IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT

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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ORAL ARGUMENT CALENDARED

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None.

ARGUMENTS

I. THE RECORD DEMONSTRATES THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO AND REQUEST THAT THE STATE BE PRECLUDED FROM PLAYING THE EXCERPTS OF THE JAIL CALLS FOR THE JURY'S CONSIDERATION.

The State claims that Mr. Wilson "has not overcome the strong presumption that his counsel performed effectively" in handling the recordings of various jail phone calls played by the State for the jury. *See* Brief of Appellee, p. 29, *et seq*. This claim, however, fails due to a number of significant omissions and miscalculations in the State's analysis – as demonstrated below.

Part and parcel with this claim, the State contends that "[c]ompetent counsel could reasonably conclude that a rule 403 objection was unlikely to succeed." *See id*., p. 32. The argument presented in support of this contention omits a number of critical facts and considerations of law.

While relevant[1] evidence is generally admissible,[2] rule 403 of the Utah Rules of Evidence provides an exception to this general rule by stating that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or

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[1]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." *See* Utah R. Evid. 401.

[2]*See* Utah R. Evid. 402; *see also State v. Dunn*, 850 P.2d 1201, 1221-22 (Utah 1993) (explaining that courts "indulge a presumption in favor of admissibility").

more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Utah R. Evid. 403. Thus, rule 403 – at its heart – is a balancing test. *See State v. Maurer*, 770 P.2d 981, 984 (Utah 1989).

Mr. Wilson recognizes – as demonstrated in his opening Brief – that rule 403 "imposes . . . the heavy burden not only to show that the risk of unfair 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). Evidence, for purposes of the rule, is unfairly prejudicial when it has "'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Maurer*, 770 P.2d at 984 (quoting Fed. R. Evid. 403 advisory committee's notes). Further, "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).

Contrary to the State's assertion, our supreme court's decision in *Maurer* is particularly relevant to the analysis in this case. In *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. *See Maurer*, 770 P.2d 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*.

Defense counsel – prior to trial – 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.

The supreme court reversed the conviction, determining 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.

Here, the excerpts of the recorded jail phone calls played by the State at trial displayed an extreme callousness by Mr. Wilson towards the stabbing of D.H., which he expresses in profane and vulgar language, manifesting his complete insensitivity to the injuries inflicted upon D.H. For instance, during one excerpt, Mr. Wilson – referring to the victim, D.H. – stated,

> 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 . . . 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].

(*See* SR3:9-13).[3] This callousness is further demonstrated by another excerpt where Mr. Wilson stated, "Yeah. Because um, I'm going to play it cool, like you know what I'm saying and I can't do too much talking, but I have no problem taking somebody's life, at all. So that's not a big deal to me, it really isn't." (*See* SR4:11-14). In another excerpt, which includes one of many racial slurs, Mr. Wilson states, "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." (*See* SR8:5-8).

Even more troubling are excerpts played by the State that not only indicate extreme callousness but a shocking lack of remorse for D.H. with an almost psychopathic repulsive treatment of him. For example, the State played an excerpt where Mr. Wilson – referring

[3]A true and correct copy of the Supplemental Record SR1-37 - Transcript: Powerpoint Audio (Jail Phone Call Excerpts) is attached to this Brief as Addendum A.

to the incident – stated, "I'm like whatever. So I'm not even tripping off of it and if he tries something, I'm going to put this nigger in the hospital, I don't care. So that's how I'm laughing." (*See* SR23:1-4). In another excerpt, Mr. Wilson stated:

> I clearly knew – know my surroundings when I'm stabbing somebody the fuck up. I was prepared, he wasn't. He lost. He's mad about it . . . . . He got handled, dog, straight East Coast style. He thought I was one of these Utah motherfuckers that I was going to tell the cops, or get bitch slapped or some shit like that, and he got stabbed the fuck up. What do – what do you want me to say?

(*See* SR30-31).

Equally troubling are the excerpts played by the State that demonstrate derogatory comments and extreme amounts of callousness towards V.N., a nonparty to the criminal proceedings, not to mention women in general.[4] In one of the excerpts, Mr. Wilson – in the course of arguing with V.N. – stated:

> So I don't – I don't – I don't know what to tell you. Shouldn't have to fucking . . . physically threaten you so you don't hang out with another dude. And that's why we not – that's why I would never say to you in that type of situation. I hope you bump into a rich, rich white dude that doesn't mind fat girls because that's what – that's what you going to get. Because I'm not – I'm not marrying you, not with – I shouldn't have to fucking force you to do some shit like this.

(*See* SR7:11-20). Mr. Wilson, in another excerpt, during another argument with V.N., states, "Okay then. And I'm trying to convey the fucking message and your punk ass is

[4]In its Brief, the State claims that the jury did not hear Mr. Wilson's "vulgar expressions toward" V.N. *See* Brief of Appellee, p. 34 n.6. This is not true.

over there typing some bullshit for your fucking job." (*See* SR17:6-8). In another, Mr. Wilson – getting frustrated with V.N. – states, "He's only been talking like – like he tough Tony since I got in jail, you stupid motherfucker. (*See* SR29:6-8; *see also* SR11:9-11 (stating "I don't do shit but fuck bitches, chop, and get money. Why would somebody be made at me? Unless it's over the money that I'm getting or the bitches that I'm fucking."); SR22:22-24 (stating "I had just been chilling with Amanda fucking her all weekend, so I don't really give a fuck. I'm like whatever bitch."); SR26:16-18 (stating in reference to his T.D.'s pregnancy, "I'm trying to make amends with you. You ain't having it. I'm telling you I'm telling [T.D.] to kill the kid so we can work things out with us.")).

A large portion of the foregoing excerpts also demonstrate a warped and suffused aura of nonspecific criminality. This is also indicated in other excerpts played by the State. For example, Mr. Wilson states in one such excerpt, "So the roommate was this gay guy that I didn't like. Like, I didn't like him.. He would always say little slick racist shit. I done already smacked him up and everything." (*See* SR19:16-18; *see also* SR29-30 (stating "If somebody stabbed me, I'd kill them. That's it. Serious."; SR31:7 (stating "Because everything that I got a problem with, I go handle shit.")).

Based on the foregoing, the balance of the recordings were likely highly inflammatory in the eyes of the jury. Considering the statements made during the excerpts, 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 during the jail phone calls utilized by the State.

The State claims in its Brief that Mr. Wilson's opening Brief "glosses over the high probative value of the jail clips, focusing only on the potential risk they may have had." *See* Brief of Appellee, p. 37. This is not true and demonstrated by the argument set forth on page 30 of the Brief of Appellant.

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 Maurer*, 770 P.2d at 983 (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). The failure of trial counsel 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.

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 v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052 (1984)). "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).

Notwithstanding the State's claim, 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[5] 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. In fact, the excerpts 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, and women in general.

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.

[5]*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).

Under the circumstances, reasonable trial counsel would have objected and moved to preclude the recordings from being heard and considered by the jury.

As a touchstone for any ineffective assistance of counsel issue like that in this case, 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 existed only an upside in the preclusion of the repulsive statements particularly when the primary defense theory at trial was the defense of others.

The State – in its Brief – downplays counsel's unfulfilled promise during his opening statement to the jury. *See* Brief of Appellee, p. 46 *et seq*. In that statement, 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 (emphasis added)). Counsel – by stating that the things said by Mr. Wilson on the jail phone call recordings "are absolutely not true" – implicitly promised a presentation of evidence that demonstrated as much. This is critical 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).[6]

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[7] 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,"[8] trial counsel failed to present any evidence that addressed Mr. Wilson's callousness towards the stabbing, lack of remorse for the victims, his repulsive treatment of V.N., a nonparty to the proceedings, or the referenced nonspecific criminal behavior. Further, 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*.).

