Case No. 20180095-CA

IN THE

UTAH COURT OF APPEALS

State of Utah
Plaintiff/Appellee

v.

JEREMIAH RAY HART
Defendant/Appellant

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT AND CONVICTION OF AGGRAVATED MURDER, OBSTRUCTING JUSTICE AND POSSESSION OF A DANGEROUS WEAPON BY RESTRICTED PERSON IN THE THIRD DISTRICT COURT

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The Defendant is Incarcerated in the Utah State Prison

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INTRODUCTION

Nature And Context Of Dispute And Reasons Why The Defendant Should Prevail On Appeal.

Defendant, Jeremiah Ray Hart, appeals from the October 3, 2017 jury trial verdict of Aggravated Murder, a First Degree Felony, in violation of Utah Code § 76-5-202; Obstructing Justice, a First Degree Felony, in violation of Utah Code § 76-8-306-1; and Possession of a Dangerous Weapon by Restricted Person, a Second Degree Felony, in violation of Utah Code § 76-10-503(2)(a). R.1987-1988.

The trial court sentenced the Defendant as follows: for Aggravated Murder, an indeterminate term of twenty five years to life in the Utah State Prison; for Obstruction of Justice, an indeterminate term of not less than one year nor more than fifteen years in the

Utah State Prison; and for Possession of a Dangerous Weapon by Restricted Person, an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison. R.2051-2054;R.4585-4583(4572-73). The court ordered that all sentences run consecutive to prior commitments pursuant to Utah Code Ann. § 76-3-401(3) and consecutive to each other. Id. The trial court's Sentence, Judgment and Commitment is included in Addendum A.

The Supreme Court transferred this case to the Court of Appeals in an order issued February 6, 2018. R.2082-2084. The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code § 78A-4-103(2)(j), whereby the Court of Appeals has jurisdiction over cases transferred from the Supreme Court.

The Defendant contends he should prevail on this appeal and a new trial be granted for the following reasons:

The Defendant contends defense counsel was ineffective in failing to request a mistrial when the state introduced evidence of two firearms, only one of which was recovered in this case. An unrelated firearm was taken from Defendant during a traffic stop and search weeks after the killing, and the state's forensics expert used it to show the distinctive firing pin mark left by a Glock firearm, which was the same type of firearm suspected in the murder. The Defendant contends the jury would have been unnecessarily confused and would have believed the firearm was that of the Defendant. The relevance of the evidence presented by the State is indeed extremely questionable

and the probative value was undoubtedly outweighed by the prejudicial effect.

The Defendant contends he received ineffective assistance of counsel for counsel's failing to object and request a mistrial when a critical witness testified that the Defendant was previously in prison for prior offenses. Counsel was further ineffective by engaging in a wholly unreasonable strategy of emphasizing that the Defendant had been previously convicted of an offense which was punishable by incarceration in the Utah State Prison. There was no reason for this information to be disclosed. Counsel was clearly unprepared to meet the issue, which he should have easily foreseen, and it was reversible error to allow such prejudice to infect the trial process when there was no necessity for such testimony to be presented.

The Defendant contends it was ineffective assistance for defense counsel to fail to request a mistrial when the jury came back asking for clarification as to whose DNA was found on whose jacket, as testified to by the DNA expert. The DNA expert testified only that Hart's DNA was found on a jacket that was tested, failing to state that it was the Defendant's own jacket. A stipulated instruction was read to the jury stating the jacket was the Defendant's immediately after the evidence was admitted, because it was going to be another two days before a witness would testify that the jacket was the Defendant's, and therefore render the evidence innocuous. The instruction was insufficient for the jury, which came back during deliberations with the very question which had been the source of the problem leading to the stipulation. However, the court would not permit

clarification during deliberations. This was prejudicial error.

The Defendant contends that it was ineffective assistance of counsel where defense counsel failed to object when the lead detective testified that blood spatters and drops found in and about the victim's body matched the Defendant's DNA, where the detective was not noticed or qualified as a blood pattern expert. The testimony led the jury to conclude the victim and Defendant had been shot in a certain way, which was far from his area of expertise and no doubt misled and confused the jury. The evidence was prejudicial and should not have been allowed. But defense counsel failed to object.

Lastly, the cumulative effect of all identified and assumed errors must necessarily undermine confidence in the verdict.

STATEMENT OF ISSUES PRESENTED FOR REVIEW, STANDARD OF APPELLATE REVIEW, PRESERVATION OF ISSUES AND GROUNDS FOR APPEAL.

I. A. Issue: Was defense counsel ineffective in failing to request a mistrial when the State introduced evidence of two firearms, when only one of which was recovered in this case. An unrelated firearm was taken from Defendant during a traffic stop and search weeks after the killing, and the state's forensics expert used it to show the distinctive firing pin mark left by a Glock firearm, which was the same type of firearm suspected in the murder and recovered from Defendant, but it was determined they were not the same firearms. The trial court gave a verbal instruction that the firearm was used solely for comparison, and was not involved in the case. However, it took a conspicuous

sidebar to achieve this.

B. Standard of Review: An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. To establish ineffective assistance of counsel, a Defendant must demonstrate: (1) that counsel's performance was objectively deficient; and (2) a reasonable probability exists that but for the deficient performance, the Defendant would have obtained a more favorable outcome at trial. *State v. Kurr*, 2012 UT App 194, ¶ 2, 283 P.3d 995, 997

C. Preservation: The issue respecting the gun, to which counsel objected, occurred during the testimony of SL Police Crime Lab Firearms Expert, Derek Mears. R.3888-3904. The issue of ineffective assistance of counsel was not raised in the trial court, but may be raised for the first time on appeal as an exception to the preservation rule. *State v. Johnson*, 2017 UT 76, ¶ 23.

II. A. Issue: Was it ineffective assistance of counsel to fail to object and ask for a mistrial when key witness, Kary Carter, disclosed that he and Defendant were incarcerated together before and during the trial? Was it ineffective assistance of counsel to fail to object and request a mistrial when a critical witness testified that the Defendant was previously in prison for prior offenses? Was counsel further ineffective by engaging in an unreasonable strategy of emphasizing that the Defendant had been previously convicted of an offense which was punishable by incarceration in the Utah State Prison?

B. Standard of Review: An ineffective assistance of counsel claim raised for the

first time on appeal presents a question of law. To establish ineffective assistance of counsel, a Defendant must demonstrate: (1) that counsel's performance was objectively deficient; and (2) a reasonable probability exists that but for the deficient performance, the Defendant would have obtained a more favorable outcome at trial. *State v. Kurr*, 2012 UT App 194, ¶ 2, 283 P.3d 995, 997.

C. Preservation: The issue of ineffective assistance of counsel was not raised in the trial court, but may be raised for the first time on appeal as an exception to the preservation rule. *State v. Johnson*, 2017 UT 76, ¶ 23.

III. A. Issue: Was defense counsel ineffective in failing to request a mistrial when the jury came back and asked for clarification as to whose DNA was found on whose jacket?

B. Standard of Review: An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. To establish ineffective assistance of counsel, a Defendant must demonstrate: (1) that counsel's performance was objectively deficient; and (2) a reasonable probability exists that but for the deficient performance, the Defendant would have obtained a more favorable outcome at trial. *State v. Kurr*, 2012 UT App 194, ¶ 2, 283 P.3d 995, 997.

C. Preservation: The issue of ineffective assistance of counsel was not raised in the trial court, but may be raised for the first time on appeal as an exception to the preservation rule. *State v. Johnson*, 2017 UT 76, ¶ 23. The DNA expert testified only

that Hart's DNA was found on a jacket that was tested without stating that it was Hart's jacket. R.3861. The parties stipulated to an instruction which was read to the jury stating the jacket was Hart's after the evidence was admitted. R.3921. The jury had a question about it during deliberations but the court would not permit clarification. The instruction apparently was insufficient for the jury and counsel failed to move for a mistrial.

IV. A. Issue: Was defense counsel ineffective in failing to object when lead detective testified that he believed a key blood drop (found under the victim's body) was likely Hart's, when the sample was not tested for DNA, and the detective was not noticed or qualified as a blood pattern expert?

B. Standard of Review: An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. To establish ineffective assistance of counsel, a Defendant must demonstrate: (1) that counsel's performance was objectively deficient; and (2) a reasonable probability exists that but for the deficient performance, the Defendant would have obtained a more favorable outcome at trial. *State v. Kurr*, 2012 UT App 194, ¶ 2, 283 P.3d 995, 997.

C. Preservation: Detective Spangenburg testified to his conclusion regarding blood spatters in and about the body of the deceased without objection from defense counsel. R.4166-4173, Addendum B. Detective Spangenburg testified as an expert regarding blood spatter evidence, without being qualified as such. A notice of expert provided regarding his proposed testimony related solely to his proposed testimony as "to

his knowledge and experience regarding drug distribution practices and methodology." R.735-736.

V. A. Issue: Did the cumulative effect of all the errors require reversal?

B. Standard of Review: Reversal is required if the cumulative effect of all identified and assumed errors undermines confidence in the verdict. *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993).

C. Grounds and Preservation: See Issues I through IV, *supra*.

CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

The controlling constitutional provisions, statues and rules are included in Addendum C.

STATEMENT OF THE CASE

PROCEDURAL HISTORY NECESSARY TO UNDERSTAND ISSUES PRESENTED FOR REVIEW AND DISPOSITION IN THE COURT BELOW

An Information, filed May 4, 2015, charged Defendant with Aggravated Murder, a First Degree Felony, in violation of Utah Code § 76-5-202; Obstructing Justice, a First Degree Felony, in violation of Utah Code § 76-8-306-1; and Possession of a Dangerous Weapon by Restricted Person, a Second Degree Felony, in violation of Utah Code § 76-10-503(2)(a). R. 1-4. Notice of Intent to seek the death penalty was not filed. See R.2484.

Use Immunity was granted for several witnesses who later appeared at preliminary

hearing and trial, Richard McDonald, Alyssa Henrie, Kandise Newby, and Kimberly Martinez. R.78-79. Preliminary hearing was held November 4, 2015. R.94-97;R.2118-2480. Defendant was bound over for trial on the Information as charged. R.96;R.2452.

Mr. Hart moved the trial court to hold Utah's aggravated murder statute facially unconstitutional under article I, section 24, and article V, section 1 of the Utah Constitution. R.165-192. The State responded. R.203-210. Argument was heard July 11, 2016. R.2481-1552. On July 27, 2016, the trial court issued its Memorandum Decision and Order Denying Defendant's Motion to Declare Utah's Aggravated Murder Statute Unconstitutional. R.235-248. This issue was considered in considerable depth by the Utah Supreme Court which issued its decision on November 21, 2016, the gravamen of which effectively renders moot and extinguishes the Defendant's argument. *Met v. State*, 2016 UT 51, ¶ 52, 388 P.3d 447, 461 (Utah's dual-track sentencing structure for those convicted of aggravated murder does not violate the federal and state constitution).

The defense moved to strike the panel on the basis that the jury venire did not represent a fair cross-section of the community as required by the constitution and state law. R.3211. The basic argument was the age of the venire was heavily skewed in favor of 45 up to 65 years old and therefore a jury which would be far more conservative, set in its ways, and less likely to acquit, i.e., the panel's socio-economic status was unfavorably weighted against younger people. Id. Defendant correctly asserted that he had the right to an impartial jury drawn from a fair cross-section of the community. *State v. Young*,

853 P.2d 327, 338 (Utah 1993). On its face, the Defendant's criticism was well taken. Two problems prevent effectively raising this claim on appeal. First, "courts do not recognize geographical distribution or socio-economic status as a distinctive classification or group for Sixth Amendment purposes." *State v. Young*, 853 P.2d at 339. Secondly, the raw data was so unreliable and unpreserved that it is not possible to demonstrate that the defense demonstrated a *prima facie* violation that a particular group was insufficiently numerous and distinctive to be cognizable for fair cross-section purposes. *State v. Tillman*, 750 P.2d 546, 575–76 (Utah 1987). Indeed, the trial court specifically stated,

> At the end of the day, I do not find that any group has been excluded in the selection process. I do not have enough evidence to show that there is. And my general experience as a judge doing a lot of juries, again, I – I think I've done about 15 this year, and that -- that's just this year, I -- I perceive that we get a good cross-section of our community. In terms of the representation in relation to the number of persons in the community, this particular panel may be less representative than others that I've seen, but I think that's a -- that's just a random -- the result of a random process. I've tried to observe how the process has worked.

R.3261. It does not appear from the record that defense counsel demonstrated to the contrary of the court's finding in this regard. Ultimately, the court determined that defense counsel had failed to establish a *prima facie* case of a violation of the Sixth Amendment. R.3262-3263. In counsel's judgment, trial court error cannot be shown.

