nigger, huh? So, he got stabbed in the fucking shoulder, neck, face, all that shit. Where is, where is you super nigger shit now, nigger? You ain't talkin none of that shit, dog. He ain't talking none of that shit he was talkin.

V.N.: I don't understand that.

WILSON: Liar, no you don't understand that. You like all those dumb white bitches, like Amanda, that believe the hype.

V.N.: Oh, my god. I'm not going to let you to continue to compare me to her, I am not her.

WILSON: Yea, you are. What are you going to do hang up, not answer the phone, lie and say the calls dropped, like a little coward? You all mighty and powerful because I am in jail – you can ignore my phone calls, bitch. If I was at your house, I bet you would be calling the cops. That does not make you tough. That [inaudible]

fucking hurt. That nigger is a fucking bitch. He is the one. fucking, witness stand, shit like that. You understand that? You understand that? You don't get that? Cause, that's how you think. That is something you would do. Someone does something to you, you do the witness stand [inaudible] instead of being a real person and handle it yourself. Someone stab me, I kill 'em. [Inaudible] all he did was push me [inaudible]. See all he did was push me and hit me and I stabbed the fuck up. But you think this is [inaudible] because I'm educated and I talk this way so I'm sorry get the fuck out of here.

V.N.: I never said you [inaudible] or a bitch. I said – what I am trying to fucking say to you, is I know that what actually fucking happened had what [D.H.] have not not done what [D.H.] did. That is what I am trying to say to you. Him putting his fucking hands on you is not ok. That is the fucking point here.

WILSON: I use a little too much force. But I do like the fact [inaudible]. But let's be real; he had a taser on him and he was planning on using it. He is not no dummy. He knows I'm not weak.

V.N.: What?

WILSON: He had a taser on him because he was planning on using it. He's not no dummy.

V.N.: Exactly!

WILSON: He's not. He's not. He knows I wasn't just sucking laid out. He never hit me before. [Inaudible] . . . before. Anybody touch their hands on me, they can say what they want all day long, they can [inaudible] say all that shit.

Soon as they put their hands on me, it's over. I don't know how many examples you need. They just say whatever the fuck they want all day long. As soon as they put their hands on you, it's dark. I'm going to try my best to kill her. And I understand like, "Well you didn't place her? All you did was [inaudible]. You didn't have to stab him." So, so does that mean that she gets to file assault charges. Can I file charges [inaudible]?

(State's Exhibit Nos. 67 and 68; R. 1172-73).

Notwithstanding portions of the jail phone call recordings that might be interpreted as reflecting Mr. Wilson's mental state at the time of the stabbing, the balance of the recordings reflect his state of mind at the time the calls were made. The balance of the recordings displays his callousness towards the stabbing, which he expresses in profane and vulgar language and manifests what might be considered as a complete insensitivity to the tragic event. A large portion of the recorded phone calls demonstrates a shocking lack of remorse by Mr. Wilson and the repulsiveness of his expressions toward the victim. Additionally, the recorded phone calls demonstrate several repulsive expressions toward V.N., an individual who is not a party to the very proceedings before the trier of fact.

In light of the foregoing, the balance of the recordings were likely highly inflammatory in the eyes of the jury. Based on the statements made during the jail phone calls, it would be difficult to imagine expressions that would be more repulsive to the notion of the value of human life than those made by Mr. Wilson in the jail phone calls.

The appraisal of the probative and prejudicial value of evidence under rule 403 is generally entrusted to the sound discretion of the trial judge and will not be upset on appeal absent manifest error. *See Maurer*, 770 P.2d at 983 (citing *State v. Miller*, 709 P.2d 350, 353 (Utah 1985)). However, the balance of the jail recordings contained little or no relevance to the central issues and any relevance that could be found therein was greatly and clearly outweighed by the danger of “unfair prejudice, confusion of the issues, [and] misleading the jury.” *See id.* (citing Utah R. Evid. 403). The overwhelming weight of this danger is underscored by the fact that the State had other evidence available to prove Mr. Wilson’s state of mind and to rebut his defense of others argument. *See State v. Cloud*, 722 P.2d 750, 754 (Utah 1986) (holding it was reversible error to admit photograph showing allegedly obscene gesture by a homicide victim as motivation for killing when evidence of gesture could have been presented to the jury readily by other means). Trial counsel’s failure to ultimately pursue an objection and request that the State be precluded from playing the recordings for the jury’s consideration constituted ineffective assistance of counsel.