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[6]In a footnote, the State challenges this "extra-jurisdictional authority" as without "the necessary factual predicate for his ineffectiveness claim." *See* Brief of Appellee, p. 49 n.8. The factual predicate is demonstrated, as discussed above, by the plain language of trial counsel's opening statement that is difficult to interpret in any other way. In addition, the legal principles upon which the authorities cited above rely are sound for purposes of an ineffective assistance of counsel analysis under the Sixth Amendment to the United States Constitution.

[7]Significantly, V.N. was the only witness utilized by the defense at trial (*See* R. 1176-78).

[8]*See* R. 1177-78.

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. 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").

A defendant must also demonstrate prejudice under *Strickland* by showing "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 many considerations that demonstrate that the proceeding would have ended differently in this case. 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 undermined the primary defense theory at trial that the stabbing occurred in the defense of others. 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" (SR6:14-16; R. 1169:6-10; R. 1169:12 *et seq*.). The State underscored 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). Additionally, 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 failures created what the jury might have considered as bearing the defense's imprimatur. The recordings – after all – 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).

Trial counsel's failure to present evidence that Mr. Wilson's statements in the jail recordings "are absolutely not true" also prejudiced Mr. Wilson. 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). By priming the jury to hear a different version of Mr. Wilson's statements from what was ultimately presented, the reasonable juror quite probably 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). This in no way served Mr. Wilson's interests; thereby prejudicing the entire case against him.

Trial counsel's misstep 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 record shows that 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. Worst of all, perhaps, is 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 preluded 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. "[A] showing of innocence is not required." *Fisher v. Gibson*, 282 F.3d 1283, 1307 (10th Cir. 2002).

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.

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

The State argues that Mr. Wilson "has not overcome the strong presumption that trial counsel's strategic decisions" in foregoing an instruction on the lesser-included offense of attempted manslaughter. *See* Brief of Appellee, p. 50 *et seq*. This argument is without

merit in light of circumstances of the instant, which includes trial counsel's failures set forth in Argument I.

The evidence in the instant case was ambiguous or subject to alternative interpretation requiring the court to instruct on the lesser offense of attempted manslaughter. 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 in the opening Brief, 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 light of the circumstances 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. This is particularly so because trial counsel's failure to object and request that the excerpts of the jail recordings precluded the jury from considering the primary defense theory at trial that the stabbing occurred in the defense of others. As a result, 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, 424 P.3d 117). 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, the plain and mandatory language of Utah Code Ann. § 76-1-402, and 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

In light of the foregoing, Mr. Wilson respectfully requests that this Court reverse his convictions and remand for a new trial as the Court deems just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 18th day of November, 2019.

ARNOLD & WIGGINS, P.C.

/s/ Scott L Wiggins
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 Reply Brief of Appellant complies with the applicable rule by containing 4,840 words.

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

/s/ Scott L Wiggins
Scott L Wiggins

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2019, I personally caused a true and correct copy of the REPLY BRIEF OF APPELLANT to be sent by electronic mail to:

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The undersigned further certifies that the appropriate number of hard copies of the aforementioned Brief will be delivered to the foregoing within the required period of time.

/s/ Scott L Wiggins
Scott L Wiggins

ADDENDA

Addendum A:	Supplemental Record SR1-37 - Transcript: Powerpoint Audio (Jail Phone Call Excerpts)
Addendum B:	*State v. Maurer*, 770 P.2d 981 (1989)

Addendum A:
Supplemental Record SR1-37
Transcript: Powerpoint Audio (Jail Phone Call Excerpts)

Marian Decker

From: Nathan Lyon <nlyon@co.davis.ut.us>
Sent: Thursday, December 13, 2018 10:54 AM
To: Marian Decker
Subject: Wilson Time Stamps

Exhibit #53 (slide #2): 5:30 - 6:20 on court audio. Played twice b/c juror couldn't hear
Exhibit #54 (slide #3): 8:20 - 10:20
Exhibit #55 (slide #4): 11:02 - 12:05
Exhibit #63 (slide #5): 12:40 - 13:40
Exhibit #62 (slide #6): 14:18 - 14:30
Exhibit #56 (slide #7): 15:27 - 16:50
Exhibit #57 (slide #8): 15:27 - 16:50
Exhibit #64 (slide #9): 18:30 - 39:00
Exhibit #65 (slide #10): 39:45 - 43:00
Exhibit #66 (slide #11): 43:48 - 45:50
Exhibit #67 (slide #12): 43:48 - 45:50

Exhibit #68 (slide #13: 46:11 - 47:12
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Nathan D. Lyon
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SR1

* * *

Jacquan Wilson Jail Calls

TRANSCRIPT: POWERPOINT AUDIO

* * *

* * *

SLIDE 2

January 9, 2016

* * *

AMANDA: Work on the weekend, but this (inaudible) weekend.

JACQUAN: I'm sorry. Like, I don't know cops says it was. I'm not Donte. I don't call the cops to help me out with shit. I handle shit like a man, on my own. People --

AMANDA: Correct.

JACQUAN: -- fuck with 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). Yo --

AMANDA: It wouldn't be a whole different --

* * *

SLIDE 3

January 9, 2016 continued

* * *

JACQUAN: So I was just -- um, I don't know, you just made it seem, like, you know he is winning because I'm in jail and he's out there.

VICTORIA: I am -- the thing is I -- that's what frustrating to me though is that he gets to fucking pop off and say all this shit and he gets to be a certain type of way and talk all this fucking mad shit about you, but, like, he can't

handle shit like a man. And he has to fucking text me and he -- and he, like, I -- I want you home, that's what I want.

I don't want to be in this situation. I don't want us to have to be fighting because you think that something is going on that isn't. I'm -- like and I'm trying to do everything I can to be here. That's why if -- I've been trying to retain Shapiro when I get my taxes. Like, I'm going to go get my concealed weapon's permit. I'm going to get a gun. I've already looked into that. I already know what class I have to take. I already know what I have to do that.

JACQUAN: Yeah. Because, um, I'm going to play it cool, like, you know what I'm saying and I can't do too much talking, but I have no problem taking somebody's life, at all. So that's not a big deal to me, it really isn't. So I mean, ask Tyrese, ask anybody. You might have been surprised when you saw the news and saw me on there, but he wasn't.

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SLIDE 4

January 14, 2016

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JACQUAN: What is -- hold on. When did you talk to this -- when did you talk about this to my cousin? You didn't tell me about this.

VICTORIA: When everything first happened, I called and talked to Tyrese.

JACQUAN: And what did Tyrese say?

VICTORIA: Tyrese told me that, like, you went over -- like, that you went over there because you had something of his and he was already lit at you and he'd already been mad at you, like, prior to that and had been upset at you. And that as far as Tyrese, you know, like, things had just escalated. Like, he was already fucking pissed at you and had already started, like, going off on you as it was.

JACQUAN: Well, yeah. He did start going off on me, but he never said -- he never threatened me. He might have said, "Oh, fuck you; you're a lame-ass nigger." He might have said all types of derogatory shit, but he never said, "Oh, I'm going to find you and I'm going to get you." You understand?

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SLIDE 5

January 14, 2016 continued

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JACQUAN: That's not trying to get (inaudible) with somebody?

VICTORIA: And I agree.

PHONE SYSTEM: You have one minute left.

VICTORIA: I should -- I agree. I should be better. I should call more frequently, and I will. I promise you that. That is the next important thing. That's, like -- like, that is basically No. 1 over the one thing that you asked me to do.

JACQUAN: And everything that you're telling me, like, you talk to my cousin and all that shit and you -- all that. Like, know what I'm saying? Like, everything that we're talking about, like, why he was mad (inaudible) and tell him. Like --

VICTORIA: Okay.

