

2010

# Utah v. Larry Lewis Hutchings : Brief of Appellee

Utah Court of Appeals

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Case No. 20100024 – SC

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IN THE  
UTAH SUPREME COURT

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State of Utah,  
Respondent/Plaintiff,

vs.

Larry Lewis Hutchings,  
Petitioner/Defendant.

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Brief of Respondent

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On writ of certiorari to the Utah Court of Appeals

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Brief of Respondent

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**STATEMENT OF JURISDICTION**

The court of appeals affirmed Defendant’s convictions for aggravated assault and criminal mischief in an unpublished memorandum decision. *State v. Hutchings*, 2009 UT App 330 (Addendum A). This Court granted Defendant’s request for a writ of certiorari, and accordingly has jurisdiction under Utah Code Annotated § 78A-3-102(3)(a) (West 2009).

**STATEMENT OF THE ISSUE**

This Court granted review of two issues:

1. Whether “the court of appeals erred in affirming the district court’s instruction defining intentional conduct in relation to causation of serious bodily injury under Utah Code Ann. § 76-5-103(1)(a).”
2. “Whether Petitioner’s trial counsel was ineffective.”



*Standard of Review.* “On certiorari, we review the decision of the court of appeals and not that of the district court. The court of appeals’ decision is reviewed for correctness.” *State v. Alvarez*, 2006 UT 61, ¶ 8, 147 P.3d 425 (quotations and citation omitted).

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

Utah Code Annotated § 76-2-103 (West 2004), Utah Code Annotated § 76-5-102 (West 2004), and Utah Code Annotated § 76-5-103 (West 2004) are attached as Addendum B.<sup>1</sup>

## **STATEMENT OF THE CASE AND FACTS<sup>2</sup>**

### **Defendant kicks down his girlfriend’s door and assaults her**

In April 2004, Defendant convinced his girlfriend, Deborah Cuddeback, to move to Utah from New York with her 14-year-old daughter, promising her that they could live in a house that he owned. R. 271: 131; 272: 24-26. But when Deborah and her daughter arrived, they learned that Defendant did not actually own a home.

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<sup>1</sup> The Legislature amended Utah Code Annotated § 76-5-103 during the 2010 legislative session. All statutory references in this brief are to the versions in effect at the time of the crime.

<sup>2</sup> The “evidence and all reasonable inferences which may reasonably be drawn from it” are recited “in a light most favorable to the verdict.” *State v. Hamilton*, 827 P.2d 232, 236 (Utah 1992) (quotations and citation omitted).

R. 271: 131-32; 272: 36. Instead, Defendant agreed to pay rent on an apartment for them to live in. R. 272: 33.

Defendant spent the night at Deborah's apartment "[q]uite a bit," but he "never lived there." R. 272: 34, 39; *see also* R. 271: 63-64; 272: 38, 117. In fact, some of Deborah's neighbors testified that they had never seen him until the morning of the assault. R. 272: 101-02, 110.

Defendant and Deborah fought "all the time." R. 272: 40. At one point, Deborah took Defendant's key away because she feared that he would steal her belongings and sell them. R. 272: 39-40.

In early April 2006, Defendant and Deborah had a "fight" after she left him stranded at work without giving him a ride home. R. 272: 48. A few days later, Deborah awoke to the sound of Defendant pounding on her door. R. 272: 48. When Deborah told Defendant through the door to go away, Defendant demanded that she let him inside. R. 272: 49-50. Defendant was "very angry and screaming and yelling." R. 272: 50. When Deborah refused to let him in, Defendant began kicking at the door. R. 272: 50.

Deborah's front door had three locks: one on the doorknob, a deadbolt, and a chain. R. 272: 49. Although all three were engaged, Defendant was able to break in by kicking the door out of its frame. R. 271: 65; 272: 50-51 (explaining that the

“whole right hand side” of the door “just came out of the door frame,” and that the “wall was broke[n]”).