Mr. Hart moved the trial court pursuant to Utah R. Crim. P. 16, Utah R. Civ. P. 37, and the due process clause of the Utah Constitution, to compel production of all non-

privileged officer notes and all records of contacts between State agents and witness Richard McDonald, and to impose sanctions up to and including dismissal for destruction of evidence by members of the prosecution team. R.280-307. Hearing, including taking testimony, took place on November 28, 2016. R.2553-2662. The issue before the court was whether there were notes taken by officers during the investigation that may not have been preserved and if there were notes that were preserved, the court's order was that "within seven days you're to provide either electronic or paper response describing what, if any, notes are there." If there are handwritten notes, it may take slightly longer to get them to counsel, but the State will at least provide the information. R.2639. Defense counsel is directed to file an amended motion to narrow and focus the issues based upon the evidence that's come in and proffers made. R.2640-41. A further evidentiary hearing was held March 21, 2017 wherein the defense called several witnesses. R.388-390;R.2663-2774. Defendant defines the issue: "The bigger issue is that there's notes -- an unwritten policy at Salt Lake City to destroy all notes. And that's -- the claims that I'm making are a *Tiedemann* motion, Rule 37 spoliation motion, for us to have a proper record here." R.2670. The State noted that no amended motion had been filed as the court previously directed and requests defense be ordered to specifically address issues with the evidence. R.2726. The court orders supplemental briefing. R.2728. Defendant agrees that the State will submit a new order regarding discovery from the defense. R.2734-2735. Ultimately the Defendant withdrew, in writing, the motion to compel

discovery and sanctions for destruction of evidence. R.518-519.

The court held a hearing on several motions *in limine* on May 8, 2017. R.554-555;R.2745-2778. The court's order is set forth R.567-569; See R.2478. The Defendant stipulated to the State's motion allowing Utah R. Evid. 404(b) evidence that the Defendant had sold, provided, purchased, and used illegal drugs. R.2745-2778, 2748; R.567-569. As to the use State's motion to allow reference to the Defendant's nickname, "bullet," the State withdrew its motion. R.2745-2778, 2748-2750: R.567-569. Further hearing on the 404(b) issue regarding Kary Carter's testimony of the Defendant's participation in a prior robbery was heard June 27, 2017. R.752-755;R.2793-2887. The trial court subsequently determined that the evidence regarding the Defendant's participation in a prior robbery was admissible. Findings, Conclusion, and Order, R.848-856. The Defendant petitioned for an interlocutory appeal from this Order. R.887-888. The Court of Appeals granted the Petition. R.1739. The appeal became moot upon the parties entering in to a stipulation to exclude the 404(b) robbery evidence. R.3022-3040, 3025;R.1790-1793, 1789. The State filed a notice of intent not to introduce the disputed 404(b) evidence in its case in chief. R.1760-1761.

The court heard Defendant's other Motions *in Limine*, a motion to exclude witness tampering evidence, R.1613-16115, a motion to exclude inconclusive DNA test results, R.1618-1621, and a motion to bifurcate the aggravating factors in the murder, R.1607-1610. R.2983-3021. The parties stipulated to exclude witness tampering evidence,

R.2985, the court granted the motion, R.2995, and to bifurcate the aggravating factors in the murder. R.2985, 2991;R.1869-1870. Based upon stipulation of the parties regarding the DNA evidence, the court determined that reference can be made to the test and inconclusive results, "but there can be no inference drawn beyond what the expert has stated in her report." R.2997;R1867-1868. Defense counsel withdrew the motion to bifurcate the aggravating factor in the murder. R.2997. The aggravating factor was that the homicide was "committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit a robbery or aggravated robbery." R.1.

Jury trial commenced September 25, 2017 and concluded October 3, 2017. R.1885-1996;R.3041-4524. The jury found the Defendant guilty of Aggravated Murder, a First Degree Felony, in violation of Utah Code § 76-5-202; Obstructing Justice, a First Degree Felony, in violation of Utah Code § 76-8-306-1; and Possession of a Dangerous Weapon by Restricted Person, a Second Degree Felony, in violation of Utah Code § 76-10-503(2)(a), as charged in the Information. R.1987-1988;R.4510-4583(4513-4516).

The trial court sentenced Mr. Hart as follows: for Aggravated Murder, an indeterminate term of twenty-five years to life in the Utah State Prison; for Obstruction of Justice, an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison; and for Possession of a Dangerous Weapon by Restricted Person, an indeterminate term of not less than one year nor more than fifteen years in the Utah State

Prison. R.2051-2054;R.4585-4583(4572-73). The court ordered that all sentences run consecutive to prior commitments pursuant to Utah Code Ann. § 76-3-401(3) and consecutive to each other. Id.

Defendant timely appealed. R.2055-2056. The Utah Supreme Court transferred the case to this Court. R.2086-2087. The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) (2008).

STATEMENT OF FACTS NECESSARY TO UNDERSTAND ISSUES PRESENTED FOR REVIEW.

OVERVIEW

Christian McDonald was killed on January 24, 2015 in relation to his involvement in a drug deal wherein he and his brother, Richard McDonald, arranged to sell five pounds of marijuana to Erick Burwell and his associate. The other person, as alleged by the State, was the Defendant, Jeremiah Ray Hart. Mr. Hart did not testify and at all times maintained through his counsel that, although he was present,[1] he was not involved in the circumstances which resulted in the shooting death of Christian McDonald. There were only two actual witnesses to the shooting incident, Richard McDonald and Erick Burwell.

THE TRIAL

[1] "We're going to talk about a slug, a slug that was fired and -- and actually went through Mr. Hart's face. They (the State) are going to link that to him. He had a -- he had a bullet go through his face. So there is DNA out there that actually links him to this scene. He admits he was there. . . ." Defense Counsel's Opening Statement, R.3314.

Erick Burwell testified that he had an extensive criminal history. R. 3319. He agreed to testify to his roll in the homicide in exchange for pleading guilty to manslaughter and a robbery, both second degree felonies. R.3421-3422. A couple of months prior to January 24, 2015, Erick, introducing himself as Michael, made the acquaintance of Kandice Newby, a probationer, with whom he exchanged drugs three or four times and gave her rides. R.3322-3324;R.2531-33. Erick asked Kandice if she could come up with five pounds of marijuana, that he had a buyer and both could profit. R.3532-2534;R3324-25. Kandice texted Alyssa Henrie who was also on ankle monitor with her and gave her Erick's number so Alyssa could give it to her contact. R.3537-3538. Kandice asked Alyssa if she knew anyone who could get 5lbs of marijuana. R.3538. Kandice's friend, Garrett Pitkin, was at her house and overheard them talking about the deal and wanted to get involved. R.3339. He was willing to pick up her share since she couldn't leave with the ankle monitor. Id. They made a deal if he went and picked up her share of the money, she would give him part of it. R.3540. She put Garret Pitkin and Erick Burwell in contact. Id.

After he was released from prison in 2014, Erick ran into the Defendant in West Valley. R.3320. They had been associates for years. R.3321. Erick testified that he arranged the robbery on January 24, 2015. R.3321. He maintained he talked to Mr. Hart on the phone about setting up a deal for 5 pounds of marijuana, that he had a person for the robbery. R.3328. According to Erick, the Defendant was to bring a gun; Erick

claimed he was not to bring one. R.3329. Eventually, through various intermediaries, Erick was able to set up the deal through Shawn Runyan, who located the McDonald brothers as potential sellers of the drug. R.3601-3604.

After he was released from prison in 2014, Erick Burwell ran into Mr. Hart with whom he was a long time acquaintance. R.3320. Burwell testified that he arranged the robbery the day of January 24, 2015. R.3321. Kandise Newby and others were involved, but did not know the Erick Burwell intended a robbery. Id.

Burwell set the robbery up in a phone call to Jeremiah Hart. R.3328. He told Mr. Hart it was for five pounds of weed and that he was to bring a gun. R.3328-3329. Burwell spoke to a friend of Kandise Newby on January 24, 2015. R.3330. He could not recall his name. Id. The friend called later that day and indicated he had a potential seller with five pounds. R.3332. According to his testimony, Erick and the Defendant intended to rob these sellers of the marijuana and cut everyone else out of the deal. R.3325, 3327. They picked a location in Sugar House to meet, in the parking lot near several businesses. R.3332-3333. Erick said to meet him by the Red Lobster. R.3333. Jeremiah Hart was there when he arrived. Id.

Adam Sandoval, who assisted in setting up the sale, arranged through Kandise Newby that the sellers would show up in Sugarhouse by the Red Lobster. R.3581-3582. Shawn Runyan picked up Adam Sandoval and went to Shawn's friends' house. R.3583. They then got in the friends' car. Id. There were two of them, brothers (the McDonald

Brothers), whose names Adam could not recall. R.3584. Adam noticed a backpack was by the feet of the passenger. Id. They drove up to the parking lot in Sugarhouse by the Red Lobster. R.3585. Adam texted Kandise Newby to let her know they were there. Id. A friend of Kandise Newby, Garret Pitkin, also one of the many intermediaries who expected to make some money, drove to the Sugarhouse Parking lot at about the same time as the others. R.3638, 3646. He met Erick Burwell, whom he knew as Michael, there. R.3646. The others, Adam, Shawn and the brothers showed up and he met them for the first time. R.3649.

Adam testified that he observed another man, bald, Hispanic, heavier set, in the parking lot near a car. R.3587. Erick Burwell testified that he arrived and Kandice Newby's friend (Garret Pitkin) arrived alone. R.3336. Garret told him Christian McDonald is on the way and shortly he arrived with his brother, Richard McDonald, whom he had never met before. R.3337. The brothers were driving their car and Adam wanted the stranger (Erick) to get in their car, but he refused. R.3587. The Latino man insisted that they get into his car. R.3339, 3588. They didn't want to at first, but eventually ended up getting in, both into the backseat. Id. Garret Pitkin also tried to get in with the Latino man, who was in fact Erick Burwell. R.3650. But he was refused. Id. Erick had one brother sit behind him, the other in the passenger seat because he didn't want them both behind him. R.3341. The car then pulled away leaving Adam and Shawn waiting in their car and Garret in his car. R.3588, 3651-3652.

Erick then told them that, "this dude's going to get in, he's going to check the weed, we're going to count the money." R.3440. "The plan was for us to go down the street and just, you know, jack them, rob them. . . . It was no plan for nobody to get shot. The plan was to pull out a gun and to, you know -- to after these were some kids, you know, they would get scared, give us the weed and leave, you know." Id. Erick explained that, "(t)he robbery is, I get them in the car, get them to where we need, you know, get them to where Jeremiah is, Jeremiah gets in, we take them for a ride." R.3441-3442. The Defendant was to sit in the back seat behind the passenger so he could control the person in front of Erick and the person on the side of him. R.3442, 3446-3447. The Defendant was at the Olive Garden with his wife. R.3441.

Erick Burwell met the McDonald brothers for the first time that day in the Red Lobster parking lot. R.3423, 3427. Christian McDonald was in the passenger seat. R.3426. His brother Richard McDonald was seated directly behind Erick Burwell. R.3427. They then drove from the Red Lobster parking lot to the Olive Garden parking lot where Jeremiah was sitting outside. R.3444. They met the Defendant at the Olive Garden and he got in the car. R.3424-3425. He sat in the back passenger seat. R.3445. Jeremiah Hart was seated directly behind Christian McDonald and next to Richard McDonald in the back seat of Erick Burwell's vehicle. R.3427. Christian was holding the backpack of marijuana at that point. R.3443. Erick testified that he knew the Defendant had a gun, a Glock with an extended magazine. R.3447, 3553.

Erick testified that he told them all he didn't want to do the deal in a parking lot and so started driving. R.3448. They then travelled South on 13th East, to Parkway Avenue to the middle of the block and then flipped a U-turn so that the car was facing east. R.3428-3430. It was the first street that he could turn on, the plan being to rob the brothers and let them walk back to their car. R.3348. It was all Erick's plan. R.3349. Then, as Erick testified, "first off they gave us the marijuana, so Jeremiah opened it to look at it, make sure it was good marijuana. So by the time we got to the residential street and I turned around and parked, Jeremiah was already out with the -- with the pistol." R.3350. Erick explained that "Jeremiah never was going to shoot them. It wasn't until he got shot that he shot . . ." R.3553. So "Jeremiah pulls out the pistol, tells them, 'It's a robbery, it's a jack move, you know, everybody out of the car.'" R.3553-3554. Jeremiah at that point put the gun over on Richard's head. R.3355. According to Erick, Richard froze in the back seat. R.3554.

Christian started to get out of the car and as soon as he started getting out of the car, he pulled out a gun and shot Jeremiah in the back seat. Id. He shot before he got out of the car. R.3356. Christian didn't hesitate, just pulled his gun out and shot Jeremiah. R.3356. Jeremiah then shot right back, like "a reflex;" as soon as Christian shot, Jeremiah shouted, "ah," tried to get out of the car and shot back. R.3355, 3359. Erick didn't see how Jeremiah shot Christian. R.3359. Erick described the action as follows:

> Christian gets of the car as soon as -- so fast, like, the rapid shot was like boom, boom. Like, Christian got out of the car, Jeremiah got out of the car together and I gave -- like, I hit the steering wheel with -- and I hit the gas pedal at the same time to get away, because I didn't – I didn't know that Richard was still in the car with me.