JACQUAN: -- you can't just talk to him, and send him some screen shots. He doesn't care.

VICTORIA: Okay.

JACQUAN: A screen shot of him threatening Tia is not going to get me off. A screen shot of him saying I'm a fagot-ass nigger is not going to give me off. It's not going to -- that's not going to do shit.

VICTORIA: Okay.

JACQUAN: That ain't going to -- so, like, I don't know, but I gotta think of a good reason as to why my life was in danger.

VICTORIA: Okay.

JACQUAN: Because, obviously, my story, me telling the truth doesn't sound believable.

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SLIDE 6

JANUARY 15, 2016

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JACQUAN: Let me tell you how I'm different, because I don't call the cops. I handle shit on my own. And I never

will.

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SLIDE 7

JANUARY 16, 2016

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JACQUAN: You think I'm not crazy? You don't think I know that they're recording these conversations? That it's going to be used against me? You think I don't got -- I'm in my right state of mind right now? I'm serious. I'm dead-fucking serious. I don't know how else to tell you. And him too.

So I don't -- I don't -- I don't know what to tell you. Shouldn't have to fucking --

VICTORIA: (inaudible).

JACQUAN: -- physically threaten you so you don't hang out with another dude. And that's why we not -- that's why I would never say to you in that type of situation. I hope you bump into a rich, rich white dude that doesn't mind fat girls because that's what -- that's what you going to get. Because I'm not -- I'm not marrying you, not with -- I shouldn't have to fucking force you to do some shit like this.

Like, that's not -- that's off the fucking wall. Like, if you didn't want me hanging out with somebody, you didn't want me hanging out with a girl and I'm fuck -- you got to argue with me for two hours. We don't need to fucking be together. You don't understand that?

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SLIDE 8

January 16, 2016 continued

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JACQUAN: 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.

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SLIDE 9

January 18, 2016

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PHONE SYSTEM: Hello this is prepaid collect call from --

JACQUAN: Jacquen Wilson.

PHONE SYSTEM: An inmate at Davis County Jail, Utah. This call is subject to recording and monitoring. To accept charges, press one. To refuse -- thank you for using Securis. You may start the conversation now.

JACQUAN: Hello?

VICTORIA: Hello.

JACQUAN: Hey, I was thinking last night, like, you know what I'm saying, like, me and -- me and CJ was talking. And I was, like, so I was, like, "Man" -- I know I sound retarded as fuck right now. I'm trying to get my thoughts on it. When the -- when the conversation is timed and you got to remember

shit on queue, it's crazy.

All right. I was like, "Why do you think he was acting crazy in the first place?"

And CJ was, like, "He had to have been fucking her or something." Because he was like you -- he was, "Like, he ain't start acting crazy until you told him that Tia was pregnant." Because I had came over and told him that. I was with Amanda and I had came over and told him. And that's when everything started happening. You know what I'm saying?

So he was, like, "That's why he was popping it at the house looking for her because he wanted to talk to her in private, but you just happened to be with Tia at the time. Because later on the next day, he popped up over at Tia's house. But he thought I was still with Amanda. He wasn't expecting me to be with Tia. You know what I'm saying?

VICTORIA: Yeah.

JACQUAN: So I'm thinking that if you can tell -- if you can tell, like -- aren't you supposed to be meeting my -- with the lawyer today?

VICTORIA: Yeah.

JACQUAN: What's wrong now?

VICTORIA: Nothing. I'm just listening to you.

JACQUAN: What's wrong?

VICTORIA: So did you want me -- what?

JACQUAN: What's wrong?

VICTORIA: Nothing. I'm listening to you.

JACQUAN: All right. Yeah. I wanted you to bring that up to him. You know what I'm saying? Because, like, I can't -- it's really to fight a case in jail when you can't contract nobody, gather evidence, go through your phone, get text messages, prove anything.

VICTORIA: Right.

JACQUAN: I'm fighting against somebody who has the comforts of living at home with their parents, have people to back up their story, have all the support in the world, and then I don't have the same luxuries as they have to fight. You see what I'm saying?

VICTORIA: I understand exactly what you're saying.

JACQUAN: So that's why I'm trying to think of a way to get my story to him because me having 25 minutes to talk to him every three weeks is not a good enough way to get my defense game up for what the fuck they trying to hit me with. So I was -- I was paying, like --

VICTORIA: Um --

JACQUAN: Huh?

VICTORIA: No, go ahead.

JACQUAN: I was just saying, like, if you could bring that up to him, like, you know, that maybe -- like, Jacquan still hasn't figured out to this day why, you know what I'm saying, he was acting like this. Or you could just explain to him

what's going on.

VICTORIA: Okay.

JACQUAN: You know what I'm saying? Like what do you think?

VICTORIA: I mean, that would make sense to me. Did they have --

JACQUAN: I mean, you even said my cousin even said, "Well, he was already mad before Jacquen got there. Why would he be mad?" I don't do shit but fuck bitches, chop, and get money. Why would somebody be mad at me? Unless it's over the money that I'm getting or the bitches that I'm fucking.

I don't go out and start shit with people. If I wanted to go out and (inaudible) people, by God, it would be easy as fuck. I don't do that. I don't do that type of stuff. You know what I'm saying? I don't go --

VICTORIA: So --

JACQUAN: What?

VICTORIA: Did him and Tia have a relationship that you know of?

JACQUAN: No, they don't. But here is the deal: I was hanging out with Amanda from Friday until, like, Sunday. Saturday night Tia had texted me and was like, "I just took a birth control test and I failed it." And was like, "I'm going to go get the baby taken care of, don't worry about it." Blah, blah, blah.

That's when I called her. I was like, "Hey, should we talk about this? It's my kid too." And she was -- start crying and was like, "I don't know what to do (inaudible) shit. So she's like, "Can I see you tonight when I get off work?"

I was like, "Maybe." I was chilling with Amanda, kind of like -- but wasn't feeling like, you know what I'm saying, going all the way back to Salt Lake at that time. So I ignored Tia that night.

Saturday morning, me and Amanda went over to see Donte, since he lives, like, a couple of minutes away and I hadn't seen him in a month. Because I've been ignoring him because dude was tripping off of the Erika situation. You feel me?

VICTORIA: The what?

JACQUAN: Remember how me and him got into it over the Erika situation?

VICTORIA: Yeah.

JACQUAN: Remember how he was trying to be funny and be like, "You trying to talk to my bitch." Then as far as Tiffany is concerned and then he was trying to, like, talk shit about Erika. He was like, "Yeah, she give good head."

And my cousin was like, "Just leave him alone, so you're not fucking him up."

VICTORIA: Right.

JACQUAN: Right. So I hadn't talked to him for a month.

So I thought, ah, gave him a month, maybe I can just stop by and say hi. What's the harm in saying hi, right?

VICTORIA: Correct.

JACQUAN: So I leave -- so I stop by and say hi to him (inaudible) with Amanda. And he's like -- he's like -- he's like, "Who this?"

I was like, "Oh, this is Amanda," blah, blah, blah.

He's like, "Oh, that's what is up." So then we walk away from the car because Amanda -- I just (inaudible) yesterday. So I mean and I just met Amanda, like, a couple days before that. So, like, I didn't think it was pertinent for Amanda to know that I might have a child on the way. You know what I'm saying? What can she say? She got two kids by two different dudes that are, like, half my size down there.

But anyway, so I pulled him aside and I'm like, "Yo, Tia is pregnant."

And that's when he's like, "Yo, you should keep the kid. And it's going to be a pretty baby. And don't make her get an abortion."