Deborah “yelled at him and told him he needed to get out.” R. 272: 50-51. But Defendant did not get out. Instead, he “grabbed” Deborah by the neck, “threw [her] over the couch,” and began choking her. R. 272: 51. When Deborah said that “he was hurting [her],” Defendant responded that he “was going to kill” her. R. 272: 51-52.

Deborah “almost blacked out” from a lack of oxygen. R. 272: 52. She had “very long finger nails,” though, and began “jab[bing]” at Defendant. R. 272: 52. She cut his forehead, drawing blood, and was then able to get off the couch and run toward a back bedroom. R. 272: 52-53.

Defendant chased after her and tackled her. R. 272: 53. As the two struggled on the floor, Defendant “grabbed [her] wrist and threw [her] hand backwards,” smashing it into a large wooden object against the wall. R. 272: 55-56.<sup>3</sup> Deborah’s hand “immediately hurt” and began swelling “up huge.” R. 272: 56. Witnesses who later saw it said that it looked “black and blue,” “purple,” “very swollen,” and “gruesome.” R. 271: 12, 68; 272: 122.

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<sup>3</sup> Deborah was later unsure whether her hand had struck a wooden bookshelf or a nearby wooden breadbox. R. 272: 56.

Deborah asked Defendant whether he planned to kill her. R. 272: 56. At that point, Defendant abruptly stopped his assault, got off her, and retrieved some cigarettes from the kitchen. R. 272: 57. Deborah asked him: "How do you think you're going to get away with this? The door frame's hanging all over the place." R. 272: 58. Defendant grabbed a small object from the door and started pounding the door frame back into place "so no one would know that he had kicked the door in." R. 272: 57-58.

Several of Deborah's neighbors had heard the commotion. R. 272: 101, 118. One of them, a 12-year-old girl who lived across the hall, looked out the peephole in her door at the beginning of the confrontation. R. 272: 101. She saw Defendant "pounding on the door, telling her to let him in." R. 272: 101. When she saw Defendant kick open the door, she was "scared" and called the police. R. 272: 102.

Police officers arrived while Defendant was still trying to repair the door frame. R. 271: 7. After securing the scene, an officer interviewed Deborah. R. 271: 12. He saw "discoloration" on her hand, as well as "some bruising." R. 271: 12. The hand looked "very swollen as if possibly the knuckles or the bones had been broke[n], or there was some pretty good severe trauma to the hand." R. 271: 12. Deborah could not "move her fingers very well." R. 271: 12. When the officer asked

her to write a witness statement, she could not, and she accordingly had to dictate it to a friend. R. 271: 13.

Deborah was taken to the emergency room. R. 271: 36. The attending physician noted signs of “strangulation trauma” on her neck. R. 271: 38. The physician testified that the trauma he observed was consistent with her account of having been choked during an assault. R. 271: 50.

The physician also noted that Deborah’s hand was “very swollen.” R. 271: 36. X-rays showed that the bone beneath her index finger was “shattered into dozens of pieces and was a little bit displaced.” R. 271: 39. The physician explained that these injuries were consistent with Deborah’s claim that her hand had struck a hard object while being thrust backwards. R. 271: 39, 50-51. He also explained that the injuries were inconsistent with those she would have received while punching something. R. 271: 39, 50-51. According to the doctor, there is a “characteristic type of a fracture that occurs when you punch something,” and the injuries to Deborah’s hand did not fit that fracture pattern. R. 271: 40.

As a result of the broken bones, Deborah subsequently had difficulties in her job as a housekeeper. R. 272: 66. She now had limited mobility in her hand and could not form a fully closed fist. R. 272: 67. Her hand would get sore and hurt while doing certain job-related tasks, such as cleaning toilets. R. 272: 66-67.