R.3355. It happened so fast Erick did not see Jeremiah get hit. R.3358. He saw that Christian was shot in the chest. R.3360. He heard only two gunshots in very rapid succession. R.3362. Both Christian and the Defendant were then out of the car and Erick tried to take off as fast as possible. R.3363.

After the shooting occurred Richard got in the front seat with the marijuana, Eric made a right and headed southbound on thirteenth East. R.3430, 3364-65. Richard told Erick he had a gun and Erick wanted him in the front seat where he could see him. R.3365. Richard wanted to be taken home and Erick took him to his home, dropping him off on 1300 West and 3500 South. R.3364-3665.

Eventually Shawn got a call informing them that it was a setup and to get out of there. R.3589. They left at that point and Shawn's wife picked them up. Id. Garret also called Erick, who told him someone had been shot, that it all went bad, and sounding frantic. R. 3652, 3654, 3367.

Richard McDonald tells a story similar to the other eye witness, Erick Burwell. Richard "Malcolm" McDonald testified that he and his brother sold marijuana together. R.4072. He testified that on January 24, 2015 he was contacted by Shawn, his friend, that he had a buyer who needed 5 lbs of marijuana. R.4073. Shawn came over, had he

and Christian McDonald follow him to a friend's house to pick up somebody else. R.4074. They had the weed already. Id. He put the marijuana in a blue backpack. R.4075. He testified that he had a .40 caliber pistol, and carried it in his pants. Id. His brother also had a gun. Id.

Richard, Shawn, and his brother drove to pick up another person he didn't know. R.4076-4077. From there they drove to the Sugarhouse parking lot and met someone by the Red Lobster. R.4078. Shawn talked to this person and returned saying they needed to get in his car, which felt weird and they did not want to do. R.4079-4980. Richard got in the back seat behind the driver, whom they had never met, and Christian got in the passenger seat. R.4081. They then drove to the Olive Garden to pick up another person who gets in the back seat with him. R.4082. Richard identifies this person as the Defendant in the courtroom. R.4083. They wanted to go somewhere more private, so they headed out from there and went down 1300 East, and turned down one of the first small streets, Parkway Avenue. Id. On the way Richard unzipped the backpack and showed Jeremiah the bags of marijuana. R.3484. The car u-turned, they parked in the street, "(a)nd then that was the point the passenger had pulled a gun out of his hoody." R.4085. It was a pistol. R.4086. He points it at Richard about a foot from his head and said, "This is a robbery." Id. Richard testified, "So at that moment, I just kind of froze. Like my whole body went cold. And I just put my hands up and just stood still." R.4087.

Richard claimed that he was stunned, and that he did not grab his own gun. R.4087. But he saw Christian moving for his gun. Id. Here the stories between Erick Burwell and Richard McDonald diverge. Richard testified, "So at that point, when I saw my brother reaching for his gun, the passenger, the guy who pulled the gun on me, reaches around my brother with his left arm, holds him to the seat, and reaches around with his right arm and shoots him." R.4087-4088. He heard one or two gunshots. R.4089. But he claims he never saw Christian's gun. Id. He could not recall if it was the passenger or his brother who got out of the car first. R.4090. He claims he never pulled his gun out. Id.

The next thing Richard experiences after both his brother and the passenger are out of the car, they are driving down the street and he is wondering what just happened. R.4091. When the driver asks him to get in the front he climbed over and got in the front seat. Id. He then was taken home. R.4093.

When Richard was first interviewed by the police, he told them he didn't have a gun. R.4094. When confronted with Erick Burwell's statement, he eventually told the police about having a gun. R.4095, 4126. He then claimed he had taken it out in the desert, broken it down and scattered the pieces to get rid of it. R.4094-4095. He even went out with police nearly 8-9 months after him telling them about it to look for it, unsuccessfully, in the desert in March 2016. R.4132. He got rid of the marijuana also. R.4095.

At the scene of the shooting an expended 9 mm shell casing was found, but no compatible bullet. R.3691-3692. A Glock magazine holding 9 mm ammunition, but no gun, was found at the scene. R.3689. A Taurus PT145, .45 caliber semiautomatic handgun was recovered at the scene. R.3688-3690. Exhibit 22 was a fired bullet, presumably from the Taurus. R.3690. A Taurus holds only .45 ammunition. R.3689. .45 ammunition is not interchangeable with 9mm ammunition. Id.

The medical examiner performed an autopsy on the body of Christian McDonald on January 25th, 2015 at 7:28 am. R. 3813. An internal and external examination was performed. Id. Two specific injuries noted, gunshot entrance wound on right-upper chest and exit wound on mid back that was just to the left of spine. R.3815. His only chance of survival would have been instant medical intervention. R.3828. Even so, Christian McDonald's survival would have been unlikely. Id. His time of death was put at January 24th at 7:32 p.m. R.3832.

SUMMARY OF ARGUMENT

The Defendant contends defense counsel was ineffective in failing to request a mistrial when the state introduced evidence of two firearms, only one of which was recovered in this case. An unrelated firearm was taken from Defendant during a traffic stop and search weeks after the killing, and the state's forensics expert used it to show the distinctive firing pin mark left by a Glock firearm, which was the same type of firearm suspected in the murder. The Defendant contends the jury would have been

unnecessarily confused and would have believed the firearm was that of the Defendant. The relevance of the evidence presented by the State is indeed extremely questionable and the probative value was undoubtedly outweighed by the prejudicial effect.

The Defendant contends he received ineffective assistance of counsel for counsel's failing to object and request a mistrial when a critical witness testified that the Defendant was previously in prison for prior offenses. Counsel was further ineffective by engaging in a wholly unreasonable strategy of emphasizing that the Defendant had been previously convicted of an offense which was punishable by incarceration in the Utah State Prison. There was no reason for this information to be disclosed. Counsel was clearly unprepared to meet the issue, which he should have easily foreseen, and it was reversible error to allow such prejudice to infect the trial process when there was no necessity for such testimony to be presented.

The Defendant contends it was ineffective assistance for defense counsel to fail to request a mistrial when the jury came back asking for clarification as to whose DNA was found on whose jacket, as testified to by the DNA expert. The DNA expert testified only that Hart's DNA was found on a jacket that was tested, failing to state that it was the Defendant's own jacket. A stipulated instruction was read to the jury stating the jacket was the Defendant's immediately after the evidence was admitted, because it was going to be another two days before a witness would testify that the jacket was the Defendant's, and therefore render the evidence innocuous. The instruction was insufficient for the

jury, which came back during deliberations with the very question which had been the source of the problem leading to the stipulation. However, the court would not permit clarification during deliberations. This was prejudicial error.

The Defendant contends that it was ineffective assistance of counsel where defense counsel failed to object when the lead detective testified that blood spatters and drops found in and about the victim's body matched the Defendant's DNA, where the detective was not noticed or qualified as a blood pattern expert. The testimony led the jury to conclude the victim and Defendant had been shot in a certain way, which was far from his area of expertise and no doubt misled and confused the jury. The evidence was prejudicial and should not have been allowed. But defense counsel failed to object.

Lastly, the cumulative effect of all identified and assumed errors must necessarily undermine confidence in the verdict.

POINT I

THE DEFENDANT CONTENDS THAT DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A MISTRIAL WHEN THE STATE INTRODUCED EVIDENCE OF TWO FIREARMS, ONLY ONE OF WHICH WAS RECOVERED IN THIS CASE. AN UNRELATED FIREARM WAS TAKEN FROM DEFENDANT DURING A TRAFFIC STOP AND SEARCH WEEKS AFTER THE KILLING, AND THE STATE'S FORENSICS EXPERT USED IT TO SHOW THE DISTINCTIVE FIRING PIN MARK LEFT BY A GLOCK FIREARM, WHICH WAS THE SAME TYPE OF FIREARM SUSPECTED IN THE MURDER. THE DEFENDANT CONTENDS THE JURY WOULD HAVE BEEN UNNECESSARILY CONFUSED AND WOULD HAVE BELIEVED THE FIREARM WAS THAT OF THE DEFENDANT.

Detective Gordon Parks testified that Exhibit 16, a Taurus PT145, .45 caliber semiautomatic handgun was recovered at the scene. R.3688-3690;R.3708. A 9 mm magazine was discovered at the scene. R.3710;R.3511. Only one gun, the Taurus, was found at the scene, the other being lost. R.3511;R.3686-3690;R.3888. A Glock magazine holds only 9mm ammunition, and the magazine found at the scene was consistent with a Glock handgun. R.3686-3692. Exhibit 22, fired bullet, was found at the scene; it was not a 9 mm. R.3692. No 9mm bullet found at scene. Id. A fired bullet, Exhibit 22, presumably from the Taurus, was recovered from the scene. R.3690.

The confusion in this matter arises from the fact that Derek Mears, Salt Lake Police Crime Lab Firearms Expert, testified that he examined two firearms which he had received in evidence. R.3886-3887. He first tested the Taurus firearm: "I examined this particular firearm and another firearm that was submitted as well." R.3887.

Mr. Mears commenced to testify regarding a slight malfunction he observed in the trigger mechanism of the .45 caliber Taurus. R.3887-3888. Defense counsel called for a bench conference. The discussion went as follows:

> (Bench Conference.)
> MR. JOHNSON: He just asked if that was Jeremiah Hart's.
> THE COURT: What?
> MR. JOHNSON: He just asked how many firearms he examined in this case. One of them was picked up off of the Defendant after the fact.
> MR. HANSEN: Yeah, I'm only going into this firearm.
> MR. JOHNSON: I just -- now we have to have a firearm out there that we're not going to talk about.

> THE COURT: Well, the only evidence I think we've had is that there is one firearm from the scene, the other one was lost.
> MR. HANSEN: Right. So I'm only asking about the Taurus.
> THE COURT: So let's be clear: You're not going to go into another firearm that may have been --
> MR. HANSEN: No. We will only talk about the --
> THE COURT: -- received from some other person or from the Defendant.
> MR. HANSEN: Yeah. I intentionally did not – I moved up [inaudible] would not be --
> MR. JOHNSON: I just don't want [inaudible].
> THE COURT: Okay.
> (End of Bench Conference.)

R.3888-3889. Momentarily, the issue seems to have been addressed. Mr. Mears testified regarding the .45 caliber bullet, recovered from the scene, which he examined, which he concluded was fired from the Taurus found at the scene. R.3890-3891.

Shortly thereafter, confusion arose again during Mr. Mears examination. The problem arose as follows:

> Q. (BY MR. HANSEN:) I'm showing you what's been already been admitted as State's Exhibit 122.
> A. Okay.
> Q. Do you recall, or do you know what that is?
> A. Yes. That's a photo I took to show the comparison of Item 43, which is on the right side of that photograph *versus a test fired cartridge case from another firearm that I received.*

R.3891-3892 (Emphasis added). Again defense counsel called for a bench conference. R.3892. The court thereupon excused the jury and a lengthy dialogue ensued about the relevance, necessity, and potential for a mistrial if the second gun received in evidence were connected to the Defendant. R.3895-3904 (Addendum D). The court noted that if

that were to happen, the State would be risking a mistrial. R.3899. Defense counsel also noted, regardless of any curative pronouncements from the bench, that the damage had been done: "I think the cat is out of the bag at this point. We're talking about he's seen two guns as a part of this case." R.3901.

After the lengthy conference, the court determined that the problem could be solved wherein the parties would enter into a stipulation. The discussion follows:

> MR. JOHNSON: Well, I don't know why you're using actual evidence instead of using something from Google to show that comparison.
> MR. EVERSHED: Because it just -- it just demonstrate. It's something that he created. It just demonstrates it. It's just a demonstrative -- it really is.
> THE COURT: So let's be clear. The stipulation is that he received another 9mm that has no connection to this case. And when I say "no connection to the case," that's true.
> MR. EVERSHED: It's true.
> THE COURT: Because the fact that it came from the Defendant in this case or from anybody else is really not relevant. So I will just direct you to state on the record that there is a comparison gun. We stipulate there is a comparison gun used and to demonstrate how a different manufacturer's firearm, a 9mm creates a different impression on a shell.
> MR. JOHNSON: On that end, feel free to lead in into that.
> MR. HANSEN: Yeah. Yeah. In fact --
> THE COURT: Okay. And that's -- so does that resolve this issue?
> MR. EVERSHED: Yes.
> THE COURT: Assuming -- you do that. And I will direct you to lead the witness on that issue to make clear it's a comparison firearm that has no connection to this case.
> MR. JOHNSON: That's fine.
> THE COURT: Both sides agree. Okay.