And I ain't even said nothing other than "Tia is pregnant," and this dude coming out of the woodworks and all this shit. You know what I'm saying? I'm like, okay, like, why does he care so much? You know what I'm saying?

Hello?

VICTORIA: I'm -- yeah, I'm here. I'm listening to you.

JACQUAN: All right. I'm telling you this so you can tell him.

VICTORIA: I know.

JACQUAN: Are you, like, hearing what I'm saying?

VICTORIA: Yes. I'm listening to everything that you're saying to me.

JACQUAN: All right. I know you at work and stuff. I was just trying to, like, get -- like, talk to you because --

VICTORIA: I'm listening to you. Because what?

JACQUAN: Because I don't -- because I don't know when you will be able to schedule another fucking appointment with Shapiro before my preliminary. If I can prove that -- that this was self-defense, they will just dismiss my shit right now, as soon as I go to court. That's why I'm trying so hard to -- to convey this to you right now. So...

VICTORIA: Well, when you're telling me --

JACQUAN: I thought today was a holiday.

VICTORIA: No, we're working. I'm doing catch-up work, essentially.

JACQUAN: All right.

VICTORIA: So I'm listening to you. When you're just trying to convey something to me I'm, obviously, not going to talk over you. I'm going to listen to what you have to say so that I can make sure --

JACQUAN: It just seemed like you were so engrossed in

your work, you couldn't -- you wasn't even, like, paying attention to me.

VICTORIA: Do you want me to repeat everything back to you?

JACQUAN: No, it's not like -- never mind. I was, like, "You understand what I'm saying?" And you were just, like, silent, like you were stuck in thought of something else.

VICTORIA: Like what?

JACQUAN: Like you were stuck in thought of something else.

VICTORIA: No, I'm listening to what it is that you're telling me.

JACQUAN: I mean, this is important. Like, I'm not calling you to badger you about -- all right. Anyway, let me not get on that because that will take up the whole phone call.

VICTORIA: Well...

JACQUAN: I'm trying to give you an understanding of what the fuck happened and you're fucking, like, just acting like everything is more important than my life right now. All right. You know -- all right. So basically --

VICTORIA: You don't know that. Okay. I'm listening to what it is that you're conveying to me, but I'm also sitting at my desk and I'm trying to get work done --

JACQUAN: I know, you got to get work done, so --

VICTORIA: So that I can be off --

JACQUAN: -- you don't get fired and all that shit.

VICTORIA: -- so that I can be off at 3:00 --

JACQUAN: I get it. I get it. I get it.

VICTORIA: -- and I can go talk to Shapiro.

JACQUAN: You sound just like some bitch I know in Maryland --

VICTORIA: But I'm not going to sit and --

JACQUAN: -- whose career was always more important than me.

VICTORIA: -- talk -- I'm not going to sit and talk over you --

JACQUAN: Whatever. All right. I'm not going to sit here and argue with you. I'm not going to argue with you. Whatever.

VICTORIA: Jacquan.

JACQUAN: I'm not going to fucking argue with you about this.

VICTORIA: I'm not going to talk over when you are telling me something. I'm going to do that. You want and you need me to listen. When you ask me to do something, I'm going to do it.

JACQUAN: But if you're not listening, so then what's the point of me fucking talking to you?

VICTORIA: I am listening to you. I understand exactly what you're saying and that makes sense. Obviously, that's

going to be something that I discuss with Shapiro.

JACQUAN: We trying to prove that this is not something I do on a daily basis. I don't go out and stab people for a fucking living. I'm not Jack the fucking ripper.

VICTORIA: No, and you don't.

JACQUAN: Okay then. And I'm trying to convey the fucking message and your punk ass is over there typing some bullshit for your fucking job.

VICTORIA: And since I've known you -- and since I've known you, you have never been in a fight since I've known you.

JACQUAN: All right. Look, I don't got time to argue with you. I'm trying to get the story out so you can know what the fuck happened, so you can understand.

So anyway so, motherfucking -- we've been arguing -- we argued, like, $100 worth phone conversation away. I'm not arguing with you no more about this shit.

So anyway, fucking -- and then I also tell him while we over there, I'm, like -- you know what I'm saying? "I still got your pants. You know what I'm saying? Do you mind" --

And he was like, "Don't worry about the pants, like, it's cool. Like, I can't even really fit those anyway."

I was like, "Yeah, I just wanted to wash them and bring them up to you."

And he was like, "Nah, don't even worry about that. I'm not tripping" (inaudible) right?

And then he walked up to Amanda and was, like, "Do you smoke?"

And she was like, "Nah, I don't smoke or drink." And then we bounce.

You hear me?

VICTORIA: Yes.

JACQUAN: This is Saturday. Sunday, you need to listen to this. Sunday -- Sunday Amanda's kids -- her daughter is getting on my fucking nerves, so I leave. I meet with up with Tia. Tia's dog had to get euthanized, so me and Tia end up going to the vet.

While we're at the vet late at night -- she didn't go to work this day, while at the vet late at night, she gets a phone call -- a text message from her roommate saying, "One of J's friends came over." And I'm like, okay, I don't have any friends that know where Tia lives.

And then so after the dog is put down or whatever, on our way back to the house, and then we get to the house and then I asked a friend, I'm like, "Yo, what is the friend's name or whatever?"

And she was like, "Oh, his name -- his begins with a "D" or something like that."

And I was like, "Well, what did he look like?"

He's like, "Oh, he's tall. Dreads, kind of buff."

And then I was like, "Oh, that's Donte." And I was

like, "Well, what did he want?"

He was like, "Oh, he was looking for Tia, not you. I thought he was looking for you because he was your friend, and he was looking for Tia."

And that's when I looked at Tia and I was like, "First of all, how the fuck does he know where you live by (inaudible). This motherfucker doesn't even drive. I could see if he drove over here before and put it in his GPS system. You know what I'm saying?

VICTORIA: Yeah.

JACQUAN: Driving, like, 35, 40 minutes away from Layton. How the fuck does he know where the fuck you live? She's -- you know how I am, I'm in or out. But she's like (noise). So she texting him or hitting him up on Facebook blah, blah, blah because his cell is off and he is not responding.

So the roommate was this gay guy that I didn't like. Like, I didn't like him. He would always say little slick racist shit. I done already smacked him up and everything. So he has no problem putting her dirty laundry in the air because he's hoping that I don't fucking see her again anyway, because he don't want to see my face. You feel me?

VICTORIA: Yeah.

JACQUAN: So he like -- he, like, "oh, yeah, he was here for her, not" -- you know what I'm saying? He couldn't wait to do that shit. You know what I'm saying?

So she like -- she like, "I'm going to hit him up right now." So she's like, "Why are you -- you're putting me in deep water. I don't need this right now. I'm pregnant. Why are you popping up at my house looking for me at 11:00 at night," blah, blah, blah.

So I'm like fuck this, we going to his house. So we go all the way to this house, 40-minute drive to Layton. His dad answered all scared and shit like, "Donte is not here."

I'm like, "Well, why is he popping up at Tia's house? Why is he popping off at her house looking for me?"

And he is like, "I don't know. Last time I checked, he was in Salt Lake."

So on the way back to Tia's house, Tia's same roommate texted her and was "Oh, I thought y'all was at work today. I don't know y'all -- I didn't know that Tia" -- he's like, "I thought Tia was at work. I didn't know that y'all went to the vet." So he was like, "I told Donte that she was at the Taco Bell in Sugarhouse, or whatever."

So I'm like, "All right. Let's go." We go to -- we go to Taco Bell. And her workers, they all know me. So they're, like, "Oh, yeah, some dude was looking for you." He said he wants his jeans back. I was like, "I just (inaudible). I just thought that was (inaudible). But I think that he got the messages and was trying to come up with an excuse to cover his ass.