The first prong of *Strickland* sets a high bar. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. While a defense lawyer “navigating a criminal proceeding faces any number of choices about how best to make a client’s case”, the lawyer – under *Strickland* – “has discharged his constitutional responsibility so long as his decisions fall within the ‘wide range of professionally competent assistance.’” *Buck v. Davis*, \_\_\_ U.S. \_\_\_, 137 S.Ct.

759, 775 (2017) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052). “It is only when the lawyer’s errors were ‘so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment’ that *Strickland*’s first prong is satisfied.” *Id.* (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052).

The record demonstrates that trial counsel did not pursue an objection and request that the State be precluded from playing the jail phone call recordings for the jury’s consideration. Trial counsel was aware of the content of the jail recordings<sup>8</sup> and was thus aware of the extremely prejudicial content contained in the recordings that displays Mr. Wilson’s callousness towards the stabbing, which he expressed in profane and vulgar language and thereby manifested a complete insensitivity to the tragic event. Moreover, a large portion of the recorded phone calls demonstrated a shocking lack of remorse by Mr. Wilson and the repulsiveness of his expressions toward the victim and V.N., a nonparty to the criminal proceedings.

As a result, trial counsel had ample opportunity to determine that the prejudicial content of the jail recordings were in direct conflict with the primary defense theory that the stabbing occurred in the defense of others, namely, Mr. Wilson’s girlfriend and his unborn child. Under the circumstances, reasonable trial counsel would have objected and moved to preclude the recordings from being heard and considered by the jury.

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<sup>8</sup>See R. 1159:3-4 (trial counsel conceding that he reviewed the jail phone calls); R. 1164:17-18 (State representing to court that recordings were provided to trial counsel prior to trial); R. 1255:1-2).

There is no reasonable trial strategy that could explain trial counsel's performance in failing to object and request that the State be precluded from playing the recordings. *See State v. Barela*, 2015 UT 22, ¶¶ 25-30, 349 P.3d 676 ("there is no reasonable strategy that could explain trial counsel's performance" in not requesting a jury instruction that would serve as the very basis of primary theory of the defense). No reasonable trial counsel would have found an advantage by allowing the repulsive statements of Mr. Wilson to be utilized by the State; statements that not only directly undermined the defense-of-others defense at trial but inserted the danger of "a conviction based on a generalized assessment of character" with conversations that included "obscenities, ethnic slurs, and otherwise coarse language, warped and suffused with an aura of nonspecific criminality . . . ." *Maurer*, 770 P.2d at 985. There was only an upside in the preclusion of the repulsive statements particularly when the primary defense theory at trial was the defense of others.

In his opening statement to the jury, trial counsel addressed the jail phone recordings by stating the following:

You're going to hear conversations. You are going to hear telephone recordings from my client. And you're going to hear language that most of you may not have heard, or maybe you have heard but don't like. . . . One thing you need to understand, that I hope we can get out there to you, are these phone calls from an individual who is in jail; who is trying to puff himself up. . . . My client, talking to individuals on the phone, says things that are absolutely not true in order to make himself seem tougher and better and bigger than what he really is.



(R. 622:5-24). By stating that the things said by Mr. Wilson on the jail phone call recordings “are absolutely not true” – counsel implicitly promised a presentation of evidence that demonstrated such. This is particularly noteworthy in light of the court’s instruction to the jury that “[s]tatements made by the attorneys during the trial are not evidence . . . .” (See Jury Instruction No. 33, R. 291).

“The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel.” *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166-67 (3rd Cir. 1993) (citing *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (Sixth Amendment violation where defense counsel failed to call witnesses who he claimed in opening statement would support defense version of shooting)); *see also State v. Zaborski*, 59 N.Y.2d 863, 465 N.Y.S.2d 927, 452 N.E.2d 1255, 1256-57 (1983) (mem.) (unfulfilled promise to produce entrapment evidence constituted ineffective assistance of counsel); *Commonwealth v. Lambeth*, 273 Pa.Super. 460, 417 A.2d 739, 740 (1979) (per curiam) (unfulfilled promise to produce evidence that the defendant and the victim had argued and that the victim had threatened the defendant determined to be ineffective assistance of counsel).

Here, trial counsel essentially promised a presentation of evidence that would demonstrate Mr. Wilson’s statements made in the jail recordings “are absolutely not true.”