## The Charges

Defendant was charged with aggravated burglary, aggravated assault, and criminal mischief. R. 4-5. With respect to the aggravated assault charge, the information alleged that Defendant had violated Utah Code Annotated § 76-5-103(1)(a) (West 2004). R. 5. As set forth in the version of that statute then in effect, a person committed aggravated assault by “commit[ting] assault as defined in Section 76-5-102,” and by “intentionally caus[ing] serious bodily injury to another.” *Id.*

With respect to the aggravated burglary charge, the State was required to prove, among others, that Defendant had “enter[ed] or remain[ed] unlawfully” in Deborah’s apartment. Utah Code Ann. § 76-6-202(1) (West 2004). The State initially sought leave to prove this by showing that as a convicted sex offender, Defendant was not entitled to live in the apartment with Deborah and her 14-year-old daughter. R. 72-79. The trial court denied that request before trial, concluding that evidence of Defendant’s prior conviction and parole conditions would violate rule 404(b), Utah Rules of Evidence. R. 153: 16-17. Thus, the State’s burglary prosecution at trial was based solely on evidence that Defendant was not living at the apartment at the time of his forced entry.

**Defendant claims that he was the victim of Deborah's assault**

Defendant testified at trial. R. 271: 92-143. Defendant claimed that although he had been living elsewhere for much of 2004-2006, he had moved into Deborah's apartment in March 2006. R. 271: 95. He then claimed that after their fight a few days earlier, he had spent several days sleeping on a friend's couch without access to food or cigarettes. R. 271: 105-09.

Defendant admitted going to Deborah's apartment that morning, as well as to kicking her door out of its frame when she refused to let him in. R. 271: 114, 121, 129-30. According to Defendant, however, Deborah attacked him without provocation before he could come inside. R. 271: 114. Defendant said that Deborah choked him and scratched his face, but that he was able to push her off him. R. 271: 116-17. Defendant said that rather than leaving, he went to get his cigarettes from the kitchen, at which point Deborah "came at me again." R. 271: 117. According to Defendant, Deborah tried punching him three times; she missed the first two times, but when Defendant "let [his] guard down," she tried a third time, this time hitting him in the face. R. 272: 118-20. Defendant claimed that she broke her hand when she hit him. R. 271: 121, 130. During closing argument, defense counsel thus argued that Deborah's hand had never been flung back into the bookshelf as she had claimed. R. 271: 190-92, 202-03.

Defendant asked the jury to acquit him of burglary and criminal mischief based on the fact that he paid the rent on the apartment and allegedly lived there at the time of the confrontation. R. 271: 180-204. Defendant also asked the jury to acquit him of aggravated assault based on his claim that Deborah had been the aggressor during their physical confrontation, as well as the fact that any injury to Deborah's hand had been caused when she punched him. R. 271: 180-204.

**Discussions and instructions regarding the intent element  
of aggravated assault**

As noted, the State alleged that Defendant committed aggravated assault under Utah Code Annotated § 76-5-103(1)(a). R. 5. Under that statute, a "person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he . . . intentionally causes serious bodily injury to another." This language was submitted to the jury in Instruction # 14, defining aggravated assault as:

1. That on or about April 6, in Salt Lake County, Utah, the defendant, LARRY HUTCHINGS;
2. Intentionally or knowingly;
3. Committed an assault on Deborah Cuddeback; and
4. Intentionally caused serious bodily injury.



R. 186.<sup>4</sup>

During trial, the prosecutor repeatedly stressed that the State's theory was that Defendant intentionally caused the injuries to Deborah's hand. During the opening statement, the prosecutor claimed that the jury must decide what Defendant's "intent" was "when Debby Cuddeback's hand was injured. Did he intend to cause injuries to her, such as the breaking of her metacarpal" bones? R. 272: 12. After summarizing the anticipated evidence, the prosecutor asserted that the jury would be "convinced that he intended to cause serious bodily injury." R. 272: 15.