Does that make sense?

VICTORIA: Yeah.

JACQUAN: So then so -- anyway, so then I'm still arguing with Tia. I'm like, "I don't believe that." I was like, "First of all, how does he know where you live? And you know I'm saying, third of all, you know what I'm saying, why would he come over at 11:00 to your house asking for you, not asking me to get jeans from me. Why didn't he come to where I was at?"

She didn't have nothing to say. So I chill off, you know what I'm saying? Around this time period, you're fucking best friend with the cops and filing reports against me, against (inaudible). So I'm not really talking to you.

But anyway so --

VICTORIA: Well, but that Sunday, you had even texted me and said that you and her got in an argument and you weren't having the kid.

JACQUAN: Yeah. Did I tell -- yeah. Yeah. That was the argument. Oh, so it all makes sense now. Okay. I'm just making sure we're on the same page. That was the freaking argument right there. I was like, "Bitch, like, something ain't right."

So now he -- he had been to her house, like, a month and a half before me and Tia had picked him up from Layton and brought him to Tia's house because Tia has another girl

roommate that was single at the time and likes black guys and that was the only reason. But that was a month and a half before.

So you remembered -- so I know when you left Tia's house the last time, the first initial time, he left and caught the train. So remembered what route to take. Mind you, the train doesn't run on fucking Sunday. So he had to know her exact address to have somebody take him to Tia's house on Sunday. You get what I'm saying?

VICTORIA: Yeah.

JACQUAN: It doesn't make sense. I mean, as soon as he remembered what route he took to walk to the train and then take the train back. But he didn't take the train on Sunday. He couldn't retrace his steps. You see what I'm saying? Because the train ain't running on Sunday. So he would have to know Tia's exact address by heart, give it to somebody, and have him -- have somebody drop him off.

Unless he remembered exactly how the fuck every left and right and street and tee it took that he -- when he was in the car. It just make sense. So I'm like -- I'm like, all right, you know I'm -- I'm like -- I'm not even tripping because I'm like Tia -- I had just been chilling with Amanda fucking her all weekend, so I don't really give a fuck. I'm like whatever bitch.

So I'm just chilling, like: You ain't playing; you

getting played. I'm like whatever. So I'm not even tripping off of it and if he tries something, I'm going to put this nigger in the hospital, I don't care. So that's how I'm laughing.

So the next day me and Tia are together still. I don't think she went to work again. Some shit text something about Donte and I was, like, "I don't know," blah, blah, blah. Then Donte texts --

Are you listening?

VICTORIA: Yeah.

JACQUAN: And Donte texted me -- basically, we had got into an argument over some girl. He was, like, basically, like -- basically like, some bullshit like -- some argument (inaudible) and he was, like, "You a lame-ass nigger," blah, blah, blah. So I blocked him off Facebook and then he is mad about that.

And he was like, "Step your game up when you talking to me." Because the girl, like, me and him, but she was badmouthing him. You see what I'm saying? So I screen shot the girl saying, "I don't like Donte. He live with his parents." You know what I'm saying? He a dumb -- all this other shit she was saying. And I sent it to him. I blocked him, he was mad about that because he probably playing both sides of the fence. You see what I'm saying?

Like, she was probably saying to him, like, "I like

you," blah, blah, blah. And then saying to me the same thing. But meanwhile she's bagging on him to me, you know what I'm saying, for her to (inaudible), so now he know.

You listening?

VICTORIA: Yes.

JACQUAN: Well, this is around 10:00, next day. 10:45 Tia's downstairs with her roommate smoking cigarettes. She's on the stairs. She's like, "Jacquan, Donte is outside."

I'm like, "All right." So you know what I am saying? I go downstairs, I'm like, "Yo, what you want?"

He like, "Oh, I just want my jeans back."

I'm looking at him like -- I was like, "Man, I haven't washed them yet." I was like, "You know what, I'm not going to argue with you." I was like Tia, "Let's go. We're going to go to my house and get the motherfucking jeans."

So we go to -- we go -- but he -- I'm like, "Yo, Donte, you might want to" -- because you know -- and he's like, "Nah, I follow you." And I'm thinking in my head, in what vehicle?

So he starts walking down the street and we ride past him. You know what I'm saying? And he still walking. So I tell -- I was like, "Yo, something is up with that nigger. He acting weird. He showed up to the house in, like, an all-black hoodie with (inaudible).

PHONE SYSTEM: You have one minute left.

JACQUAN: You know what I'm saying? I was like, "Yo, (inaudible) he can't come into Tia's house, none of that shit until -- you know what I'm saying? (inaudible) her roommate said (inaudible) fucking, we never let him in.

So that motherfucker stood outside Tia's house until I came back down there. I didn't get back until 3:30 in the morning. I was like, "He not going to rush me. He want to sit there and wait." When I came back, he was gone. So now he (inaudible) everything, but he had to sit outside for fucking 3:00 in the fucking morning.

You still there?

VICTORIA: Yes.

JACQUAN: Hey, so if you working, how you going to meet up with dude at 3:00?

VICTORIA: Because I'm getting off early.

JACQUAN: What time are you getting off?

VICTORIA: At 3:00. I meet him at 3:30. I may get off earlier than that though. It just depends.

JACQUAN: I never got the chance to tell you this because it has to do with my case, but I would have -- you were not talking to me, so you know what I'm saying, I have -- I have no sense (inaudible).

PHONE SYSTEM: Thank you for using Securis. Good-bye. The caller has hang up. Thank you for using Securis. Good-bye.

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SLIDE 10

January 18, 2016

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PHONE SYSTEM: Hello. This is a prepaid collect call from --

JACQUAN: Jacquan Wilson.

PHONE SYSTEM: An inmate at Davis County Jail, Utah. This call is subject to recording and monitoring. To accept charges press one. To refuse charges -- thank you for using Securis. You may start the conversation now.

JACQUAN: All right. So -- so can we get back to the crib (inaudible) crib, he not there. Meanwhile, I'm trying to make --

VICTORIA: (inaudible).

JACQUAN: I'm trying to make amends with you. You ain't having it. I'm telling you I'm telling Tia to kill the kid so we can work things out with us. You ignoring me, blah, blah, blah. Totally different from the way you acting right now.

This is -- this is -- this point of time, so you can get a gage of what's going on. So I'm like, all right, fuck it. She want to keep calling the cops, ignoring me, what all (inaudible) what am I supposed to do? You know what I'm saying?

So, um, okay. So then the next -- so I basically

(inaudible) I wake up. And as soon as I wake up, I wake up at, like, 1:00 p.m. Freaking -- oh, I take a shower. I get out of the shower and she's like, "Donte is just hitting me back. So he text me all this shit, like fuck that dude, he had me sit outside, blah, blah, blah. I want my jeans. I ain't playing. And I'm going to get my jeans.

Don't worry about it. I ain't trying to stress you out because you pregnant, I don't want you to lose the kid, but there are some thing I got -- I got to tell you about Jacquen." Just talking all greesy like -- like he some type of stupid gangster-ass nigger like -- like whatever.

So I'm already in my mind, like, okay, well, don't think you about to, like, fuck me up because I ain't going to let that happen. And so I'm, like -- I'm like "Yo, let's go over to his house right now."

Tia's dumb ass says, "We're on our way to your house right now," da-da-da-da.

I'm like, "Bitch, why would you tell him that?" We already know by his tone and demeanor that he wants confrontation. You see what I'm saying? I'm hoping that I can just drop off the shit because I know -- I already know how I am. If he touch me, I'm going to try to kill him. You see what I'm saying?

VICTORIA: Right.