Notwithstanding V.N.'s<sup>9</sup> testimony at trial that Mr. Wilson was "very put together and eloquent" and that he – during the jail phone calls – did not make any threats that she "took serious,"<sup>10</sup> trial counsel failed to present any evidence that addressed Mr. Wilson's callousness towards the stabbing, lack of remorse for the victims, or his repulsive treatment of V.N., a nonparty to the proceedings. Moreover, counsel never presented any evidence to disprove Mr. Wilson's statement that he needed to make up "a good reason as to why [his] life was in danger" during the confrontation with D.H. because his version "doesn't sound believable." (State's Exhibit No. 63; R. 1169:6-10; R. 1169:12 *et seq.*).

The failure to object and request that the recordings be precluded from the jury's consideration fell below an objective standard of reasonableness and constituted a failure to advocate on Mr. Wilson's behalf. Trial counsel was therefore ineffective by failing to object and request that the State be precluded from playing the jail phone call recordings for the jury. There is no sound course of trial strategy that would dictate trial counsel to be silent at such a crucial time as the State's presentation of jail recordings containing little or no relevance to the central issues and any relevance that was greatly and clearly outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. *See State v. Humphries*, 818 P.2d 1027, 1030 (Utah 1991) (holding that "[n]o sound course of trial strategy could dictate defense counsel to be silent at such a crucial time").

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<sup>9</sup>V.N. was the only witness utilized by the defense at trial (*See* R. 1176-78).

<sup>10</sup>*See* R. 1177-78.

Under *Strickland*, a defendant must also demonstrate prejudice – “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. There are a number of considerations that demonstrate that the proceeding would have ended differently had counsel rendered competent representation. If trial counsel had objected and moved to preclude the State from playing the jail phone call recordings for the jury, the court – in light of the *Maurer* decision – would have precluded the recordings from being considered by the jury.

Trial counsel’s failure to object and request that the recordings be precluded from the jury’s consideration, substantially – if not totally – undermined the primary defense theory at trial that the stabbing occurred in the defense of others, namely, Mr. Wilson’s pregnant girlfriend and his unborn child. This is demonstrated by Mr. Wilson’s statement during one of the recordings that he needed to make up “a good reason as to why [his] life was in danger” during the confrontation with D.H. because his version “doesn’t sound believable” (State’s Exhibit No. 63; R. 1169:6-10; R. 1169:12 *et seq.*). The State emphasized this at trial by essentially arguing that Mr. Wilson’s statement proves that the defense of others claim was fabricated (*See* R. 1239:1-8). Moreover, the State contended that Mr. Wilson’s statements in the jail calls demonstrate that “[h]e wasn’t concerned for T.D. that night.” (R. 1230:9-20).

Trial counsel's failure to object and request that the State be precluded from playing the jail recordings created what the jury might have considered as bearing the defense's imprimatur. After all, the recordings constituted Mr. Wilson's own statements that he made with the knowledge that the jail phone calls were being recorded and monitored (R. 1153-54 (testimony by Chief Webb that the jail system for inmate calls puts both parties on notice that the call is being recorded and monitored)).

Mr. Wilson was also prejudiced by trial counsel's failure to present evidence that Mr. Wilson's statements in the jail recordings "are absolutely not true." The implied promise that there would be a presentation of evidence in this regard created an expectation in the minds of jurors, and when defense counsel without explanation failed to keep that promise, the jury may well have inferred that the testimony was adverse to Mr. Wilson and may have also questioned trial counsel's credibility. *See United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 259 (7th Cir. 2003). When counsel primed the jury to hear a different version of Mr. Wilson's statements from what was ultimately presented, the reasonable juror might have inferred that the apparent failure to present evidence was due to witnesses being unwilling or unable to deliver the testimony he promised. *See Anderson v. Butler*, 858 F.2d 16, 18 (1st Cir. 1988). In no sense did that serve Mr. Wilson's interests; thereby prejudicing the entire case against him.

This misstep by trial counsel is reasonably likely to have affected the verdict. *See Strickland*, 466 U.S. at 696, 104 S.Ct. 2052. While the jury did not accept Mr. Wilson's

defense of others argument, this does not foreclose the probability that had the jury not heard the jail recordings it could reasonably have acquitted Mr. Wilson of attempted murder and convicted him of either attempted manslaughter or even aggravated assault.

The jury heard two different accounts of the events leading to the stabbing of D.H. Had the jury not heard the jail recording statements of Mr. Wilson, there is a reasonable probability of a different outcome at trial. The jail phone call statements painted Mr. Wilson with an extraordinary amount of callousness towards the tragic event, a shocking lack of remorse for D.H., and an almost psychopathic repulsive treatment of D.H. and V.N., a non party to the criminal proceedings. Perhaps, worst of all, the statement of Mr. Wilson in the jail recordings that he needed to formulate a new defense demonstrated untruthfulness as to the claim that the stabbing occurred in the defense of T.D. and his unborn child.