During closing argument, the prosecutor again stressed that the jury must decide whether Defendant "intentionally or knowingly committed an assault on Deborah Cuddeback," and whether he "intentionally caused serious bodily injury" to her. R. 271: 178. The prosecutor argued that Defendant "intentionally caused" the injuries to her hand when he "grabbed her hand and . . . threw it back behind her head. She was trying to protect herself, and he grabbed her hand and threw it. He intentionally caused the serious bodily injury." R. 271: 178. Summarizing the

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<sup>4</sup> The State has attached a complete copy of the jury instructions as Addendum C to this brief.

case at the close of argument, the prosecutor again stressed that the question was whether Defendant had “intentionally [broken] Debby’s hand.” R. 271: 179.<sup>5</sup>

**The trial court gives a general instruction defining intentional conduct**

As noted, the specific statutory elements of aggravated assault were correctly set forth in Instruction 14 R. 186. Instructions 15-18 then defined a number of the terms specific to that crime. R. 187-89.

After issuing a series of intervening instructions regarding other aspects of the case (such as the elements of criminal mischief and the principles of self-defense), R. 190-93, Instructions 24-27 set forth a series of general principles regarding intentional conduct. R. 195-98. These instructions did not mention any of the three crimes at issue by name, nor were these instructions specific to any particular crime. R. 196-98. Instead, they addressed such issues as the jury’s ability to infer intent

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<sup>5</sup> The statute defines “serious bodily injury” as an injury that creates a “serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.” Utah Code Ann. § 76-1-601(11) (West 2004). In the pro se portion of the briefing at the court of appeals, Defendant argued that a broken hand does not meet this standard. Aplt. Br., addendum A (14-16). The court of appeals did not accept that claim, this Court did not grant certiorari on that issue, and Defendant does not re-raise it here.

In any event, a broken bone which results in long-term impairment satisfies that element. *See State v. Leleae*, 1999 UT App 368, ¶¶ 18-20, 993 P.2d 232.

from circumstantial evidence and the distinction between intent and motive. R. 195-98.

Among these was Instruction 27, which offered the statutory definitions for intentional and knowing conduct. R. 198. As set forth in Instruction 27, a “person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.” R. 198. This instruction was a verbatim recitation of the definition of intentional conduct from Utah Code Annotated § 76-2-103(1) (West 2004).

Before submitting the case to the jury, the trial court discussed the proposed jury instructions with the parties. R. 271: 147-61. During that discussion, defense counsel objected to various instructions. R. 271: 147-61. But defense counsel never objected to Instruction 14, which set forth the elements of aggravated assault, nor did she object to Instruction 27, which set forth the statutory definition of intentional conduct. R. 271: 147-61. Instead, after receiving the rulings on the objections she had offered, counsel affirmatively represented that she had no further objections. R. 271: 160.

## Verdict & Appeal

The jury convicted Defendant of aggravated assault and criminal mischief, but acquitted him of aggravated burglary. R. 212-14; 271: 219. Following sentencing, Defendant timely appealed to the Utah Court of Appeals.

His original appellate counsel filed a hybrid *Anders*/merits brief with the court of appeals. In Point I, counsel identified a number of issues that Defendant wished to raise, but then, pursuant to *Anders v. California*, 386 U.S. 738 (1967), argued that those issues were frivolous. Aplt. Br. 8-21. As an addendum, defense counsel attached a pro se memorandum from Defendant that had initially set forth his views of the issues he wished to raise on appeal, as well as Defendant's pro se "response" to the *Anders* brief that defense counsel had filed. Aplt. Br., addenda A & B.