JACQUAN: So -- so we go -- we go to his motherfucking

crib. You know what I'm saying? When we get there, that's when the whole -- that's when the whole thing -- that's when the whole thing happened. He got all up in my face, pushed me, put his hands on me, all that shit. I was just trying to get return some shit. You know what I'm saying? But why was he that mad?

And after he pushed me and hit me and hopped in the car with her, what was he trying to tell them? Like, why was he -- what was he so mad about? He wasn't mad when I just talked him three days ago. Stopped by his house. He was all Gucci. See what I'm saying?

VICTORIA: Yeah.

JACQUAN: (inaudible) for a minute.

VICTORIA: Well, I agree and I understand what you're telling me. I mean, that only makes sense.

JACQUAN: All right. Well, I gotta -- let me call you back in, like, ten minutes. They going to lock us down just to take two minutes to pass out some fucking (inaudible) so let me call you right back. Okay?

* * *

Slide 11

March 5, 2016

* * *

VICTORIA: Well, don't you think that shoving you and hit you and then him getting in the car with Tia, I can only

SR28

imagine the way that he was fucking talking to you. If he was talking to you the way that he was talking to you when we were at fucking court --

JACQUAN: He wasn't talking to me like that.

VICTORIA: I can only imagine.

JACQUAN: He's only been talking like -- like he's tough Tony since I got in jail, you stupid motherfucker. He was acting like everything was cool. (inaudible).

I was always buying shit for him and shit like that. And now he wants to play the role like I'm broke. He's trying to play the role like I'm some homeless black guy from the hood or some shit.

VICTORIA: Which you're not. Which everybody knows that.

JACQUAN: (inaudible) he's talking shit. And he's trying to act like I was a coward because he got stabbed in the back. Okay. 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 would have kept facing me, I would have you stabbed in the fucking -- well, I did stab him in the face. I mean, what do you -- what more do you want?

* * *

SLIDE 12

March 5 2016; 11:08

* * *

JACQUAN: If somebody stabbed me, I'd kill them. That's

it. Serious. All he did was push me and I stabbed him up. I mean, what you think it is (inaudible) thin. All he did was push me and hit me and he got stabbed the fuck up. Because you think it's the [inaudible]. Because I'm educated and I talk -- you know, I talk this way, so I'm soft. Get the fuck out of here.

VICTORIA: I never once said that you're soft --

JACQUAN: (inaudible).

VICTORIA: -- or that you're a bitch. What I was trying to fucking say to you is that I know that actually it wouldn't have fucking happened, had Donteus have not done what Donteus had did. That's what I'm trying to say to you. Him putting his fucking hands on you was not okay. That's the fucking point here.

JACQUAN: I do feel as though I used a little too much force --

VICTORIA: You --

JACQUAN: -- but I do --

* * *

SLIDE 13

March 5 2016 11:08

* * *

JACQUAN: -- a good job, but his dad, he never even saw me. I saw who stabbed me stab me. And nobody saw me (inaudible) but him. I clearly watched it. I clearly knew --

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know my surroundings when I'm stabbing somebody the fuck up. I was prepared, he wasn't. He lost. He's mad about it.

His ego is fucked up. That's why he's going out the way to post shit on my wall. I don't place shit on niggers' walls. I really don't. You know, you going to see a situation where a person -- some shit on some dude's (inaudible). Because everything that I got a problem with, I go handle shit.

He got handled, dog, straight East Coast style. He thought I was one of these Utah motherfuckers that I was going to tell the cops, or get bitch slapped or some shit like that, and he got stabbed the fuck up. What do -- what do you want me to say?

(End of Powerpoint.)

C E R T I F I C A T E

STATE OF UTAH)
) SS
COUNTY OF SALT LAKE)

I, KATIE HARMON, a Certified Shorthand Reporter in and for the State of Utah, do hereby certify that I received the audio recording in this matter, and that I transcribed it into typewriting and that a full, true and correct transcription of said audio recording so recorded and transcribed is set forth in the foregoing pages, inclusive except where it is indicated that the recording was inaudible.

DATED this 12th day of April, 2019.

Katie Harmon
KATIE HARMON, RPR, CSR.
License No. 7386959-7801

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2019, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

MARIAN DECKER
mdecker@agutah.gov

SCOTT L WIGGINS
swiggins@awpc.net

SECOND DISTRICT, FARMINGTON
ATTN: KIERA BITTER
800 W STATE ST BX 0442
PO BOX 769
FARMINGTON UT 84025
kierab@utcourts.gov

By _____
Jeffrey Ricks
Appellate Court Coordinator

Case No. 20171011
SECOND DISTRICT, FARMINGTON, 151702212

Addendum B:
State v. Maurer, 770 P.2d 981 (Utah 1989)

770 P.2d 981 (Utah 1989)

STATE of Utah, Plaintiff and Appellee,

v.

John Henry MAURER, Defendant and Appellant.

No. 860006.

Supreme Court of Utah.

February 28, 1989

Rehearing Denied March 17, 1989.

Nancy Bergeson and James Bradshaw, Salt Lake City, for defendant and appellant.

R. Paul Van Dam, Sandra L. Sjogren, Salt Lake City, for plaintiff and appellee.

HOWE, Associate Chief Justice:

Defendant John Henry Maurer was convicted by a jury of second degree murder in violation of Utah Code Ann. § 76-5-203 (1978, Supp.1988). He was sentenced to an indeterminate term of five years to life in the Utah State Prison. He appeals, assailing the trial court's admitting into evidence a letter he wrote to the victim's father over a month after the homicide.

Defendant met the victim, Janet Hannan, in 1984, and they began living together in a condominium in June of that year. In October of 1984, Janet and defendant became engaged to be married. Their relationship apparently was without major problems until January of 1985, when she apparently indicated some affection for Mike Bickley, a close friend of defendant's. On January 30, Janet, upon encouragement from her father, telephoned defendant and told him the engagement was off and not to come home. Defendant nevertheless came home to talk to her, and she told him that their relationship was over and that he should return the following morning to remove his belongings.

Defendant left the condominium in a state of emotional turmoil and called a suicide hotline. He was referred to a hospital, where he spoke with doctors and was diagnosed as suffering from "acute situational anxiety and grief reaction." He telephoned his mother, who lived out of state, and asked her to call Janet at the condominium

the next morning and persuade her to reconsider her decision. A doctor gave him some valium, and he left with another friend, Ed Gutierrez.

Defendant and Ed went to Ed's apartment, where they talked for about three hours. Defendant was crying at times and seemed depressed. He slept for two or three hours and then the next morning left Ed to return to the condominium to meet Janet and move his clothing out. On the way, he again stopped at the hospital to get some valium.

Janet and Mike arrived at the condominium soon after defendant. Janet was staunch in her decision to break off their relationship and began to move defendant's clothing out of the bedroom. At one point, defendant's mother telephoned and spoke with Janet. He perceived from Janet's end of the conversation that his mother sided with her. Defendant paced from the kitchen to the living room to the bedroom, alternating between crying and being very calm. He hugged Janet and Mike and told her she deserved someone better than himself. He asked Mike, "Don't you feel guilty about this?" Mike said, "Yes," and that he felt so guilty that he had difficulty having sexual relations with Janet. This comment apparently enraged defendant, and he rushed to the kitchen, grabbed a knife, and went into the bedroom, where Janet was packing his clothes, and stabbed her in the back. Defendant fought with Mike when he tried to summon help. Janet died shortly thereafter.

Defendant was charged with second degree murder, and while in jail awaiting trial, had written a letter to the victim's father on March 10, 1985. This was thirty-eight days after the homicide. The letter reads as follows:

3/10/85

To Mike Hannon,

Just a letter to let you know that I'm glad I killed Janet. "Daddy's Little Girl" is no more. You spoiled her rotten. Thank God you were not there that morning. You might have prevented it. I hope you feel guilt over it.