Upon objecting and requesting that the State be precluded from playing the jail recordings for the jury, there is a reasonable probability that the jail recordings, at least in large part, would have been precluded from the jury's consideration. There is a reasonable probability<sup>11</sup> that the recordings would have been precluded from consideration by the jury and that the outcome of the proceeding would have been different. "[A] showing of innocence is not required." *Fisher v. Gibson*, 282 F.3d 1283, 1307 (10<sup>th</sup> Cir. 2002).

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<sup>11</sup>A reasonable probability is "less than a preponderance of the evidence" but "sufficient to undermine confidence in the outcome." *Fisher v. Gibson*, 282 F.3d 1283, 1307 (10<sup>th</sup> Cir. 2002) (quoting *Strickland v. Washington*, 466 U.S. 688, 694, 104 S.Ct. 2052 (1984)).

As a result, the failure of trial counsel to reasonably object and request that the jail recordings be precluded from the jury's consideration was deficient and in turn prejudiced Mr. Wilson's primary defense theory at trial. By failing to object and request preclusion of the recordings, trial counsel did not act as reasonably competent counsel, did not protect Mr. Wilson's rights to due process, and did not zealously represent his interests prior to and during trial.

Because the statements in the jail recordings directly undermined the primary defense theory at trial, they – not to mention the danger of “unfair prejudice, confusion of the issues, [and] misleading the jury” – affected the overall consideration of the jury's deliberations; thereby affecting essentially the “entire evidentiary picture” at trial. *See Strickland*, 466 U.S. at 696, 104 S.Ct. 2052. As a result, trial counsel breached the duty to represent the interests of Mr. Wilson with zeal and loyalty. *See State v. Holland*, 876 P.2d 357, 359 (Utah 1994) (stating that “an attorney's duty to represent the interests of a client with zeal and loyalty” is “[c]ritical to the attorney-client relationship and the integrity of judicial proceedings . . .”). Trial counsel's faithful discharge of this duty is not only mandated by the Rules of Professional Conduct, but also – in criminal cases – by the Sixth Amendment right to the effective assistance of counsel.

Counsel's errors were “so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment” and thus *Strickland*'s first prong is satisfied. *Buck*, 137 S.Ct. at 775 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). In other

words, trial counsel's conduct so undermined the adversarial process in the instant case that the trial cannot be relied on as having produced a just result. *See Strickland*, 466 U.S. at 686, 104 S.Ct. 2052 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

## **II. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF ATTEMPTED MANSLAUGHTER.**

Courts – as a matter of well-established principle – recognize that a jury instruction for a lesser included offense can be beneficial to the defendant “because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal.” *State v. Baker*, 671 P.2d 152, 156 (Utah 1983) (citing *Beck v. Alabama*, 447 U.S. 625, 633, 100 S.Ct. 2382 (1980)). When the jury is instructed concerning a lesser included offense, “the defendant is afforded the full benefit of the reasonable doubt standard”, and

it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction – in this context or any other – precisely because he should not be exposed to the substantial risk that the jury's

practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

*Id.* (quoting *Keeble v. United States*, 412 U.S. 205, 212-13, 93 S.Ct. 1993 (1973)). The United States Supreme Court recognized and warned of this risk in *Beck*, where the Court stated:

Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience. . . .

*Beck*, 447 U.S. at 642, 100 S.Ct. 2382 (quoting *Jacobs v. State*, 361 So.2d 640, 651-52 (Ala. 1978), *cert. denied*, 439 U.S. 1122, 99 S.Ct. 1034 (1979)). Consequently, when proof of an element of the crime is in dispute, the availability of a “third option” – the choice of conviction of a lesser offense rather than conviction of the greater or acquittal – affords the defendant the full benefit of the reasonable doubt standard. *See Baker*, 671 P.2d at 157.