In Point II of the brief, defense counsel argued the merits of the one claim that he found to be non-frivolous. Aplt. Br. 21-23. Counsel argued that Jury Instruction 14(2) was incorrect when it stated that the mental state for the underlying assault could be either "intentional" or "knowing" conduct. Aplt. Br. 21-23. According to counsel, the assault could be proven only through intentional conduct. *Id.* But defense counsel never raised any additional claim regarding Instruction 14(4), which had required the State to prove that Defendant intentionally caused the serious bodily injury. Counsel also did not argue that Instruction 27 had improperly

modified Instruction 14(4) in a manner that allowed Defendant to be convicted of aggravated assault if he only intended the conduct, as opposed to also intending the result. *See* Aplt. Br. 21-23.

In response, the State filed a brief in which it first agreed with defense counsel that the *Anders* issues were frivolous. Aplee. Br. 3-4. The State accordingly did not file a substantive response to those issues. *See State v. Clayton*, 639 P.2d 168, 170 (Utah 1981) (“Because of the special nature of the *Anders* brief, the attorney general [is not] expected to file a responsive brief.”). Instead, the State limited its response to the one claim argued by defense counsel: whether an assault could be proven through both intentional and knowing conduct. Aplee. Br. 4-6. Like defense counsel, the State did not make any arguments about what a defendant must intend in order to convert a simple assault into an aggravated assault.

On November 13, 2009, the court of appeals issued an unpublished memorandum decision denying Defendant’s claims. The court first agreed that the *Anders* issues were “indeed frivolous.” *State v. Hutchings*, 2009 UT App 330 at \*1.

The court also agreed with the State that a simple assault can be based on intentional, knowing, or reckless conduct. *See id.* at \*2-3.<sup>6</sup>

The court of appeals then turned to a question that had not been briefed by defense counsel or the State: whether Instruction 27's definition of intentional conduct had improperly modified the intent requirement for aggravated assault. *Id.* at \*3.<sup>7</sup> In its brief analysis of the issue, the court of appeals concluded that Instruction 27 had allowed a defendant to be convicted of aggravated assault if he "intend[ed] the act that result[ed] in serious bodily injury," regardless of whether he intended to cause the serious bodily injury. *Hutchings*, 2009 UT App 330 at \*3. The court of appeals then concluded that this was a correct interpretation of the aggravated assault statute. *Id.*

Defendant filed a pro se petition for a writ of certiorari, asking for review of 23 different issues. Pet. Cert. 1-9. This Court granted Defendant's petition, but only

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<sup>6</sup> As recognized by the court of appeals, this meant that Instruction 14(2) was actually more stringent than required by law. Specifically, although the State could have proven the underlying assault through intentional, knowing, or reckless conduct, Instruction 14(2) required the State to show that the underlying assault was intentional or knowing. *See Hutchings*, 2009 UT App 330 at \*3 n.3 As a result, "by not including recklessness as a basis for a finding of assault, the State was held to a higher standard of proof for that mens rea element than required by the statute." *Id.*

<sup>7</sup> As discussed below, the only place where Defendant arguably made this claim was in his pro se response to the *Anders* brief that had been filed by counsel. *See* Aplt. Br., addendum B (3).

with respect to two issues: first, whether “the court of appeals erred in affirming the district court’s instruction defining intentional conduct in relation to causation of serious bodily injury under Utah Code Ann. § 76-5-103(1)(a)”; and second, “[w]hether Petitioner’s trial counsel was ineffective.” (Addendum D).

### **SUMMARY OF ARGUMENT**

**Point I:** Defendant claims that the court of appeals incorrectly held that he could be convicted of aggravated assault whether or not he intended to cause the serious bodily injury, so long as he intended the act that caused the serious bodily injury. The State agrees that the court of appeals erred in its interpretation of the mental state required for aggravated assault. But this Court should still affirm the court of appeals’ result for two reasons. First, the jury instructions below accurately informed the jury that it could convict Defendant only if it first found that he intended to cause the serious bodily injury. Thus, the court of appeals’ affirmance was correct, albeit for the wrong reason. Second, the court of appeals should not have reached the issue in the first instance, because Defendant’s claim regarding Instruction 27 was barred by the invited error doctrine.