It was a great feeling to watch her die. She kept crying "It hurts, It hurts". I should hope so, I mean it was a 13 inch kitchen knife. Mike Bickley got to watch her die too. It was great. Your daughter was nothing but a whore, a fucking whore. Drifting from one man to another. She couldn't break the engagement herself. No Daddy had to demand that she make a decision. God she was 29 and couldn't function or live without you doing everything for her.

So you had her buried in the Catholic section of the Salt Lake Cemetary [sic]. After her having an abortion? You fucking cover up artists, I hope her her [sic] death hurt you. Or are you relieved? What a stupid bitch she was. She did everything in the relationship and I sat back and did very little. I love it! She was so emotional and stupid. But basically a real whore. What are you going to do now? Bring her back from the dead. You should have been there that morning to prevent the murder. Hope you enjoyed your skiing that day. The laughs [sic] on you.

The killer

John H. Maurer

Prior to trial, defendant filed a motion in limine to preclude the State from introducing the letter into evidence at trial. The trial court denied the motion on the basis that the letter was probative of defendant's state of mind at the time of the homicide and thus would assist the jury in determining whether defendant was guilty of second degree murder or only of the lesser offense of manslaughter.

Subsequently, defendant petitioned the court for a rehearing on his motion, and argument was heard again just prior to trial. His counsel conceded that the letter was not hearsay under rule 801(d)(2), Utah Rules of Evidence, because it was an admission by a party-opponent, but argued that there was no material issue as to who killed the victim. He stated that he was prepared to stipulate that defendant did kill her. He pointed out that the only issue to be addressed by the jury was whether defendant intentionally killed

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the victim, which would be second degree murder, or whether he killed her while acting under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation or excuse, which would constitute manslaughter. Defense counsel further argued that the letter was not admissible as evidence of defendant's state of mind at the time of the homicide because the letter was written at a time too remote to reflect accurately whether he was under extreme mental or emotional disturbance when he killed the victim. Finally, he argued that even if the letter had some relevance on the issue of state of mind, the prejudicial effect of the letter far exceeded its potential relevance under rule 403, Utah Rules of Evidence, which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The State argued that the letter was admissible as an admission and that the letter was relevant to prove the State's theory that defendant intentionally killed the victim without any justification or mitigation. The trial court again denied the motion to exclude the letter from evidence, concluding that "the probative value of the letter goes to the state of mind of defendant ... on the date the offense allegedly occurred." The court further found that "the probative value is not outweighed by the danger of unfair prejudice, confusion of the issues, nor is there any chance of misleading the jury...." The entire letter was admitted into evidence at trial over defendant's objection.

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. Both the State and defendant are in agreement that the central issue to be determined by the jury was defendant's state of mind at the time he killed the victim. That being so, the first five sentences of the second paragraph of the letter were arguably relevant. They read: "It was a great feeling to watch her die. She kept crying 'It hurts, It hurts'. I should hope so, I mean it was a 13 inch kitchen knife. Mike Bickley got to watch her die too. It was great." These sentences can fairly be interpreted to reflect defendant's recollection of his own mental state and impressions at the time of the killing.

Except for these sentences, the balance of the letter reflects defendant's state of mind at the time the letter was written. It displays his callousness toward the killing which he expresses in profane and vulgar language and manifests his complete insensitivity to this tragedy. The letter taunts the victim's father and was designed to inflict guilt upon him and add to the grief he must have then been feeling. However, because of its shocking display of lack of remorse by defendant and the repulsiveness of his expressions toward the victim and her father, the balance of the letter may well have been highly inflammatory in the eyes of the jury. It would be difficult to draft a letter which would be more repulsive to the notion of the value of human life than was this letter. We are cognizant of the rule that 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. *State v. Miller,* 709 P.2d 350, 353 (Utah 1985). Notwithstanding the salutariness of that rule, we cannot conclude otherwise than that the balance of the letter contained little or no relevance to the central issue and that any relevance which could be found therein was greatly and clearly outweighed by the danger of "unfair prejudice, confusion of the issues, [and] misleading the jury." Utah R.Evid. 403. The trial court's admission of the entire letter was clearly erroneous. Utah R.Civ.P. 52(a) (applicable in criminal cases by virtue of Utah Code Ann. § 77-35-26(7)

(1982, Supp.1988); see *State v. Walker,* 743 P.2d 191 (Utah 1987)).

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Our rule 403 is verbatim to rule 403, Federal Rules of Evidence, to which the Advisory Committee's note reads "that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme." Fed.R.Evid. 403 advisory committee's note, quoted in M. Graham, Handbook of Federal Evidence § 403.1, at 178 (2d ed.1986). " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Id. "In reaching a decision whether to exclude on grounds of unfair prejudice ... [t]he availability of other means of proof may also be an appropriate factor." Id. Graham explains:

Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more specialized meaning: an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror. Where a danger of unfair prejudice is perceived, the degree of likely prejudice must also be considered. The mere fact that evidence possesses a tendency to suggest a decision upon an improper basis does not require exclusion; evidence may be excluded only if the danger of unfair prejudice substantially outweighs the probative value of the proffered evidence.

Graham at 182-83.

The following expressions in federal cases illustrate the interpretation given to rule 403 by a number of federal courts: *United States v. Bailleaux,* 685 F.2d 1105, 1111-12 (9th Cir.1982) ("Unfair prejudice results from ... that aspect of the evidence which makes conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude towards the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged."); *Carter v. Hewitt,* 617 F.2d 961, 972-73 (3d Cir.1980) ("It is unfairly prejudicial if it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise 'may cause a jury to base its decision on something other than the established propositions in the case.' "); *United States v. McRae,* 593 F.2d 700, 707 (5th Cir.) (the major function of rule 403 "is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect ... to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance"), cert. denied, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979).

In *Pearce v. Wistisen,* 701 P.2d 489, 493 (Utah 1985), we recognized that "precedent ... is of little value" in reviewing whether a trial court has correctly made the balancing test required by rule 403. "We simply determine whether, on the facts of the particular case, the trial court's ruling was within the reasonable or permissive range." (*Citing Carlson v. Piper Aircraft Corp.,* 57 Or.App. 695, 646 P.2d 43 (1982)). Nevertheless, the cases which follow illustrate the bounds of the "reasonable or permissive range" of discretion.

Application of rule 403 by a federal district court to exclude from evidence the so-called "Last Hour Tape" was upheld in *United States v. Layton,* 767 F.2d 549 (9th Cir.1985). The defendant was charged with conspiracy to murder a congressman and the Deputy Chief of Mission of the United States in Guyana, aiding and abetting the murder of the congressman, and aiding and abetting the attempted murder of the Deputy Chief of Mission. The defendant was a member of the People's Temple, a religious organization founded by Jim Jones in a settlement known as Jonestown, consisting of approximately 1,200 members, located in the Republic of Guyana. Congressman Leo Ryan was assassinated and the Deputy Chief of Mission was wounded as they attempted to provide an escape and transportation for members of

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the organization who wished to return to the United States.

In its effort to convict the defendant of conspiracy, the government sought to admit into evidence the "Last Hour Tape" made by Jim Jones while mass suicides were taking place. The tape records statements made by Jim Jones soon after Congressman Ryan's party left Jonestown for the airstrip. Jones is encouraging all of his followers to commit suicide by drinking poison. Screams of dying children can be heard in the background. The government argued that the statements made by Jones in the tape were highly probative of a conspiracy between him and the defendant to commit the charged crimes. In spite of the apparent relevance of the statements contained in the tape and the government's attempts to utilize procedures to minimize the potential prejudice, the district court refused its admission on grounds of unfair prejudice and confusion of the issues. Said the court:

It would be virtually impossible for a jury to listen to this Tape and ignore the sounds of innocent infants crying (and presumably dying) in the background. The discussion of the impending mass suicide set against the background

cacophony of innocent children who have apparently already been given poison would distract even the most conscientious juror from the real issues in this case.