Although the United States Supreme Court – in *Keeble* – stopped short of declaring that the defendant's right to have the jury instructed on a lesser included offense is guaranteed by the Due Process Clause of the Fifth Amendment, the Court warned that a construction of the subject statute precluding lesser included offense instructions “would raise difficult constitutional questions.” *See Keeble*, 412 U.S. at 213, 93 S.Ct. 1993; *see*



also *Beck*, 447 U.S. at 637, 100 S.Ct. 2382; *Baker*, 671 P.2d at 157. In a subsequent case, the Court went further by stating, “Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction.” *Baker*, 671 P.2d at 157 (quoting *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049 (1982)). Moreover, in *Bell v. Watkins*, 692 F.2d 999 (5<sup>th</sup> Cir. 1982), the Fifth Circuit Court of Appeals stated that if supported by evidence, “[t]he due process clause of the fourteenth amendment requires a trial judge to give a lesser included offense instruction to the jury ‘if the evidence would permit a jury to rationally find [the defendant] guilty of the lesser offense and acquit him of the greater.’” *Id.* at 1004 (quoting *Beck*, 447 U.S. at 635, 100 S.Ct. 2382).

“This is not to say that the defendant's right to a lesser included offense instruction is absolute or unqualified.” *Baker*, 671 P.2d at 157. Any potential characteristics of jurors based on compassion or leniency do not justify – in and of itself – the basis for such an instruction. *Id.* According to our supreme court's directive in *Baker*, “The defendant's right to a lesser included offense instruction is limited by the evidence presented at trial. This limitation requires the application of the evidence-based standard . . . , which is the appropriate basis for determining whether to instruct a jury regarding a lesser included offense at the defendant's request.” *See id.*

The Court – in *Baker* – noted that “this evidence-based standard is widely recognized.” *Id.* at 158. In so doing, the Court referenced the *Beck* decision, where the

United States Supreme Court stated that “[a]lthough the States vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction, they agree that it must be given when supported by the evidence.” The *Baker* Court also acknowledged *Keeble*, where the United States Supreme Court held that “it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *Id.* (quoting *Keeble*, 412 U.S. at 208, 93 S.Ct. 1993). In further support of the evidence-based standard, the Court in *Baker* authoritatively mentioned the *Hopper* case, where the Supreme Court emphasized that “due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction.” *See id.* (quoting *Hopper*, 456 U.S. at 611, 102 S.Ct. 2049). Finally, the supreme court recognized that the Tenth Circuit Court of Appeals – in *United States v. Pino*, 606 F.2d 908 (10<sup>th</sup> Cir. 1979), stated the following:

It is true that common law cases earlier dictated a strict adherence to the statutory elements alone and analysis of them as the basis for determining the availability of a lesser offense charge. We are persuaded, however, not to apply the artificial analysis suggested by the Government and that instead the availability of the lesser-included-offense instruction should be decided in practical terms of the evidence developed in this case on the offense charged.

*See id.* (quoting *Pino*, 606 F.2d at 916 and citing *United States v. Slater*, 692 F.2d 107 (10<sup>th</sup> Cir.1982)).

Utah Code Ann. § 76-1-402 incorporates the evidence-based standard by providing that “[t]he 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.” Utah Code Ann. § 76-1-402(4). The definitions of an “included offense” are contained in subsection (3) of the statute, which contains three alternative definitions with (3)(a) and (c) being applicable in this case.

Subsection (3)(a) states that an offense is included in the offense charged when “it is established by proof of the same or less than all the facts required to establish the commission of the offense charged.” The analysis of whether an offense is included for purposes of deciding whether to grant a defendant’s request for a jury instruction begins with the proof of facts at trial. *See Baker*, 671 P.2d at 158. “If the same facts tend to prove elements of more than one statutory offense,” the offenses are therefore related under § 76-1-402. *See id.* Thus, the application of § 76-1-402(3)(a) will require some reference to the statutory elements of the offenses involved in order to determine whether given facts are “required to establish the commission of the offense charged.” *See id.* at 158-59 (quoting Utah Code Ann. § 76-1-402(3)(a)). The requirement that there exist some overlap in the statutory elements of allegedly “included” offenses precludes the argument that totally unrelated offenses might be deemed included simply because some of the evidence necessary to prove one crime is also necessary to prove the other. *Id.* at 159. “[W]here two offenses are related because some of their statutory elements overlap, and where the

evidence at the trial of the greater offense includes proof of some or all of those overlapping elements, the lesser offense is an included offense under subsection (3)(a).” *Id.*

Once an offense is established as included within the meaning of § 76-1-402(3), the court is obligated to instruct on the lesser offense only if the evidence offered provides a “rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.” *Id.* (quoting Utah Code Ann. 76-1-402(4)).