R.3903-3904. That did not entirely end the discussion however. Subsequently the court enquired about the stipulation and the exhibit, Exhibit 122, the "comparison" gun. R.3917. Thereupon further discussion took place as follows:

> THE COURT: Can you state into a microphone, Counsel. What the exhibit -- what the stipulation is?
> MR. HANSEN: Your Honor, when I put the witness back up there I'm going to lead the witness. He is going to -- I'm going to direct his attention to -- if I could just use this. I'm going direct his attention to this.
> THE COURT: And you're pointing to an exhibit --
> MR. HANSEN: To this casing -- so if you look at this, it's the left casing, if you're looking at Exhibit-22.
> THE COURT: Okay.
> MR. HANSEN: I'm going to ask him if that is a comparison gun that was found and available in the lab that's unrelated to this case.
> THE COURT: Okay. Does that work?
> MR. JOHNSON: Your Honor, that does work but we just want to put on the record that we objected to the eliciting of testimony from the witness that there were two guns provided to him for examination.
> THE COURT: I understood the stipulation would include that that second gun he referred to is the gun used for that test.
> MR. JOHNSON: Certainly, Your Honor.
> THE COURT: Is that what you agreed to?
> MR. JOHNSON: Your Honor, correct. When I point to the casing of the gun issue I want to say that's a comparison gun that's available in the lab. It's not related to this case.
> THE COURT: But he said -- I understood the stipulation would also go to the discussion of him receiving two guns in the case. Were you going to clarify that the second gun was the comparison gun?
> MR. HANSEN: Right. And I can -- that's what I'm going to do as well. I'm just going to say the casing and the gun are just comparison guns, they are not affiliated with the case.
> THE COURT: And that that is the second gun that he referred to in his testimony?
> MR. HANSEN: Correct.
> MR. JOHNSON: And that's what we understand, Your Honor, and we're okay with that . . . .

R.3917-3919. So while defense counsel agreed to the stipulation, he made clear that he objected to the testimony regarding two guns in the first instance. R.3918.

The subject was dealt with by the State as follows:

> Q. (BY MR. HANSEN:) . . . But when we talk about two guns, one of those guns was a comparison gun just available to you in the lab; is that correct?
> A. That's correct.
> Q. It is not affiliated with this case?
> A. That's correct.

R.3921.

The Defendant contends the evidence was prejudicial by introducing it in the first place, to which appropriate objection was lodged. But the persistence of the issue and the amount of perseveration devoted to the subject leant further error to what was already a problem, which the "stipulation" that the State's explanation did not solve. It is the Defendant's position that the trial was tainted by this evidence, that defense counsel was remiss in not sticking to his guns and standing by his initial objection and requesting a mistrial.

The reason for the State presenting this "demonstrative" evidence is highly suspect in the first place. It had very little relevance to the issues in the case. Even given the low standard for determining relevance under Utah R. Evid. 402, it is difficult to understand what the testimony demonstrated. "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." Utah R. Evid. 403. The evidence, it may be said, was likely to run afoul of most if not all of these problems. To say the least, it was unfairly prejudicial, confusing, misleading, and a waste of time. It should not have been allowed.

For the reason stated, defense counsel provided ineffective assistance of counsel. The Defendant, by this reference, incorporates the full discussion of the principles related to ineffective assistance of counsel and failure to request a mistrial as is set forth in Point II.B.

POINT II

THE DEFENDANT CONTENDS HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT AND REQUEST A MISTRIAL WHEN A CRITICAL WITNESS TESTIFIED THAT THE DEFENDANT WAS PREVIOUSLY IN PRISON FOR PRIOR OFFENSES. COUNSEL WAS FURTHER INEFFECTIVE BY ENGAGING IN AN UNREASONABLE STRATEGY OF EMPHASIZING THAT THE DEFENDANT HAD BEEN PREVIOUSLY CONVICTED OF AN OFFENSE WHICH WAS PUNISHABLE BY INCARCERATION IN THE UTAH STATE PRISON.

A. KARY CARTER'S TESTIMONY.

Kary Carter was a witness called by the State. R.3926. Mr. Carter was convicted of aggravated burglary, a first degree felony, in 2012, and theft by receiving stolen property and possession of a dangerous weapon by a restricted person in 2014. R.3928-29. On both matters Carter was placed on probation. Id. On or before January

24, 2015, Carter's probation was revoked and he was then facing five to life. R.3929. He conceded that he should have gone back to prison for a long time.

Mr. Carter had many life-threatening illnesses, liver cancer and hepatitis, diagnosed in 2002; Clonus, a nerve disease; Ankylosing Spondylitis, a spine disease; Multiple Sclerosis; and at the time of his testimony had been in a wheel chair for two and a half years. R.3930-3931. Kary testified that he agreed with the Defendant that he would say that he shot him. R.3941-3942. He indicated that the Defendant never told him that he shot someone else although he indicate that he shot back. R.3946. Kary told the police several different versions, one of which was that he was there at the shooting and shot the other individual. R.3947. Because of his terminal condition he didn't care at the time and was trying to protect the Defendant. Id. He told Jeremiah it was fine to bring him into it, "but I never said you can tell them that I killed somebody. I said you can tell them I was there [inaudible] time, other than that, tell somebody that I killed him [inaudible]. I never agreed to that part of it." R.3948-3949. He reiterated that he told the Defendant could his name to buy some time, but never said for him to say that he, Kary, actually shot anybody. R.3951.

At a point in time, Mr. Carter testified as follows:

> [inaudible] both times I was still -- I was still trying to protect him. We were out here in a situation where I'm going to prison [inaudible] same room [inaudible]. See, yeah, if I sat there and I made up whatever to have to protect myself. So, yeah, at that time they had me in a cell with a person who was taking care of me.

R.3960. Counsel withdrew his question and backed off of this line of cross-examination at that point. Id. However, it was clear there was concern on the part of the defense counsel that oblique reference had been made to the Defendant taking care of him. Immediately after this response came in, a bench conference was called:

> MR. JOHNSON: Your Honor -- hold on a second.
> THE WITNESS: Huh?
> MR. JOHNSON: Your Honor, can we have a sidebar?
> THE COURT: Yes.
> (Bench Conference.)
> MR. JOHNSON: I think perhaps –
> MR. EVERSHED: He didn't identify him.
> MR. JOHNSON: [Inaudible] I think we need to –
> MR. EVERSHED: If I think if we draw anymore attention. Let's just finish the witness and then let's address it.
> MR. JOHNSON: Okay.
> THE COURT: Okay.
> (End of Bench Conference.)
> Q. (BY MR. JOHNSON:) Mr. Carter, you can strike that last question.

R. 3960-3961. Defense counsel was clearly concerned about letting the jury know that the Defendant had been in prison on a matter other than the instant case.

However, later during cross-examination, the following colloquy took place:

> Q. All right. So and -- without getting into details, I think you told me that -- that Mr. Hart has taken care of you through a lot of medical conditions; is that correct?
> A. Yeah.
> Q. And -- and did he -- he let you live with him before all this happened?
> A. Yeah. As soon as they're violate -- they violated his parole.
> Q. All right. You guys -- before all of this happened, you two lived together on –
> A. Yeah.

> Q. -- on the streets, yeah? And he -- he helped take care of you, and for how long? How long in your life did Jeremiah Hart help take care of you?
> A. Do you think it's a -- a few times take care of a few situations when I was a kid and then just recently. And then I've been locked up the majority of my life, so it's been off and on pretty much here and there.

R.3964.

Rather than take the appropriate course of action at this point in time, which would have been to move for a mistrial based upon the witness indication that the Defendant had been on parole and was in prison for a parole violation, after the State examined Mr. Carter on redirect, defense counsel dug in deeper with the following:

> Q. So elephant in the room, you and Jeremiah spent a year in prison together after this happened, correct?
> A. Yeah.
> Q. You're actually cellmates?
> A. Yeah.
> Q. And you're in a wheelchair?
> A. Yeah.
> Q. And he was your ADA assistant?
> A. Yeah.
> Q. He took care of you?
> A. Yeah.
> Q. He is your caretaker?
> A. Yeah.

R.3971-3972. Defense counsel then inquired about his knowledge of the Defendant's case, "(I)n a year as cellmates you never had a conversation?" R.3973. Counsel continued to stress his access to the Defendant's case information, to which the witness responded at one point, "It was in the room. Yeah, we're cellies. But no, I have no . . . I ain't never read his paperwork." Id. The testimony made clear that the witness and

Defendant had known each other and been friends their entire lives, since childhood. R.3974. Defense counsel continued to hammer it home, " . . . you guys never had a conversation about this case while you're in prison together?" Id. On re-direct, the State emphasized that the essential, in fact, according to the witness, the sole, conversation about what Kary would tell the police and about the case took place outside of prison. R.3935.

The trial court was obviously concerned about defense counsel's examination in regard to the Defendant being in prison with the witness, prompting the following colloquy after the witness was excused:

> THE COURT: I just -- at a sidebar just want to make clear on the record, there was a decision made by defense counsel to introduce the issue –
> MR. JOHNSON: That he was in prison.
> THE COURT: That he was in prison since the time of the alleged crime. And I assume based upon seeing this that was a decision you made after consulting with your – your client as part of a decision as to how to cross-examine this witness?
> MR. JOHNSON: Correct.
> THE COURT: Okay. I just wanted that to be clear.
> MR. JOHNSON: And because it came out three times during ahead of time so...
> THE COURT: It terms of that went –
> MR. JOHNSON: Yeah, in terms of –
> THE COURT: In your cross-examination.
> MR. JOHNSON: -- before I made that decision, yeah.
> THE COURT: And I didn't hear it come out on the State's examination of the witness.
> MR. EVERSHED: No. No. Nothing came out on the State's –
> THE COURT: Okay. I just want to make sure the record is clear on that.
> MR. JOHNSON: Certainly. That this was not some kind of mistake or issue like that, it was a strategic decision the defense has made in consultation

with the Defendant. Just wanted the record to be clear on that, to make sure I'm not misunderstanding.

R.3936-3997.

The Defendant contends that two observations should be made. One, it is the Defendant's contention that it is patently obvious from the entire course of defense counsel's cross-examination that he had never sought to interview this witness or attempted to determine beforehand to what the witness might testify. Secondly, Mr. Hart contends that it is evident that defense counsel was initially concerned that the jury might infer from the witness' testimony that he was being cared for in prison by the Defendant at a time when the Defendant was also thusly incarcerated. R.3960. Thirdly, the Defendant contends that defense counsel was surprised, and not prepared, for the witness' testimony to the effect that the Defendant's parole had been violated, R.3964. He so much as admitted this fact, "MR. JOHNSON . . . because it came out three times during ahead of time so . . . THE COURT: In your cross-examination. MR. JOHNSON: -- *before I made that decision, yeah.*"

In other words, defense counsel was unprepared for this witness testimony in general and unprepared for the inevitability that unless counsel was extremely circumspect, and/or the witness was fully apprised of the fact that he should not mention the Defendant's incarceration in any way, the fact that they were in prison together would come out. It was no doubt of little help to the conference counsel had with his client

about fully bringing the subject to the fore that he had waived his opportunity to object, take some curative action, and make a motion for a mistrial. On that latter subject, he could have conferred with his client intelligently – as to whether such a motion should be made. But after the subject has been allowed to come in before the jury, without objection, it is really too late to discuss a strategy of letting it all hang out without being disingenuous with one's client. It got past defense counsel, and the only thing he could tell his client was that he had a choice to just let it go or talk about the "elephant in the room."

B. INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." This Court has stated the basic principles of Ineffective assistance of counsel as follows:

> ¶ 13 Criminal Defendants are entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. See *Strickland v. Washington*, 466 U.S. 668, 684–86 (1984). To prove a claim of ineffective assistance, the Defendant must show (1) "'that counsel's performance was so deficient as to fall below an objective standard of reasonableness' "and (2) "'that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.' "See *State v. Hales*, 2007 UT 14, ¶ 68, 152 P.3d 321 (quoting *State v. Gonzales*, 2005 UT 72, ¶ 64, 125 P.3d 878). "Failure to satisfy either component of this test is fatal to an ineffective assistance of counsel claim." *State v. C.D.L.*, 2011 UT App 55, ¶ 13, 250 P.3d 69, cert. denied, 255 P .3d 684 (Utah 2011). However, if the Defendant succeeds on a claim of ineffectiveness, he will be entitled to a new trial. See *State v. Hales*, 2007 UT 14, ¶ 68, 152 P.3d 321. *4

> ¶ 14 Under the deficiency prong, trial counsel's performance is "presumed to be part of a sound trial strategy ... within the wide range of reasonable professional assistance." C.D.L., 2011 UT App 55, ¶ 13 (omission in original) (internal quotation marks omitted). This presumption may be overcome only if there is a "lack of any conceivable tactical basis for counsel's actions." See id. (internal quotation marks omitted). Accordingly, we "will assume trial counsel acted effectively if a rational basis for counsel's performance can be articulated." Id. (internal quotation marks omitted).
>
> ¶ 15 Under the prejudice prong, "'[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.' "*State v. Templin*, 805 P.2d 182, 187 (Utah 1990) (quoting *Strickland*, 466 U.S. at 694). "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." *Strickland*, 466 U.S. at 686. . . .

State v. King, 2012 UT App 203 (2012).

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord Defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled." *Strickland* 466 U.S. 684-85. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." *United States v. Cronic*, 466 U.S. 648, 655-56, 104 S. Ct. 2039, 2045 (1984). Effective assistance therefor is measured by reference to the functioning of the adversary system in the particular case.

I.e., it must be truly adversarial. The critical question is therefore whether counsel's performance was so deficient that the process "lost its character as a confrontation between adversaries," producing an "actual breakdown in the adversary process." *United States v. Cronic*, 466 U.S. at 654 – 58 (Internal cites omitted). These seminal and paradigmatic cases, *Strickland* and *Cronic*, put into bold relief the issue of counsel's performance in this matter.