The Ninth Circuit agreed:

We have heard the Tape and agree with the district court with regard to its emotional impact and distracting effect. The Tape would tend to divert the jury's attention from the issues in this case to a significant amount of extraneous matter. As a result, there would be a considerable potential for unfair prejudice and confusion of the issues.

Layton, 767 F.2d at 556.

A less dramatic example of exclusion of evidence under rule 403 is found in *United States v. Barletta,* 652 F.2d 218 (1st Cir.1981). The government sought to admit into evidence in a criminal trial a tape recording of a conversation between the defendant and a government informant. The apparent purpose of the informer's telephone call was to obtain an admission from the defendant that he had participated in criminal conduct several months before. Although relevant, the court explained why the tape's potential for prejudice substantially outweighed any probative value:

[T]he overall context of the tape could legitimately be found prejudicial by virtue of its tendency to suggest a kind of "guilt by association". The court might reasonably have concluded that a jury would ascribe undue influence to the mere fact that a defendant had a casual conversation with an admitted criminal, leading to a conviction based on a generalized assessment of character. This possibility might be thought particularly acute where, as here, the conversation includes obscenities, ethnic slurs, and otherwise coarse language, warped and suffused with an aura of nonspecific criminality because of the very medium of a governmentally planned clandestine overhearing.

Barletta, 652 F.2d at 220 (emphasis added).

Two state court decisions also illustrate application of the rule of evidence embraced by rule 403. In *State v. Pendergrass,* 179 Mont. 106, 586 P.2d 691 (1978), the defendant appealed his convictions of attempted robbery and sexual intercourse without consent. He sought reversal on the ground that a tape recording by the police of the victim's telephone call for assistance immediately following the incident should not have been admitted in evidence and played to the jury. He argued that the unfair prejudice of the evidence substantially outweighed any probative value and simply created sympathy for the victim. He further argued that the highly emotional nature of the recording created a climate of outrage in the minds of the jury, denying him a fair trial. The state, however, argued that the tape was admissible to prove that a rape had occurred and bolstered the victim's credibility, her attention to detail, her ability to recall, and whether she had been placed in fear of her life.

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The Supreme Court of Montana ruled that there was reversible error under rule 403, Montana Rules of Evidence (substantially identical to federal and Utah rule 403), in admitting the tape and playing it to the jury. The state had clear proof of rape without the tape, and there was no necessity for or instructive value in its admission. Ruling that the probative value was substantially outweighed by unfair prejudice, the court reasoned:

The tape was highly prejudicial to defendant. Aside from any relevance heretofore pointed out, it contained emotional and nearly incoherent outpourings of the victim in the immediate aftermath of a violent crime. These utterances necessarily induced a feeling of outrage against the defendant and sympathy for the victim. Undue prejudice against defendant was created and a fair trial climate was destroyed by this tape.

Pendergrass, 586 P.2d at 694.

In *State v. Marlar,* 94 Idaho 803, 498 P.2d 1276 (1972), the defendant was charged with assault with a deadly weapon, growing out of an altercation he had with the victim when he observed him sitting with the defendant's wife in her car, where they were conversing and possibly embracing. At trial, the victim was permitted to testify that after the incident but prior to trial, the defendant telephoned him for the purpose of persuading him to drop the criminal charges. In the conversation, the defendant allegedly threatened the victim by saying, "I'll put you in the morgue." The Idaho court reversed the defendant's conviction and ordered a new trial because of the erroneous admission of the telephone call. The Idaho court determined that the statement "I'll put you in the morgue" did not in itself tend to establish an intent or state of mind at the time of the commission of the criminal offense. Said the court: "The statement, at most, was an opprobrious remark illustrating the caller's malevolent attitude towards the witness Higgins at the time the statement was made." Marlar, 498 P.2d at 1283. The court further held that even if it could glean some probative value from the telephone conversation, it would be so slight that its admittance into evidence would not be justified in light of the possible prejudice to the defendant. The court stated that because of the inflammatory effect which the threat might have on the jury, it should not have been admitted.

In the instant case, defendant admitted the killing, and the principal issue for the jury to determine was his state of mind at the time of the killing. The State had several

witnesses to establish that. Mike Bickley was present at the time, and he testified that after the stabbing, defendant had a "strange smile" on his face. Paramedics who answered Mike's call for help saw defendant upon their arrival. They described him as "laughing," more or less "pleased," having a "smart aleck grin" and a "cold, mean stare" and that "he had a crazed look in his eyes, as if he had seen a ghost." Some of this testimony coincides with defendant's statement in his letter that "[i]t was a great feeling to watch her die." The balance of the letter, which expresses defendant's vindictiveness and complete lack of remorse, reflected little or nothing on his state of mind at the time of the killing. Several of the cases discussed above have held that where the prosecution has other evidence available to prove an element of the crime, that fact should be weighed in determining whether to admit pieces of evidence which contain some relevant statement but also contain inflammatory statements which might lead the jury to decide the defendant's guilt on an improper basis. United States v. Layton; State v. Pendergrass. We relied on this fact in *State v. Cloud,* 722 P.2d 750, 754 (Utah 1986), in holding that it was reversible error to admit into evidence a photograph showing an allegedly obscene gesture by a homicide victim, arguably indicating that she defied the defendant and that this motivated him to kill her. We there stated: "The record does not support a finding that evidence of this gesture could not have been presented to the jury readily and accurately by other means, such as the testimony of the investigating officers or the medical examiner."

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In the instant case, the prosecutor referred to the letter in his arguments to the jury. In his opening statement, he referred to the letter as an "especially crucial piece of evidence." In his closing argument, he said that the letter referred to the victim in "terms disgusting for human beings" and that the letter blamed others for the killing while showing no remorse. These remarks, together with the letter, clearly could have provoked an emotional response from the jury and provoked its instinct to punish or otherwise divert the jury from its task to determine the mental state of defendant at the time of the killing. We disapproved the prosecution's similar use of the photograph in State v. Cloud.

Defendant's conviction is reversed, and the case is remanded to the trial court for a new trial.

STEWART, DURHAM and ZIMMERMAN, JJ., concur.

HALL, Chief Justice (dissenting):

I do not join the Court in concluding that only portions of defendant's letter were admissible in evidence.

The sole issue at trial was defendant's state of mind at the time the offense was committed. The trial judge duly considered the admissibility of the letter and fairly concluded that it was probative of defendant's state of mind at the time of the murder and that it would assist the jury in determining whether defendant was guilty of second degree murder or only the lesser offense of manslaughter. It was well within the discretion of the trial judge to determine the probative value of the letter and its admissibility. I would therefore not disturb his ruling. [1] Indeed, the entire context of the letter either directly or inferentially bears upon defendant's mental state at the time of the killing.

In any event, even if it be assumed that it was error not to exclude portions of the letter from evidence, the error was harmless.

In order to constitute reversible error, the error complained of must be substantial and prejudicial, such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant. [2] No such likelihood exists in this case. The record contains substantial circumstantial evidence of defendant's intention to commit murder. That evidence, coupled with the plain, unambiguous direct evidence of defendant's state of mind contained in the first five sentences of the second paragraph of his letter, leaves no reasonable likelihood that a new trial in this case will produce a different or more favorable result for defendant.

I would affirm.

Notes:

[1] *State v. Miller,* 709 P.2d 350, 353 (Utah 1985).

[2] State v. Tillman, 750 P.2d 546, 561 (Utah 1987).