This standard does not require the court to weigh the credibility of the evidence, which is a function reserved for the trier of fact. *See id.* “The court must only decide whether there is a sufficient quantum of evidence presented to justify sending the question to the jury, a decision which must be made concerning all jury instructions in any trial.” *Id.* Where the elements of two offenses overlap, the court should instruct the jury regarding the lesser offense if there is a sufficient quantum of evidence to raise a jury question regarding the lesser offense. *See id.* “Similarly, when the evidence is ambiguous and therefore susceptible to alternative interpretations, and one alternative would permit acquittal of the greater offense and conviction of the lesser, a jury question exists and the court must give a lesser included offense instruction at the request of the defendant.” *See id.* This particular situation arises where the critical question goes to either the credibility of certain evidence or the determination of what inferences may legitimately be made on the basis of the evidence. *Id.* “By assessing the evidence and deciding whether any interpretation of it would, if believed by the jury, permit conviction of the lesser offense and acquittal of the

greater, the court preserves the weighing of evidence for the jury but is still able to protect the weighing process from frivolous ‘red herrings.’” *See id.*

The applicable statutes setting out the crimes of murder and manslaughter provide the following:

“76-5-203. Murder.

- (2) Criminal homicide constitutes murder if:
  - (a) the actor intentionally or knowingly causes the death of another;”

Utah Code Ann. § 76-5-205 provides:

76-5-205. Manslaughter.

- (1) Criminal homicide constitutes manslaughter if the actor:
  - (a) recklessly causes the death of another; . . .
  - (c) commits murder, but special mitigation is established under Section 76-5-205.5.

Utah Code Ann. § 76-6-205. Section 76-5-205.5 provides:

76-5-205.5. Special mitigation reducing the level of criminal homicide offense – Burden of proof – Application to reduce offense.

- (1) Special mitigation exists when the actor causes the death of another or attempts to cause the death of another: . . . ;
  - (b) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.

Utah Code Ann. § 76-5-205.5. Finally, Utah Code Ann. § 76-4-101 provides:

76-4-101. Attempt – Elements of offense.

- (1) For purposes of this part, a person is guilty of an attempt to commit a crime if he:

- (a) engages in conduct constituting a substantial step toward commission of the crime; and
- (b)(i) intends to commit the crime; or
- (ii) when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result.

Utah Code Ann. § 76-4-101.

Here, because the two offenses are related inasmuch as some of their statutory elements overlap, and the evidence at the trial of the greater offense included proof of some or all of those overlapping elements, the lesser offense of manslaughter is an included offense under subsection (3)(a) of Utah Code Ann. § 76-1-402. Moreover, manslaughter is an included offense as designated by statute. *See* Utah Code Ann. 76-5-205(1)(a) & (c); Utah Code Ann. § 76-1-402(3)(c). Additionally, manslaughter is an included offense of murder by established case law. *See, e.g., State v. Bolsinger*, 699 P.2d 1214, 1221 (Utah 1985).

In this case, the evidence was ambiguous or subject to alternative interpretation requiring the court to instruct on the lesser offense of attempted manslaughter. The evidence at trial established that T.D., the pregnant girlfriend of Mr. Wilson, told him that D.H. had come by her house (R. 653:9-12). As a result, Mr. Wilson was “pretty upset” because he thought T.D. and D.H. had “something going on” (R. 653:15-17).

On Monday, November 23, 2015, T.D. initiated a text with D.H. in response to his dropping by her house and – in the process – they discussed her pregnancy (R. 721-22). In

addition, D.H. informed her that Mr. Wilson may not be the person that she thinks he is (R. 651-52).

On November 24, 2015, D.H. communicated with T.D. and expressed frustration that Mr. Wilson had not returned the jeans – stating that he was “[h]otter than hell’s flames.” (R. 727:14-18). Within the hour, T.D. communicated to D.H. that she and Mr. Wilson would come by D.H.’s house and return the pants (R. 728:4-12).

Mr. Wilson arrived at the front door of D.H.’s house about 5:00 p.m. that day to return the jeans (R. 629-33; R. 728:15-21). Mr. Wilson handed D.H. a plastic bag with the pants, which D.H. dropped on the floor (R. 729:5-20). An argument – laced with profanity ensued – at which point they moved outside to the porch (R. 730-31).

Mr. Wilson looked at D.H. and said, “fuck you” (R. 732:7). D.H. responded by saying that he was “going to be a real fuck nigga right then and there” and show T.D. every “bit of validation” of what he had been doing with other women for the last two months (R. 732:7-18).