Counsel had a duty of diligence and to conduct a thorough investigation. "To determine whether "counsel's performance was objectively reasonable in light of all the circumstances, we look to prevailing professional norms. In accordance with these norms, our cases recognize that counsel has an important duty to adequately investigate the underlying facts of the case." This is "because investigation sets the foundation for counsel's strategic decisions about how to build the best defense." *State v. J.A.L.*, 2011 UT 27, ¶ 27, 262 P.3d 1, 8. The Court in *J.A.L.* specifically referred to *State v. Hales*, 2007 UT 14, ¶ 69, 152 P.3d 321, 338, which quoted *Strickland:*

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690–91, 104 S.Ct. 2052.

The admissibility of a prior conviction of a felony is permissible only for the purpose of impeachment. The Utah Rules of Evidence provide:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the Defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Utah R. Evid., Rule 609. This is the only available avenue to admit a prior felony conviction. That rule certainly had no applicability to the circumstances involved in this instance. Impeachment of Kary Carter was not the basis upon which he testified to being in prison at the same time as the Defendant. He blurted out that the Defendant's parole had been violated. R.3964. Nothing could be more damaging in a case where the facts were so indeterminate. This was not a case of overwhelming evidence. On the contrary, it is an open question, with at least the McDonald brothers both being armed, as to who shot whom.

Trial courts have discretion to grant or deny a motion for a mistrial. *State v. Maestas*, 2012 UT 46, ¶ 325, 299 P.3d 892, 980, citing *State v. Wach*, 2001 UT 35, ¶ 45, 24 P.3d 948. "In exercising its discretion, the trial court should not grant a mistrial except where the circumstances are such as to reasonably indicate that a fair trial cannot be had and that a mistrial is necessary in order to avoid injustice." To demonstrate

prejudice, a "Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. *State v. Craft*, 2017 UT App 87, ¶ 28, 397 P.3d 889, 896.

Much as in *State v. Craft*, where a detective improperly testified to a co-Defendant's statement implicating *Craft*, counsel's failure to move for a mistrial was prejudicial. It was prejudicial because, based on the evidence in that case, there was a reasonable probability of a different outcome. "(A) reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. quoting *Strickland.* In *Maestas*, the probation officer testified at the penalty phase of that capital case that Maestas had a "career criminal" conviction. *Maestas*, 2012 UT 46, ¶ 326. Because the comment was isolated and cured through subsequent testimony, the remark did not render Mr. Maestas's trial so unfair that the Utah Supreme Court held that it was not an abuse of discretion for the trial court to deny a motion for mistrial. Id. The instant matter is not comparable.

Had counsel interviewed this witness, or at least conferred with the State's attorney, he could have taken precautionary measures to insure the "cellmate" information did not come out. Counsel had to be aware that Kary Carter was in prison at the same time as the Defendant. If he was not, he was derelict. It is safe to presume that

he was aware of the fact, which means he could have questioned the witness under circumstances where the witness had been thoroughly warned of his duty to refrain from divulging the fact that the Defendant's parole was violated or that he was in prison. It is the sort of precaution which is taken routinely. Yet, even after a near miss with the witness testifying that he was cared for in prison, prompting defense counsel to request a bench conference wherein the non-identifying information was noted by the State, defense counsel sought no cautionary instruction to the witness from either the court or counsel and delved unnecessarily into areas which insured that the information would come out. He appears to have negligently opened the door. Then made a decision, rather than correct or move for a mistrial, to exacerbate the situation. This was not a reasonable strategy.

It is understood that "Counsel's competence ... is presumed, and the Defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Archuleta v. Galetka*, 2011 UT 73, ¶ 134, 267 P.3d 232, 269 quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Defense counsel's willy nilly approach to Kary Carter's testimony regarding the Defendant's parole violation and being in prison, which was completely unnecessary to his testimony, was not reasonable. It is also understood that "a party cannot take advantage of an error committed at trial when that party led the trial court into

committing the error," *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996) (quoting *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993)) (internal quotation omitted). In this instance, however, it is so transparent that defense counsel was bewildered by the circumstances and simply failed to act as an effective advocate for his client.

Effective assistance is measured by reference to the functioning of the adversary system in the particular case. It must be truly adversarial. Counsel's actions in this instance did not provide the requisite "meaningful adversary testing." The critical question is whether counsel's performance was so deficient that the process "lost its character as a confrontation between adversaries," producing an "actual breakdown in the adversary process." *United States v. Cronic*, 466 U.S. at 654 – 58. 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. *Strickland*, 466 U.S. at 686. The introduction of Defendant's parole violation and prison incarceration could not help but predispose the jury to presume his guilt in the instant case. This is especially so where the Defendant did not testify and his record would not have been revealed on cross-examination. It was a wholly unreasonable strategy on defense counsel's part which led the trial court into highly prejudicial error.

POINT III

THE DEFENDANT CONTENDS IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL TO FAIL TO REQUEST A MISTRIAL WHEN THE JURY CAME BACK ASKING FOR CLARIFICATION AS TO WHOSE DNA WAS FOUND ON WHOSE JACKET, AS TESTIFIED TO BY THE DNA EXPERT. THE DNA EXPERT TESTIFIED ONLY THAT HART'S DNA WAS FOUND ON A JACKET THAT WAS TESTED WITHOUT STATING THAT IT WAS HART'S JACKET. WE READ A STIPULATED INSTRUCTION TO THE JURY STATING THE JACKET WAS HART'S IMMEDIATELY AFTER THE EVIDENCE WAS ADMITTED, BECAUSE IT WAS GOING TO BE ANOTHER TWO DAYS BEFORE A WITNESS WOULD TESTIFY THAT THE JACKET WAS HART'S, AND THEREFORE RENDER THE EVIDENCE INNOCUOUS. THE INSTRUCTION APPARENTLY WAS INSUFFICIENT FOR THE JURY, AND THE COURT WOULD NOT PERMIT CLARIFICATION DURING DELIBERATIONS.

The sleeve of a jacket was tested by Krista Lungren, Sorenson Forensics DNA expert. R.3860. The conclusion was that the left sleeve was found to have defendant's DNA on it. R.3861. Because it remained unclear who's jacket the sleeve came from, the parties agreed and a stipulation was read in to the record for the benefit of the jury. R.3921. The stipulation was as follows: "The parties stipulate to the following: The sleeve tested which contained Jeremiah Hart's DNA was from Jeremiah Hart's jacket." Id.

During deliberations the jury submitted a question in this regard. R.4481-4485. Although defense counsel objected and wished the stipulation read to the jury again, R.4483, ultimately the following statement was read to the jury: "THE COURT: . . . I'm going to read it into the record. The question, "According to Krista Lundgren, forensic

report Item 5.0, whose jacket sleeve was tested? Whose DNA was a match for the left sleeve?"

Then I have the date, 10-2-17. "This issue was the subject of a stipulation read into the record by counsel. Please rely on your collective memory of the evidence presented by the Court. Keith Kelly." R.4484. Counsel agreed to this response. R.4485.

The DNA expert testified only that Hart's DNA was found on a jacket that was tested without stating that it was Hart's jacket. The stipulation read to the jury stated the jacket was Hart's after the evidence was admitted, because it was going to be another two days before a witness would testify that the jacket was Hart's, and therefore be highly confusing to the jury. The stipulation apparently was insufficient for the jury, and the court would not permit clarification during deliberations. R.4481-4485.

Counsel was ineffective for failing to request a mistrial at this point. "A trial court's ruling on a motion for mistrial should not be upset unless it clearly appears the trial court abused its discretion. . . . We presume the trial court exercised proper discretion unless the record clearly shows to the contrary." *State v. Pearson*, 818 P.2d 581, 582 (Utah Ct. App. 1991)(citations omitted). A mistrial would be appropriate where there is prejudice which cannot be cured and the Defendant consents to the mistrial or (2) there is "legal necessity" for the mistrial. *State v. Manatau*, 2014 UT 7, ¶ 10, 322 P.3d 739, 744.

POINT IV

THE DEFENDANT CONTENDS THAT IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL FAILING TO OBJECT WHEN LEAD DETECTIVE TESTIFIED TO BLOOD SPATTERS AND DROPS FOUND IN AND ABOUT THE VICTIM'S BODY MATCHED THE DEFENDANT'S DNA, WHERE THE DETECTIVE WAS NOT NOTICED OR QUALIFIED AS A BLOOD PATTERN EXPERT.

Detective Spangenburg testified extensively regarding his opinion and conclusions in relation to the various blood spatters and droppings at the scene where Christian McDonald lay in the street. R.4166-4173. He specifically discussed evidence flags marked A, B, C, D, and E. R.4166. He testified that the source of blood stain C, previously linked to the Defendant, R.38733874, being Jeremiah Hart, was stationary, not moving, for a period of time to leave the blood at the scene. R.4168. He further rendered his opinion with regard to State's Exhibit 26, a photograph of the scene, R.1997, there's also bloodstains at A, B, D and E. Id. He rendered his opinion that item B was attributable to Christian McDonald. Id. "It's a different pattern." Id. As to "blood marks, A, D and E, and others" he opined that those blood droppings could not have come from Christian McDonald although no DNA testing on A, B or E had been done. R.4169. He "put those deductions together." Id.

It is the Defendant's contention that it was improper for this witness to so testify as though he were an expert in the field of blood spatter. Defense counsel was ineffective

by allowing expert opinions that were improper under Utah R. Evid. 702. The Rule states as follows:

> **(a)** Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
>
> **(b)** Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony
>
> (1) are reliable,
>
> (2) are based upon sufficient facts or data, and
>
> (3) have been reliably applied to the facts.
>
> **(c)** The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Utah R. Evid. 702. In addition to failing to satisfy any of the requirements of Rule 702, the State gave no prior notice as required by Utah Code Ann. § 77-17-13. Expert testimony generally--Notice requirements. Yet defense counsel failed to object to any of the testimony, which was prejudicial in its tendency to show that the Defendant lingered momentarily over the body of Christian McDonald and thus tie him to the shooting death rather than either Richard McDonald, who admittedly had a gun, R.4075-4076, or Erick Burwell.

The Defendant therefore contends that counsel's performance was objectively deficient; and (2) a reasonable probability exists that but for the deficient performance,

the Defendant would have obtained a more favorable outcome at trial. *State v. Kurr*, 2012 UT App 194, ¶ 2, 283 P.3d 995, 997.

POINT V

THE CUMULATIVE EFFECT OF THE COMBINED ERRORS REQUIRES REVERSAL.

Under the cumulative error doctrine, an appellate court will reverse if the cumulative effect of all the identified errors, as well as any errors assumed, undermines the court's confidence that a fair trial was had. *State v. Dunn*, *supra*, 1229. "While we more readily find (cumulative) errors to be harmless when confronted with overwhelming evidence of the Defendant's guilt . . . we are more willing to reverse when a conviction is based on comparatively thin evidence." *State v. King,* 2010 UT App 396, ¶ 35, 248 P.3d 984. The Defendant contends that given the numerous errors, some extremely egregious, and the "comparatively thin evidence" of the Defendant's guilt, it must be concluded that confidence in the verdict is undermined and reversal is required.

CONCLUSION

Individually and cumulatively, the foregoing errors require a new trial.

Dated this ___ day of December, 2018.

HERSCHEL BULLEN
Attorney for Defendant

CERTIFICATE OF RULE 21 & 24 COMPLIANCE

Appellant certifies pursuant to Rule 24(f)(1)(C) Utah R. App. P. that the foregoing principal brief of appellant contains less than 12,826 words.

Appellant further certifies pursuant to Rule 21(g) that the filing herein contains no non-public information.

HERSCHEL BULLEN
Attorney for Defendant/ Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 20, December, 2018, I caused to be served two (2) true and accurate copies along with a searchable pdf. CD of the foregoing **BRIEF ON APPEAL** by hand delivery or placing said copies in the United States mail, postage prepaid, addressed as follows:

UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

HERSCHEL BULLEN

Addendum A

The Order of the Court is stated below:
Dated: January 18, 2018
05:23:29 PM

At the direction of:
/s/ KEITH KELLY
District Court Judge

by
/s/ SHAYLEE BROCIOUS
District Court Clerk

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

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 151905395 FS
JEREMIAH RAY HART,	:	Judge: KEITH KELLY
Defendant.	:	Date: January 18, 2018

Custody: Utah State Prison - Draper

PRESENT
Clerk: shayleeb
Prosecutor: MATTHEW J HANSEN
NATHAN J EVERSHED
Defendant Present
The defendant is in the custody of the Department of Corrections Utah State Prison - Draper
Defendant's Attorney(s): R SHANE JOHNSON
STACI A VISSER

DEFENDANT INFORMATION
Date of birth: October 4, 1972
Sheriff Office#: 170498
Audio
Tape Number: S35 Tape Count: 332

CHARGES
1. AGGRAVATED MURDER - 1st Degree Felony
Plea: Guilty - Disposition: 10/03/2017 Guilty
2. OBSTRUCTING JUSTICE - 2nd Degree Felony
Plea: Guilty - Disposition: 10/03/2017 Guilty
3. POSSESSION OF A DNGR WEAP BY RESTRICTED - 2nd Degree Felony
Plea: Guilty - Disposition: 10/03/2017 Guilty

HEARING

This matter is before the Court as sentencing. The parties are present as previously listed.