**Point II:** Defendant argues that he received ineffective assistance when his counsel failed to object to Instruction 27. But that instruction correctly set forth the controlling law. Thus, counsel did not perform deficiently by not objecting.

Defendant's claim also fails because he cannot show prejudice. As explained above, the instructions plainly and correctly instructed the jury that it had to find that Defendant intended to cause serious bodily injury. That the jury would have understood this is buttressed by the fact that the prosecution never argued that Defendant should be convicted merely because he intended the underlying conduct. Rather, the prosecution accurately argued that the jury must find that Defendant intended to cause serious bodily injury.

Moreover, the evidence presented at trial overwhelmingly showed that Defendant did intend to cause serious bodily injury. Defendant broke down his victim's door in a profane rage, attacked her, choked her to the point of near-unconsciousness, and then threatened to kill her. Under these circumstances, there is no reasonable probability that the result would have been different with an amended Instruction 27.<sup>8</sup>

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<sup>8</sup> As noted above, Defendant was convicted of both aggravated assault and criminal mischief. In his brief, he attacks only the conviction for aggravated assault.



## ARGUMENT

### I.

#### **THE COURT OF APPEALS' DECISION SHOULD BE AFFIRMED BECAUSE THE JURY INSTRUCTIONS CORRECTLY SET FORTH THE MENTAL STATE REQUIRED FOR AGGRAVATED ASSAULT**

Defendant argues that the court of appeals erred when it concluded that he could be convicted of aggravated assault regardless of whether he actually intended to cause “serious bodily injury.” Pet. Br. 6-10. The State agrees that the court of appeals’ analysis on this issue was incorrect. But this Court should still affirm the result because the instructions correctly instructed the jury that it had to find that Defendant intended to cause serious bodily injury.

#### **A. The court of appeals erred when it concluded that a defendant could be convicted of aggravated assault under the prior statute without intending to inflict serious bodily injury.**

Under the statute in effect at the time of this crime, aggravated assault had two elements. First, the State was required to prove that Defendant “commit[ted] assault as defined in Section 76-5-102.” Utah Code Ann. § 76-5-103(1)(a) (West 2004). Because there was no statutorily prescribed mental state for simple assault, *see* Utah Code Ann. § 76-5-102 (West 2004), the State could prove the underlying assault through intentional, knowing, or reckless conduct. *See* Utah Code Ann. § 76-2-102 (West 2004) (“when the definition of the offense does not specify a culpable

mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility”); *cf. State v. Atkin*, 2006 UT App 155, ¶ 9, 135 P.3d 894; *State v. Jones*, 878 P.2d 1175, 1177-78 (Utah App. 1994). Second, once the State proved an assault, it had to prove that the assault was aggravated under either Utah Code Annotated § 76-5-103(1)(a) or -103(1)(b).

In this case, the State proceeded only under § 76-5-103(1)(a), which increased a simple assault to an aggravated assault when the defendant “intentionally cause[d] serious bodily injury to another.” This Court has interpreted that provision to mean that the defendant must have intended the result—i.e., that he must have intended to inflict a “serious bodily injury,” as opposed to merely intending the conduct that caused the serious bodily injury. *See In re Besendorfer*, 568 P.2d 742, 744 (Utah 1977) (“To support a conviction under Sec. 76-5-103(1)(a), . . . the state must prove the accused intentionally caused serious body injury, viz., that he had a specific intent to inflict serious bodily injury on the victim . . .”); *State v. Howell*, 554 P.2d 1326, 1328 (Utah 1976) (same).