D.H. pushed Mr. Wilson out of the way and moved quickly and aggressively from the porch to the car where T.D. sat in the driver’s seat (R. 654:6-13; 657:13-18). Watching the heated exchange, T.D. became afraid as the argument quickly moved from the porch to the car (R. 657:22-24). T.D. – who froze with fear as D.H. entered the car through the open passenger door – “thought [D.H.] was reaching for [her], like he was going to hurt [her] or something.” (R. 657:3-6; R. 656:20-22; R. 688:20-24; R. 699:1-4). As D.H. entered the car,

Mr. Wilson stabbed him numerous times (R. 735-43). This constitutes a sufficient quantum of evidence to warrant an instruction as to the lesser included offense of attempted manslaughter under the facts and evidence presented in this case.

When the evidence is susceptible to alternative interpretations, the trial court is obligated to give a lesser included offense instruction if any of those alternative interpretations would provide both a “rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.” *See* Utah Code Ann. § 76-1-402(4). As specifically demonstrated above, the trial court in the instant case would have been obligated to give a lesser included offense instruction under the facts and circumstances of this case had such an instruction been requested by trial counsel. *See & cf.* Utah Code Ann. § 76-5-205(1)(a) & (c); Utah Code Ann. § 76-5-205.5(1)(b).

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), the United States Supreme Court established a two-prong test for determining when a defendant’s Sixth Amendment right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 2064. The test – adopted by Utah courts – requires a defendant to show “first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and,



second, that counsel's performance prejudiced the defendant." *State v. Martinez*, 2001 UT 12, ¶ 16, 26 P.3d 203; *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988).<sup>12</sup>

Given the circumstances of this case as outlined in detail above, it is difficult to conceive of a sound trial strategy that would justify trial counsel's decision not to request a jury instruction on the lesser included offense of attempted manslaughter. In light of the facts and evidence presented at trial, trial counsel should have requested the court to instruct the jury on the lesser included offense. *See* Utah Code Ann. § 76-5-205(1)(a) (homicide constitutes manslaughter if death recklessly caused) and *State v. Standiford*, 769 P.2d 254, 262-64 (Utah 1988); *see also* Utah Code Ann. §§ 76-5-205(1)(c) & 76-5-205.5(1)(b) (homicide or attempt mitigated if under influence of extreme emotional distress) and *State v. Lambdin*, 2017 UT 46, ¶¶ 15-33, \_\_\_ P.3d \_\_\_. By failing to do so, trial counsel failed to address the lesser-included offense issue under the facts and circumstances of this case. Consequently, trial counsel's failures are sufficiently egregious to support the conclusions that trial counsel's decision cannot be considered a "sound trial strategy," as required by *Strickland*, and that defense counsel's performance fell below the objective standard of reasonableness set forth in *Strickland*. This is demonstrated by existing Utah case law, as previously discussed, the plain and mandatory language of Utah Code Ann. § 76-1-402, and

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<sup>12</sup>Appellant – for the sake of brevity – incorporates the extensively cited case law pertaining to the analysis of an ineffective assistance of counsel claim set forth in Argument I.

the underlying factual circumstances and evidence in this case. *See & cf. State v. Gillian*, 463 P.2d 811, 814 (Utah 1970).

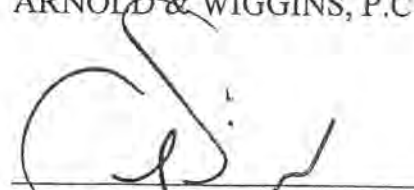
But for counsel's unprofessional failure to request a lesser included offense instruction, the result of Mr. Wilson's trial would have been different. Had trial counsel requested a lesser included offense instruction for attempted manslaughter, there is a reasonable probability that the court would have instructed the jury accordingly. By instructing the jury on the lesser included offense, the jury would have effectively been provided with the availability of a "third option" – the choice of conviction of a lesser offense rather than conviction of the greater or acquittal. The prejudice to Mr. Wilson resulting from this critical failure is evinced by the fact that he was denied the full benefit of the reasonable doubt standard in the course of the jury arriving at his conviction for attempted murder.

### CONCLUSION

Mr. Wilson respectfully requests that this Court reverse and remand for a new trial as the Court deems just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of September, 2018.

ARNOLD & WIGGINS, P.C.

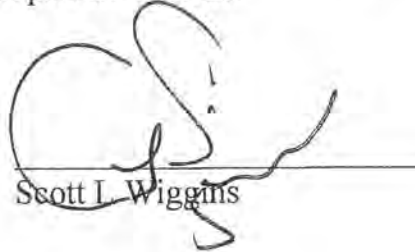


Scott L. Wiggins  
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned, Scott L. Wiggins, hereby certifies, pursuant to Utah Rule of Appellate Procedure 24(a)(11)(g), that the Brief of Appellant complies with the applicable by containing 13,204 words.