336- The State motions for a phone conference so that the victim's sister may be present. There are no objections by the defense. The Court grants motion.

338- Court is in recess.

344- Court is back in session. A telephone conference is set.

There are corrections to the presentence report. Counsel stipulate to the corrections of the presentence report.
On page 1, the Court orders that never be stricken under the marital status.
On page 1, the Court orders that the prosecuting attorney and defense attorneys be corrected on this report. Vincent B Meister and John K West is stricken from page 1. Matthew J Hansen and Nathan J Evershed are entered as the prosecuting attorneys. Shane R Johnson and Staci A Visser are entered as the defense attorneys.
On page 1, the Court orders that the codefendant Eric Burwell be entered under codefendants.
On page 4 under subpart B Offense Summary in paragraph 2, the Court strikes the statement the defendant's vehicle. The Court enters Eric Burwell's vehicle in place of the stricken statement.
On page 4 under subpart B Offense Summary in paragraph 3, the Court strikes the defendant in the first sentence and inputs Eric Burwell name.
On page 4 under subpart B Offense Summary in paragraph 4, the Court strikes the statement and took the backpack and the drugs with him.
On page 4 under subpart B Offense Summary in paragraph 7, the Court strikes the last sentence.

351- The State addresses the Court.

403- The State seeks life in prison without the possibility of parole.

418- The defense addresses the Court.

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than twenty five years and which may be life 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.

Based on the defendant's conviction of POSSESSION OF A DNGR WEAP BY RESTRICTED 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.

To the SALT LAKE 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
This case is to be served consecutive to prior commitments. The F2 Obstructions Justice is to be consecutive to F1 Aggravated Murder. The F2 Possession of a DANG WEAP by Restricted is to be consecutive to the other charges.Restitution is to remain open.

ALSO KNOWN AS (AKA) NOTE
BULLET
BULLFROG
JEREMIAH HEART

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

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 151905395 by the method and on the date specified.

EMAIL: PRISON udc-records@utah.gov

Date: 01/18/2018 /s/ SHAYLEE BROCIOUS

Deputy Court Clerk

02054

Addendum B

Q. Okay. And then was there DNA then found on that bullet?

A. Yes.

Q. And who did it belong to?

A. Jeremiah Hart.

Q. We're going to now move to where Christian McDonald's body lay, and we'll talk a little bit about blood splatter. Here, with his blood spatter -- first of all, is there an indication as to where Christian McDonald was located on State's Exhibit 26?

A. Yes.

Q. Can you just show the outline of that? Is that in yellow?

A. It is.

Q. Okay. Is there an H at the top?

A. Yes.

Q. And, again, in previous -- with previous witnesses, we see these evidence flags marked A, B, C, D, and E and continuing down the alphabet?

A. Correct.

Q. And again, what are those indications of?

A. Blood.

Q. Okay. Were swabs taken of certain evidence markers or certain bloodstains?

A. Yes. So there was 56 total markers depicting blood

at the scene, and then 11 swabs were taken at that -- at that various blood patterns.

Q. Okay. Specifically when it comes to C -- well, why don't we just republish 26 and just show us where C is located.

Right there? Okay. So with State's Exhibit C, I'll now publish State's Exhibit 30. Okay. A couple of things that -- now that we know about C that we didn't know before; is that correct?

A. Correct.

Q. Through this trial. First of all, was there DNA testing on the swab of C?

A. Yes.

Q. Was there, in fact -- let me back up one step, I guess. Was there a swab taken of this blood marked C?

A. Yes.

Q. And then was that swab submitted to Sorenson Forensics for DNA testing?

A. Yes.

Q. Was that compared to Jeremiah Hart?

A. It was.

Q. And what was -- what was the conclusion?

A. It came back as his blood.

Q. And then we had Jennifer Montero here.

A. Correct.

Q. And what was her opinion as to what as -- as it

happens with C, with bloodstain C?

A. I believe she stated the blood source would have had to have been stationary for a period of time to leave that pattern.

Q. So from that, putting that together, what do we know from this exhibit?

A. That the source, being Jeremiah Hart, was stationary for a period of time to leave the blood at the scene.

Q. Okay. Stationary meaning not moving?

A. Correct.

Q. Going back to State's Exhibit 26, there's also bloodstains at A, B, D and E; is that correct?

A. Yes.

Q. Okay. With B, is that a different kind of a bloodstain that we see there than we see compared to the others?

A. That's a different pattern, yes.

Q. Okay. Based off of what you know as the case manager, have you reached a conclusion as to what -- what that B has to be attributed to?

A. Yes.

Q. What is that?

A. I believe it's Christian McDonald's blood.

Q. Okay. And why do you say that?

A. It's a different pattern. It's in the approximate

location which he was laying. Previous testimony states that the bullet went through his chest and out his back. And based upon an evidence inspection of his clothing, there was blood on the front of his shirt. He was laying face up in the street. But there was also blood on the back, saturating his gray hoodie that he was wearing.

Q. Okay. We have, other than blood marks, A, D and E and others. Is there any indication to you, as the case manager in this case, that those blood drops could have been Christian McDonald's?

A. I don't believe so.

Q. Why do you say that?

A. They are -- they are a consistent pattern. And based upon Christian's wounds, his clothing would have captured the majority of his blood. And based upon testimony from Dr. Butler, there was not a lot of blood coming from his chest wound, and he had just a small amount of blood coming from his mouth.

Q. Okay. No DNA testing on A, B or E; is that correct?

A. Correct.

Q. Okay. But you put those deductions together?

A. Correct.

Q. We're going to zoom out again, at this house, State's Exhibit 34. Are we seeing more of the blood trail?

A. Yes.

Q. Okay. And do we see it from A until I?

A. Yes.

Q. All right. And when we continue down to State's Exhibit 36 -- and what are we seeing here?

A. It's more of the blood trail, H through K.

Q. And now we're going to K. On K, we've seen this exhibit before, but now do we know a couple more things about K?

A. Yes.

Q. Specifically, DNA. What do we know about K with the DNA testing?

A. It was swabbed at the scene. Those swabs were submitted to Sorenson Forensics for analysis. A full profile came back to Jeremiah Hart.

Q. Okay. And then also, according to Jennifer Montero, what did she indicate on K?

A. The source of that blood, being Jeremiah Hart, was moving in the westerly direction.

Q. Okay. Is there some kind of directionality on K?

A. Yes, there is.

Q. Okay. Was there a jacket that was obtained that the defendant was wearing that evening?

A. Yes.

Q. Later, was that jacket placed into evidence with the Salt Lake City Police Department?

A. Yes. It was approximately on the 24th or the 25th, so the same day, or into the early morning hours of the 25th.

Q. Was it located in the hospital?

A. Yes.

Q. So that -- was that then turned over to the Salt Lake City Police Department and placed into an evidence storage bag?

A. I don't know if it was a secured drawing locker initially or the evidence bag. Just depending on the condition of it.

Q. Eventually it did end up in the evidence room in Salt Lake City Police Department?

A. It did, yes.

Q. And were photographs taken of that jacket?

A. Yes.

Q. I'm going to show you what's been marked as State's 's Exhibit 159 and 160. I have previously shown these to Defense counsel.

Do you recognize these exhibits?

A. I do.

Q. And what -- what are they?

A. It's a black, red, white FUBU-style zip-up jacket.

Q. Are those photographs fair and accurate depictions as to what Jeremiah Hart's jacket looked like on this provided evidence?

A. Yes.

Q. And is this the same jacket that was taken at the hospital?

A. Yes.

MR. EVERSHED: Your Honor, the State would offer State's Exhibit 159 and 160 into evidence.

MR. JOHNSON: No objection.

THE COURT: State's Exhibit 159 and 160 are admitted.

(State's Exhibit Nos. 159 & 160 were received into evidence.)

MR. EVERSHED: Permission to publish.

THE COURT: You may.

MR. EVERSHED: Thank you.

Q. **(BY MR. EVERSHED)** State's Exhibit 159, what do we see in that?

A. Once again it's the black FUBU jacket that Jeremiah Hart was wearing.

Q. And why don't we just pause here. There's some earlier testimony about M-Vac, on the sleeves.

A. Yes.

Q. Did that happen on this jacket?

A. Yes.

Q. Okay. So what's an M-Vac?

A. An M-Vac is essentially a forensic vacuum, if you will. If somebody touches my sleeve, they're theoretically going to leave skin cells. So the crime lab technician will vacuum that area that somebody touched, and with special

filters that allegedly capture that DNA left by that individual that touched.

Q. And so did that happen in this case?

A. It did, yes. On both sleeves, the right and the left.

Q. Okay. And then later we heard DNA testimony about the results of that?

A. Yes.

Q. Okay. Was it just Jeremiah Hart's DNA found on one sleeve?

A. Yes.

Q. But not on the other?

A. Correct.

Q. And then finally when it comes to this, State's Exhibit 160, what do we see here?

A. It's just a -- the interior label or tag of that same zip-up jacket with two extra large size, double X.

Q. All right. So this is the size of the jacket that you saw in this exhibit?

A. Yes.

Q. In this case, was there a search of --

MR. EVERSHED: In case I didn't formally admit those, I'd like to admit those.

THE COURT: 59 and 60 were admitted.

MR. EVERSHED: Okay.

Addendum C

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5. Offenses Against the Person (Refs & Annos)
Part 2. Criminal Homicide

U.C.A. 1953 § 76-5-202

§ 76-5-202. Aggravated murder

Effective: [See Text Amendments] to June 30, 2019
Currentness

<Section effective until July 1, 2019. See, also, section 76-5-202 effective July 1, 2019.>

(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(a) the homicide was committed by a person who is confined in a jail or other correctional institution;

(b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;

(c) the actor knowingly created a great risk of death to a person other than the victim and the actor;

(d) the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping, or child kidnapping;

(e) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which the actor committed the crime of abuse or desecration of a dead human body as defined in Subsection 76-9-704(2)(e);

(f) the homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody;

(g) the homicide was committed for pecuniary gain;

(h) the defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide;

(i) the actor previously committed or was convicted of:

(i) aggravated murder under this section;

(ii) attempted aggravated murder under this section;

(iii) murder, Section 76-5-203;

(iv) attempted murder, Section 76-5-203; or

(v) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(i);

(j) the actor was previously convicted of:

(i) aggravated assault, Subsection 76-5-103(2);

(ii) mayhem, Section 76-5-105;

(iii) kidnapping, Section 76-5-301;

(iv) child kidnapping, Section 76-5-301.1;

(v) aggravated kidnapping, Section 76-5-302;

(vi) rape, Section 76-5-402;

(vii) rape of a child, Section 76-5-402.1;

(viii) object rape, Section 76-5-402.2;

(ix) object rape of a child, Section 76-5-402.3;

(x) forcible sodomy, Section 76-5-403;

(xi) sodomy on a child, Section 76-5-403.1;

(xii) aggravated sexual abuse of a child, Section 76-5-404.1;

(xiii) aggravated sexual assault, Section 76-5-405;

(xiv) aggravated arson, Section 76-6-103;

(xv) aggravated burglary, Section 76-6-203;

(xvi) aggravated robbery, Section 76-6-302;

(xvii) felony discharge of a firearm, Section 76-10-508.1; or

(xviii) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(j);

(k) the homicide was committed for the purpose of:

(i) preventing a witness from testifying;

(ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation;

(iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation; or

(iv) disrupting or hindering any lawful governmental function or enforcement of laws;

(l) the victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is based on, is caused by, or is related to that official position, act, capacity, or candidacy;

(m) the victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;

(n) the homicide was committed:

(i) by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered;

(ii) by means of any weapon of mass destruction as defined in Section 76-10-401; or

(iii) to target a law enforcement officer as defined in Section 76-5-210;

(o) the homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;

(p) the homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;

(q) the victim was a person held or otherwise detained as a shield, hostage, or for ransom;

(r) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death;

(s) the actor dismembers, mutilates, or disfigures the victim's body, whether before or after death, in a manner demonstrating the actor's depravity of mind; or

(t) the victim, at the time of the death of the victim:

(i) was younger than 14 years of age; and

(ii) was not an unborn child.

(2) Criminal homicide constitutes aggravated murder if the actor, with reckless indifference to human life, causes the death of another incident to an act, scheme, course of conduct, or criminal episode during which the actor is a major participant in the commission or attempted commission of:

(a) child abuse, Subsection 76-5-109(2)(a);

(b) child kidnapping, Section 76-5-301.1;

(c) rape of a child, Section 76-5-402.1;

(d) object rape of a child, Section 76-5-402.3;

(e) sodomy on a child, Section 76-5-403.1; or

(f) sexual abuse or aggravated sexual abuse of a child, Section 76-5-404.1.