In the opinion below, the court of appeals held otherwise, concluding that it “is enough to satisfy the mens rea requirement if the defendant intends the act that results in serious bodily injury.” *Hutchings*, 2009 UT App 330, \*3. The State

therefore agrees with Defendant that the court of appeals' interpretation of the previous version of the statute was incorrect.<sup>9</sup>

**B. This Court should affirm because the instructions set forth the correct mental state.**

Contrary to Defendant's suggestion, the instructions in this case were correct under the law discussed above. Specifically, these instructions allowed Defendant to be convicted of aggravated assault only if the jury concluded that he intended to cause serious bodily injury. Thus, although the court of appeals erred in its interpretation of the aggravated assault statute, this Court should affirm on this alternate ground. See *Johnson v. Johnson*, 2010 UT 28, ¶ 13, 234 P.3d 1100 (an appellate court may affirm on alternate grounds that are apparent on the record); *Debry v. Noble*, 889 P.2d 428, 444 (Utah 1995) (same).

When interpreting jury instructions, this Court interprets the instructions "as a whole, rather than in isolated segments." See *State v. Taylor*, 2005 UT 40, ¶ 24, 116 P.3d 360; accord *Cheves v. Williams*, 1999 UT 86, ¶ 37, 993 P.2d 191 ("If the jury

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<sup>9</sup> The aggravated assault statute was amended in 2010 to remove the intent element at issue in this appeal. Whereas the old statute required the defendant to intend to inflict seriously bodily injury, the new version requires only that the defendant commit a simple assault while using "means or force likely to produce death or serious bodily injury." Utah Code § 76-5-103(1)(b) (2010).

To avoid confusion in future cases, this Court should note that the statutory analysis in this case is based on a version of the statute no longer in effect.

instructions as a whole fairly instruct the jury on the applicable law, reversible error does not arise merely because one jury instruction, standing alone, is not as accurate as it might have been.” (Quotations and citation omitted.)).

Here, Instruction # 14 defined the elements of aggravated assault as:

1. That on or about April 6, in Salt Lake County, Utah, the defendant, LARRY HUTCHINGS;
2. Intentionally or knowingly;
3. Committed an assault on Deborah Cuddeback; and
4. *Intentionally caused serious bodily injury.*

R. 186 (emphasis added).

Instruction 14’s separately numerated structure was significant, because it differentiated the mental state required for an underlying assault (Instruction 14(2)) from the mental state required for the aggravator (Instruction 14(4)). With respect to the aggravator, Instruction 14(4) correctly instructed the jury that it could convict Defendant of aggravated assault only if it found that he “intentionally caused serious bodily injury.” This was the exact language set forth in the aggravated assault statute. *See* Utah Code Ann. § 76-5-103(1)(a).

Defendant recognizes this in his brief, acknowledging that Instruction 14 “correctly instructed [the jury] as to the elements of aggravated assault.” Pet. Br. 7.

Despite this, Defendant argues that Instruction 27 incorrectly modified Instruction 14 by allowing the jury to convict him even if he did not “intend the result, i.e., serious bodily injury.” Pet. Br. 7. But Defendant’s interpretation of how Instruction 27 affected the jury’s consideration of the aggravated assault charge is incorrect.

Instruction 27 was a general definitions instruction that defined intentional and knowing conduct. This instruction was not limited to any particular crime, but was instead applicable to all three crimes at issue, insofar as each of them contained individual elements that could be proven through intentional or knowing conduct. *See* R. 181(aggravated burglary), 186 (aggravated assault), 190 (criminal mischief).

This does not mean, however, that all of Instruction 27 applied to all of the elements of all of the crimes. Instead, Instruction 27 applied only on a clause-specific basis. For example, Instruction 27 defined knowing conduct. But while Instruction 14 allowed the underlying assault to be proven through intentional or knowing conduct, it expressly stated that the aggravator could be proven only through an intended result. R. 186. Thus, on its face, Instruction 27’s definition of knowing conduct would have been inapplicable to that particular element.

More importantly, Instruction 27’s definition of intentional conduct was multi-faceted as well. Specifically, it included definitions of both intended acts and intended results, stating that a “person engages in conduct intentionally . . . with

respect to the nature of his conduct *or* to a result of his conduct, when it is his conscious objective or desire to engage in the conduct *or* cause the result.” R. 198 (emphasis added).