The undersigned also certifies that the Brief of Appellant complies with Utah Rule of Appellate Procedure 21, governing public and private records.



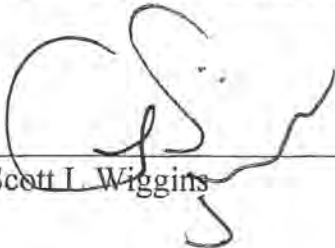
Scott L. Wiggins

**CERTIFICATE OF SERVICE**

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following on this 26<sup>th</sup> day of September, 2018:

Thomas B. Brunker  
Assistant Solicitor General  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854  
*Counsel for the State of Utah*

The undersigned also certifies that he included a digital copy of the Brief of Appellant.

  
\_\_\_\_\_  
Scott L. Wiggins

## **ADDENDA**

- Addendum A: Verdict and Special Verdict, R. 245-47  
Addendum B: Sentence, Judgment, Commitment, R. 344-45

**Addendum A:**  
Verdict and Special Verdict, R. 245-47

**FILED**

SEP 28 2017

**IN THE SECOND DISTRICT COURT, STATE OF UTAH  
DAVIS COUNTY**

<p>THE STATE OF UTAH, Plaintiff,  vs. JACQUAN WILSON, Defendant.</p>		<p><b>VERDICT</b>  Case No.: 151702212 Judge: ROBERT J. DALE</p>
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We, the jury empanelled to try the issues in the above-entitled matter, do hereby find,  
beyond a reasonable doubt, the defendant, JACQUAN WILSON:

**COUNT I**

**NOT GUILTY**

OR

**GUILTY** of Attempted Murder, as charged.

OR

**GUILTY** of Aggravated Assault, as a lesser included offense.

OR

**GUILTY** of Attempted Manslaughter, reduced from Attempted Murder, based on imperfect defense of others.

COUNT II

       NOT GUILTY of Obstructing Justice.

OR

  X   GUILTY of Obstructing Justice.

DATED this   28   day of September, 2017.

  
\_\_\_\_\_  
FOREPERSON



**FILED**

**SEP 28 2017**

Layton District Court

**IN THE SECOND DISTRICT COURT, STATE OF UTAH  
DAVIS COUNTY**

THE STATE OF UTAH,  
Plaintiff,

vs.

JACQUAN WILSON,  
Defendant.

**SPECIAL VERDICT FORM**

Case No.: 151702212

Judge: ROBERT J. DALE

If you have found the defendant Guilty under Count I of either attempted murder or attempted manslaughter, please answer the following question: Do you find beyond a reasonable doubt that the defendant used a Dangerous Weapon in the commission of either attempted murder or attempted manslaughter?

YES

OR

NO

DATED this 28 day of September, 2017.

  
\_\_\_\_\_  
FOREPERSON

**Addendum B:**  
Sentence, Judgment, Commitment, R. 344-45

The Order of the Court is stated below:

Dated: November 16, 2017 /s/ Robert J Dale  
03:08:25 PM District Court Judge



2nd District- Farmington  
DAVIS COUNTY, STATE OF UTAH

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STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
 :  
vs. : Case No: 151702212 FS  
JACQUAN DAVID WILSON, : Judge: ROBERT J DALE  
Defendant. : Date: November 16, 2017  
Custody: Davis County Jail

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PRESENT

Clerk: glendap

Prosecutor: NATHAN D LYON

BENJAMIN B WILLOUGHBY

Defendant Present

The defendant is in the custody of the Davis County Jail

Defendant's Attorney(s): RYAN J BUSHELL

DEFENDANT INFORMATION

Date of birth: May 24, 1988

Audio

Tape Number: F4-111617 Tape Count: 12.00/12.51

CHARGES

1. ATTEMPTED MURDER - 1st Degree Felony

Plea: Not Guilty - Disposition: 09/28/2017 Guilty

2. OBSTRUCTING JUSTICE - 2nd Degree Felony

Plea: Not Guilty - Disposition: 09/28/2017 Guilty

HEARING

Count 1 is sentenced to 4 years to life, because the charge was enhanced by using a dangerous weapon.

Restitution to remain open.

000344

Case No: 151702212 Date: Nov 16, 2017

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SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term from 4 to Life years in the Utah State Prison.

Based on the defendant's conviction of OBSTRUCTING JUSTICE 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.

COMMITMENT is to begin immediately.

To the DAVIS County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Count 2 of Obstructing Justice is to be served consecutively to Count 1.

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

000345