(3)(a) If a notice of intent to seek the death penalty has been filed, aggravated murder is a capital felony.

(b) If a notice of intent to seek the death penalty has not been filed, aggravated murder is a noncapital first degree felony punishable as provided in Section 76-3-207.7.

(c)(i) Within 60 days after arraignment of the defendant, the prosecutor may file notice of intent to seek the death penalty. The notice shall be served on the defendant or defense counsel and filed with the court.

(ii) Notice of intent to seek the death penalty may be served and filed more than 60 days after the arraignment upon written stipulation of the parties or upon a finding by the court of good cause.

(d) Without the consent of the prosecutor, the court may not accept a plea of guilty to noncapital first degree felony aggravated murder during the period in which the prosecutor may file a notice of intent to seek the death penalty under Subsection (3)(c)(i).

(e) If the defendant was younger than 18 years of age at the time the offense was committed, aggravated murder is a noncapital first degree felony punishable as provided in Section 76-3-207.7.

(4)(a) It is an affirmative defense to a charge of aggravated murder or attempted aggravated murder that the defendant caused the death of another or attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) The reasonable belief of the actor under Subsection (4)(a) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(c) This affirmative defense reduces charges only as follows:

(i) aggravated murder to murder; and

(ii) attempted aggravated murder to attempted murder.

(5)(a) Any aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense does not merge with the crime of aggravated murder.

(b) A person who is convicted of aggravated murder, based on an aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Credits

Laws 1973, c. 196, § 76-5-201; Laws 1975, c. 53, § 1; Laws 1977, c. 83, § 1; Laws 1983, c. 88, § 12; Laws 1983, c. 93, § 1; Laws 1984, c. 18, § 5; Laws 1985, c. 16, § 1; Laws 1991, c. 10, § 8; Laws 1994, c. 149, § 1; Laws 1996, c. 137, § 3, eff. April 29, 1996; Laws 1997, c. 11, § 1, eff. May 5, 1997; Laws 1999, c. 90, § 1, eff. May 3, 1999; Laws 2000, c. 125, § 2, eff. May 1, 2000; Laws 2001, c. 209, § 9, eff. April 30, 2001; Laws 2002, c. 166, § 4, eff. May 6, 2002; Laws 2005, c. 143, § 1, eff. May 2, 2005; Laws 2006, c. 191, § 1, eff. May 1, 2006; Laws 2007, c. 275, § 3, eff. April 30, 2007; Laws 2007, c. 340, § 1, eff. April 30, 2007; Laws 2007, c. 345, § 1, eff. April 30, 2007; Laws 2008, c. 12, § 2, eff. Feb. 26, 2008; Laws 2009, c. 157, § 2, eff. May 12, 2009; Laws 2009, c. 206, § 1, eff. May 12, 2009; Laws 2010, c. 13, § 2, eff. March 8, 2010; Laws 2010, c. 373, § 2, eff. May 11, 2010; Laws 2013, c. 81, § 1, eff. May 14, 2013; Laws 2017, c. 454, § 2, eff. May 9, 2017.

U.C.A. 1953 § 76-5-202, UT ST § 76-5-202
Current with the 2018 Second Special Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 8. Offenses Against the Administration of Government
Part 3. Obstructing Governmental Operations

U.C.A. 1953 § 76-8-306

§ 76-8-306. Obstruction of justice in criminal investigations or proceedings--Elements--Penalties--Exceptions

Currentness

(1) An actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense:

(a) provides any person with a weapon;

(b) prevents by force, intimidation, or deception, any person from performing any act that might aid in the discovery, apprehension, prosecution, conviction, or punishment of any person;

(c) alters, destroys, conceals, or removes any item or other thing;

(d) makes, presents, or uses any item or thing known by the actor to be false;

(e) harbors or conceals a person;

(f) provides a person with transportation, disguise, or other means of avoiding discovery or apprehension;

(g) warns any person of impending discovery or apprehension;

(h) warns any person of an order authorizing the interception of wire communications or of a pending application for an order authorizing the interception of wire communications;

(i) conceals information that is not privileged and that concerns the offense, after a judge or magistrate has ordered the actor to provide the information; or

(j) provides false information regarding a suspect, a witness, the conduct constituting an offense, or any other material aspect of the investigation.

(2)(a) As used in this section, "conduct that constitutes a criminal offense" means conduct that would be punishable as a crime and is separate from a violation of this section, and includes:

(i) any violation of a criminal statute or ordinance of this state, its political subdivisions, any other state, or any district, possession, or territory of the United States; and

(ii) conduct committed by a juvenile which would be a crime if committed by an adult.

(b) A violation of a criminal statute that is committed in another state, or any district, possession, or territory of the United States, is a:

(i) capital felony if the penalty provided includes death or life imprisonment without parole;

(ii) a first degree felony if the penalty provided includes life imprisonment with parole or a maximum term of imprisonment exceeding 15 years;

(iii) a second degree felony if the penalty provided exceeds five years;

(iv) a third degree felony if the penalty provided includes imprisonment for any period exceeding one year; and

(v) a misdemeanor if the penalty provided includes imprisonment for any period of one year or less.

(3) Obstruction of justice is:

(a) a second degree felony if the conduct which constitutes an offense would be a capital felony or first degree felony;

(b) a third degree felony if:

(i) the conduct that constitutes an offense would be a second or third degree felony and the actor violates Subsection (1)(b), (c), (d), (e), or (f);

(ii) the conduct that constitutes an offense would be any offense other than a capital or first degree felony and the actor violates Subsection (1)(a);

(iii) the obstruction of justice is presented or committed before a court of law; or

(iv) a violation of Subsection (1)(h); or

(c) a class A misdemeanor for any violation of this section that is not enumerated under Subsection (3)(a) or (b).

(4) It is not a defense that the actor was unaware of the level of penalty for the conduct constituting an offense.

(5) Subsection (1)(e) does not apply to harboring a youth offender, which is governed by Section 62A-7-402.

(6) Subsection (1)(b) does not apply to:

(a) tampering with a juror, which is governed by Section 76-8-508.5;

(b) influencing, impeding, or retaliating against a judge or member of the Board of Pardons and Parole, which is governed by Section 76-8-316;

(c) tampering with a witness or soliciting or receiving a bribe, which is governed by Section 76-8-508;

(d) retaliation against a witness, victim, or informant, which is governed by Section 76-8-508.3; or

(e) extortion or bribery to dismiss a criminal proceeding, which is governed by Section 76-8-509.

(7) Notwithstanding Subsection (1), (2), or (3), an actor commits a third degree felony if the actor harbors or conceals an offender who has escaped from official custody as defined in Section 76-8-309.

Credits

Laws 2001, c. 209, § 10, eff. April 30, 2001; Laws 2001, c. 307, § 2, eff. April 30, 2001; Laws 2003, c. 179, § 1; Laws 2004, c. 140, § 2, eff. May 3, 2004; Laws 2004, c. 240, § 3, eff. March 22, 2004; Laws 2005, c. 13, § 27, eff. March 1, 2005; Laws 2009, c. 213, § 1, eff. May 12, 2009.

U.C.A. 1953 § 76-8-306, UT ST § 76-8-306
Current with the 2018 Second Special Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 10. Offenses Against Public Health, Safety, Welfare, and Morals
Part 5. Weapons (Refs & Annos)

U.C.A. 1953 § 76-10-503

§ 76-10-503. Restrictions on possession, purchase, transfer, and ownership of dangerous weapons by certain persons--Exceptions

Currentness

(1) For purposes of this section:

(a) A Category I restricted person is a person who:

(i) has been convicted of any violent felony as defined in Section 76-3-203.5;

(ii) is on probation or parole for any felony;

(iii) is on parole from a secure facility as defined in Section 62A-7-101;

(iv) within the last 10 years has been adjudicated delinquent for an offense which if committed by an adult would have been a violent felony as defined in Section 76-3-203.5;

(v) is an alien who is illegally or unlawfully in the United States; or

(vi) is on probation for a conviction of possessing:

(A) a substance classified in Section 58-37-4 as a Schedule I or II controlled substance;

(B) a controlled substance analog; or

(C) a substance listed in Section 58-37-4.2.

(b) A Category II restricted person is a person who:

(i) has been convicted of any felony;

(ii) within the last seven years has been adjudicated delinquent for an offense which if committed by an adult would have been a felony;

(iii) is an unlawful user of a controlled substance as defined in Section 58-37-2;

(iv) is in possession of a dangerous weapon and is knowingly and intentionally in unlawful possession of a Schedule I or II controlled substance as defined in Section 58-37-2;

(v) has been found not guilty by reason of insanity for a felony offense;

(vi) has been found mentally incompetent to stand trial for a felony offense;

(vii) has been adjudicated as mentally defective as provided in the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), [1] or has been committed to a mental institution;

(viii) has been dishonorably discharged from the armed forces;

(ix) has renounced the individual's citizenship after having been a citizen of the United States;

(x) is a respondent or defendant subject to a protective order or child protective order that is issued after a hearing for which the respondent or defendant received actual notice and at which the respondent or defendant has an opportunity to participate, that restrains the respondent or defendant from harassing, stalking, threatening, or engaging in other conduct that would place an intimate partner, as defined in 18 U.S.C. Sec. 921, or a child of the intimate partner, in reasonable fear of bodily injury to the intimate partner or child of the intimate partner, and that:

(A) includes a finding that the respondent or defendant represents a credible threat to the physical safety of an individual who meets the definition of an intimate partner in 18 U.S.C. Sec. 921 or the child of the individual; or

(B) explicitly prohibits the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily harm against an intimate partner or the child of an intimate partner; or

(xi) has been convicted of the commission or attempted commission of assault under Section 76-5-102 or aggravated assault under Section 76-5-103 against a current or former spouse, parent, guardian, individual with whom the restricted person shares a child in common, individual who is cohabitating or has cohabitated with the restricted person as a spouse, parent, or guardian, or against an individual similarly situated to a spouse, parent, or guardian of the restricted person.

(c) As used in this section, a conviction of a felony or adjudication of delinquency for an offense which would be a felony if committed by an adult does not include:

(i) a conviction or adjudication of delinquency for an offense pertaining to antitrust violations, unfair trade practices, restraint of trade, or other similar offenses relating to the regulation of business practices not involving theft or fraud; or

(ii) a conviction or adjudication of delinquency which, according to the law of the jurisdiction in which it occurred, has been expunged, set aside, reduced to a misdemeanor by court order, pardoned or regarding which the person's civil rights have been restored unless the pardon, reduction, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(d) It is the burden of the defendant in a criminal case to provide evidence that a conviction or adjudication of delinquency is subject to an exception provided in Subsection (1)(c), after which it is the burden of the state to prove beyond a reasonable doubt that the conviction or adjudication of delinquency is not subject to that exception.

(2) A Category I restricted person who intentionally or knowingly agrees, consents, offers, or arranges to purchase, transfer, possess, use, or have under the person's custody or control, or who intentionally or knowingly purchases, transfers, possesses, uses, or has under the person's custody or control:

(a) any firearm is guilty of a second degree felony; or

(b) any dangerous weapon other than a firearm is guilty of a third degree felony.

(3) A Category II restricted person who intentionally or knowingly purchases, transfers, possesses, uses, or has under the person's custody or control:

(a) any firearm is guilty of a third degree felony; or

(b) any dangerous weapon other than a firearm is guilty of a class A misdemeanor.

(4) A person may be subject to the restrictions of both categories at the same time.

(5) If a higher penalty than is prescribed in this section is provided in another section for one who purchases, transfers, possesses, uses, or has under this custody or control any dangerous weapon, the penalties of that section control.

(6) It is an affirmative defense to a charge based on the definition in Subsection (1)(b)(iv) that the person was:

(a) in possession of a controlled substance pursuant to a lawful order of a practitioner for use of a member of the person's household or for administration to an animal owned by the person or a member of the person's household; or

(b) otherwise authorized by law to possess the substance.

(7)(a) It is an affirmative defense to transferring a firearm or other dangerous weapon by a person restricted under Subsection (2) or (3) that the firearm or dangerous weapon:

(i) was possessed by the person or was under the person's custody or control before the person became a restricted person;

(ii) was not used in or possessed during the commission of a crime or subject to disposition under Section 24-3-103;

(iii) is not being held as evidence by a court or law enforcement agency;

(iv) was transferred to a person not legally prohibited from possessing the weapon; and

(v) unless a different time is ordered by the court, was transferred within 10 days of the person becoming a restricted person.

(b) Subsection (7)(a) is not a defense to the use, purchase, or possession on the person of a firearm or other dangerous weapon by a restricted person.

(8)(a) A person may not sell, transfer, or otherwise dispose of any firearm or dangerous weapon to any person, knowing that the recipient is a person described in Subsection (1)(a) or (b).

(b) A person who violates Subsection (8)(a) when the recipient is:

(i) a person described in Subsection (1)(a) and the transaction involves a firearm, is guilty of a second degree felony;

(ii) a person described in Subsection (1)(a) and the transaction involves any dangerous weapon other than a firearm, and the transferor has knowledge that the recipient intends to use the weapon for any unlawful purpose, is guilty of a third degree felony;

(iii) a person described in Subsection (1)(b) and the transaction involves a firearm, is guilty of a third degree felony; or

(iv) a person described in Subsection (1)(b) and the transaction involves any dangerous weapon other than a firearm, and the transferor has knowledge that the recipient intends to use the weapon for any unlawful purpose, is guilty of a class A misdemeanor.

(9)(a) A person may not knowingly solicit, persuade, encourage or entice a dealer or other person to sell, transfer or otherwise dispose of a firearm or dangerous weapon under circumstances which the person knows would be a violation of the law.

(b) A person may not provide to a dealer or other person any information that the person knows to be materially false information with intent to deceive the dealer or other person about the legality of a sale, transfer or other disposition of a firearm or dangerous weapon.

(c) "Materially false information" means information that portrays an illegal transaction as legal or a legal transaction as illegal.

(d) A person who violates this Subsection (9) is guilty of:

(i) a third degree felony if the transaction involved a firearm; or

(ii) a class A misdemeanor if the transaction involved a dangerous weapon other than a firearm.

Credits

Laws 2000, c. 303, § 5, eff. May 1, 2000; Laws 2000, c. 90, § 1, eff. May 1, 2000; Laws 2003, c. 203, § 2, eff. May 5, 2003; Laws 2003, c. 235, § 1, eff. May 5, 2003; Laws 2012, c. 317, § 2, eff. May 8, 2012; Laws 2014, c. 299, § 1, eff. May 13, 2014; Laws 2014, c. 428, § 2, eff. May 13, 2014; Laws 2015, c. 412, § 203, eff. May 12, 2015; Laws 2015, 1st Sp. Sess., c. 1, § 2, eff. Aug. 20, 2015; Laws 2017, c. 288, § 1, eff. May 9, 2017.

Footnotes

1 See 18 U.S.C.A. § 921 et seq.

U.C.A. 1953 § 76-10-503, UT ST § 76-10-503

Current with the 2018 Second Special Session.

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West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Utah Rules of Evidence, Rule 403

RULE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS

Currentness

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.

Credits

[Amended effective December 1, 2011.]

Rules of Evid., Rule 403, UT R REV Rule 403
Current with amendments received through September 1, 2018

End of Document

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article VII. Opinions and Expert Testimony

Utah Rules of Evidence, Rule 702

RULE 702. TESTIMONY BY EXPERTS

Currentness

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

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

(1) are reliable,

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

(3) have been reliably applied to the facts.

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

Credits
[Amended effective November 1, 2007; December 1, 2011.]

Rules of Evid., Rule 702, UT R REV Rule 702
Current with amendments received through September 1, 2018

End of Document

West's Utah Code Annotated
Title 77. Utah Code of Criminal Procedure
Chapter 17. The Trial

U.C.A. 1953 § 77-17-13

§ 77-17-13. Expert testimony generally--Notice requirements

Currentness

(1)(a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or 10 days before the hearing.

(b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:

(i) a copy of the expert's report, if one exists; or

(ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and

(iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.

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

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

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

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

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

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

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

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

Credits

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

Chapters 1 to 21 appear in this volume.

U.C.A. 1953 § 77-17-13, UT ST § 77-17-13
Current with the 2018 Second Special Session.

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Addendum D

THE BAILIFF: Remain seated for the jury.

(Jury Excused.)

THE COURT: Okay. The jury has left. There are some issues to clarify. Do you want to do them at a sidebar to begin with? Why don't you come to the sidebar for a second.

(Bench Conference.)

THE COURT: In other words, I don't want to make the argument in front of the witness.

MR. HANSEN: So let's -- we really have, I guess, two options. One is that he just did a normal shot with a 9mm that was not related.

MR. JOHNSON: Here is the problem. What they're trying to show is that the round found at the scene was -- has a very specific characteristic [inaudible] but the problem is: Their sample test fire is from a gun taken from Jeremiah Hart a month later.

MR. HANSEN: I guess what I'm getting at is --

THE COURT: Well, I want to be clear I understand nobody is agreeing that there will be reference to a gun being taken from the defendant a month later?

MR. EVERSHED: Absolutely. He just said he was given two guns in this case and now he's talking about I test fired it against this one. It's -- it is the gun that was taken from him.

MR. HANSEN: I don't think he's said that he was

given two guns in this case. I don't think that was his testimony [inaudible].

MR. JOHNSON: But I guess what I'm trying to --

MS. VISSER: For the purposes for the record, I think maybe we should put this on the record.

THE COURT: Is it on the record.

MS. VISSER: Oh, okay.

THE COURT: It's being recorded.

MS. VISSER: Okay. Great.

MR. HANSEN: So I guess what I'm trying to say is, is that if he does not say that that gun was ever taken from the defendant, it's just 9mm he used as a reference sample, it seems to me we're -- you're not --

MR. JOHNSON: He's already testified he's been given two guns and then he started testifying about test firing one of the one guns that he was given and then he's about to testify that this doesn't match this.

THE COURT: Can we solve it by saying the second gun that he was given in the case is a 9mm gun that's just an example of a glock?

MR. EVERSHED: Yes.

MR. HANSEN: A 9mm test gun.

THE COURT: Do you want to call it a 9mm, a glock?

MR. JOHNSON: I mean, I guess we could call it a comparison gun.

THE COURT: A comparison gun.

MR. JOHNSON: Yeah. I don't want this us -- all to be suborning perjury here.

MR. EVERSHED: Well, I think if all parties agree, I don't think anything [inaudible].

THE COURT: Well, the issue is: He used it as a test reference by -- it could have been a glock that he went down and purchased at the store. It could have been a glock that was handed to him in the case.

MR. HANSEN: The problem is it's not a glock. So it actually excludes the gun that was taken from Mr. Hart a month later.

THE COURT: So what kind of -- so the bullet was from a 9mm what?

MR. EVERSHED: Glock.

MS. VISSER: Glock.

MR. EVERSHED: [inaudible].

THE COURT: The test gun was not a glock.

MR. JOHNSON: It was Cal-Tech, a different type of 9mm does not leave the characteristics.

THE COURT: So why is -- why is the comparison relevant at all in this case?

MR. HANSEN: All the relevance is pictures to show that -- what a glock does to a bullet. So it just shows the difference between two different types of guns.

MR. EVERSHED: Because that's [inaudible] magazine is a glock magazine. It's a 9mm shell casing that's found. No 9mm bullet is found. And so to have a casing that has an imprint on it that looks consistent with a glock as compared to something that's not a glock, the jury can see that. Oh, that -- that's how he made the conclusions that it's in fact not a glock.

Nothing so far has come out that there has been a prior case, that any other gun or any other bullet or any other casing has been linked to the defendant. It's -- it was just proffered for comparison purposes.

MS. VISSER: [inaudible].

MR. EVERSHED: Yeah. Is he excused [inaudible].

THE COURT: Well, no, because we may need to do --

MR. EVERSHED: Okay.

THE COURT: -- a 104 hearing. So let's just be clear then: The picture itself is a comparison -- is this expert -- is this expert in a position to testify that the bullet -- I think it was on Item 43, which is exhibit -- State's Exhibit 122, what is your offer of proof on that?

MR. HANSEN: He is going to -- he's going to testify.

THE COURT: Which one was the -- the shell cartridge found on the scene?

MR. HANSEN: This one.

THE COURT: And he has an opinion?

MR. EVERSHED: Yes.

THE COURT: That's -- he has an opinion that just looking at that alone he knows what kind of firearm --

MR. EVERSHED: Yes.

THE COURT: -- shot it?

MR. HANSEN: What it's consistent with.

MR. EVERSHED: Yes, what it's consistent with.

THE COURT: Or it's consistent with.

MR. EVERSHED: Compared to that which is not consistent with a glock.

MR. JOHNSON: But this --

MR. EVERSHED: [inaudible] firing pin.

MR. JOHNSON: -- this is a test fire from a gun received into evidence on this case.

MR. EVERSHED: Right. And as long as the jury doesn't know about it, there is no prejudice to anybody.

THE COURT: But the point is: This was a good reason to stop the examination because I want to make clear you risk a mistrial.

MR. EVERSHED: Correct.

THE COURT: If there is any evidence that this gun, the comparison gun, I will just call it that --

MR. EVERSHED: Yes.

THE COURT: The comparison gun was obtained from the

defendant because --

MR. EVERSHED: Absolutely.

MR. JOHNSON: And at this point now we have the problem of a gun coming into evidence that we're never going to talk about. Now the jury knows two guns came into evidence --

THE COURT: But clarification though is: If the -- if the testimony on 122 is that the bullet recovered from the scene was fired from the glock and the comparison gun was not a glock --

MR. JOHNSON: Sure.

THE COURT: -- then there is no inference that it was a glock held by the defendant, correct?

MR. JOHNSON: Why do we have a comparison gun?

MS. VISSER: Yeah. Why --

MR. JOHNSON: Why would we be looking? It just --

MR. EVERSHED: Well, it -- it demonstrates and it adds to --

MR. JOHNSON: It demonstrates with evidence from this case -- from another case.

MR. EVERSHED: Where is the prejudice if we don't know what [inaudible].

THE COURT: Well, hold on. Hold on. You're arguing to me. The point -- the point I understand is the offer of proof is: This is to show that it's fired from a glock. He could have covered up and not used the other -- other shell

comparison and said this was -- well, you've already shown it to the jury.

So he could have testified this is consistent with firing from a glock and then he'll just say there was a comparison -- there was another 9mm gun that was not a glock that he received from the police department as a comparison, and this shows how a different kind of 9mm imprints the shell when it's fired. This is -- this is a -- these are two different ways of having an impression on the primer or the firing pin that shoots off the bullet.

MR. EVERSHED: Yes.

THE COURT: Now is that -- does that deal with that issue?

MR. JOHNSON: I think the cat is out of the bag at this point. We're talking about he's seen two guns as a part of this case. And --

THE COURT: But let's be clear.

MR. JOHNSON: And now --

THE COURT: There has been no information that was a gun received from the defendant.

MR. JOHNSON: There has been none.

THE COURT: Has been none?

MR. JOHNSON: There has been none.

THE COURT: So we want to keep it that way.

MR. EVERSHED: Correct.

THE COURT: So the point though is: I'm not trying to -- so I want to be clear: My ruling is there is to be no testimony that this impression was made by a gun that had any connection to the defendant.

MR. EVERSHED: Absolutely.

THE COURT: And we ought to -- if there is a stipulation to refer to the gun as being a comparison gun only, he received a comparison gun from the police department to illustrate the difference between a glock and a different kind of gun.

MR. EVERSHED: Okay.

THE COURT: Does that resolve the issue or not? You look like you're a little troubled by it.

MR. JOHNSON: I'm really troubled because it's -- it's now conspicuous to the jury: Why -- why are we worried about -- he said there are two guns and now they're going to want to know what's this other gun? Because this case has one gun.

THE COURT: Well and doesn't this resolve it, 122?

MR. JOHNSON: If this -- if we -- if we have him actually affirmatively state, "I was provided this for the sole purpose of showing" --

MR. HANSEN: I'm going to tell him he had the comparison gun --

MR. JOHNSON: -- characteristics --

MR. HANSEN: Some comparison guns available to him and that's what that is. It's not affiliated with the case.

MR. JOHNSON: Okay.

THE COURT: Can we stipulate that the second gun was used -- was a comparison gun the witness received. Does that resolve the issue?

I mean, there is absolutely no connection of that gun to the defendant at this point, and there is not to be.

MR. EVERSHED: Nor did we ever intend to be.

MR. JOHNSON: Well, I don't know why you're using actual evidence instead of using something from Google to show that comparison.

MR. EVERSHED: Because it just -- it just demonstrate. It's something that he created. It just demonstrates it. It's just a demonstrative -- it really is.

THE COURT: So let's be clear. The stipulation is that he received another 9mm that has no connection to this case. And when I say "no connection to the case," that's true.

MR. EVERSHED: It's true.

THE COURT: Because the fact that it came from the defendant in this case or from anybody else is really not relevant. So I will just direct you to state on the record that there is a comparison gun. We stipulate there is a comparison gun used and to demonstrate how a different manufacturer's firearm, a 9mm creates a different impression on

a shell.

MR. JOHNSON: On that end, feel free to lead in into that.

MR. HANSEN: Yeah. Yeah. In fact --

THE COURT: Okay. And that's -- so does that resolve this issue?

MR. EVERSHED: Yes.

THE COURT: Assuming -- you do that. And I will direct you to lead the witness on that issue to make clear it's a comparison firearm that has no connection to this case.

MR. JOHNSON: That's fine.

THE COURT: Both sides agree. Okay. What's the other issue we need to deal with? Do we need to deal with this? The reason I had a side bar is I wanted it to be among attorneys, not to give suggestions to the witness.

MR. EVERSHED: Okay.

THE COURT: Can we deal with the other one in open court?

MR. EVERSHED: If you would like to now or later, it just --

THE COURT: I would rather deal with it now.

MR. EVERSHED: Okay.

(End of Bench Conference.)

THE COURT: Okay. Mr. Mears, you can go ahead and step down.