Contrary to Defendant’s claim, that instruction did not state that the definitions of intended conduct and intended results were interchangeable. Instead, as noted, Instruction 27 separated the definition of intended conduct from the definition of intended results through use of the disjunctive “or.”

Thus, Instruction 27 told the jury how to interpret any element that called for either intentional conduct or an intended result. In other words, if an individual element required intentional conduct, Instruction 27 required the jury to conclude that it was Defendant’s “conscious objective or desire to engage in the conduct.” R. 198. But if an individual element instead required an intended result, Instruction 27 required the jury to conclude that Defendant’s “conscious objective or desire [was] to . . . cause the result.” R. 198.

Read together, Instructions 14 and 27 correctly set forth the governing law as dictated by statute. Specifically, Instruction 14(2)-(3) set forth the simple assault element, directing the jury to first determine whether Defendant “intentionally or knowingly committed an assault on Deborah Cuddeback.” R. 186. This referred to Defendant’s conduct. Thus, Instruction 27 directed the jury to consider whether it

was Defendant's "conscious objective or desire to engage in the conduct" — i.e. to assault Deborah. R. 186.

Instruction 14(4) then set forth the additional element required to convert simple assault to aggravated assault. Specifically, Instruction 14(4) required the jury to find that Defendant also "intentionally caused serious bodily injury." R. 186. This referred to an intended result. Thus, Instruction 27 clarified that Defendant could only be convicted of aggravated assault if the jury found that Defendant's "conscious objective or desire" was to "cause[ ] serious bodily injury." R. 186, 190.

The jury instructions in this case therefore correctly set forth the intent requirement for aggravated assault. This Court should accordingly affirm the court of appeals' conclusion that there was no error in the instructions.

**C. This Court may also affirm because the court of appeals should not have considered the claim where it was barred by the invited error doctrine.**

Even if these jury instructions were incorrect, the court of appeals' result should be affirmed because Defendant's claim regarding Instruction 27 was not properly before the court. Specifically, the court of appeals should have rejected the claim based on the invited error doctrine.

Under the invited error doctrine, "a party on appeal cannot take advantage of an error committed at trial when that party led the trial court into committing the

error.” *State v. Alfatlawi*, 2006 UT App 511, ¶ 26, 153 P.3d 804 (quotations and citation omitted). This occurs when there are “[a]ffirmative representations that a party has no objection to the proceedings . . . because such representations reassure the trial court and encourage it to proceed without further consideration of the issues.” *State v. Winfield*, 2006 UT 4, ¶ 16, 128 P.3d 1171. In the context of jury instructions, invited error ordinarily occurs when a defendant “affirmatively approve[s] of the jury instructions at trial.” *Alfatlawi*, 2006 UT App 511, ¶ 26 (alteration in original). But even where counsel “confirm[s] on the record that the defense had no objection to the instructions given by the trial court,” or instead “fail[s] to object to an instruction when specifically queried by the court,” the invited error doctrine applies. *State v. Geukgeuzian*, 2004 UT 16, ¶ 10, 86 P.3d 742.

If the invited error doctrine applies, a defendant cannot obtain review of an issue, even for plain error or exceptional circumstances. *See Geukgeuzian*, 2004 UT 16, ¶ 9; *Alfatlawi*, 2006 UT App 511, ¶ 26. Instead, a defendant can obtain review only by alleging ineffective assistance of counsel in inviting the error. *See State v. Bullock*, 791 P.2d 155, 158-60 (Utah 1989).

Here, Defendant’s trial counsel objected to a number of proposed instructions, but she never objected to Instruction 14 or Instruction 27. R. 271: 147-61. Instead, counsel affirmatively represented that she had no further objections to any of the



remaining instructions. R. 271: 160. Thus, Defendant invited any error with respect to this issue, and the court of appeals should accordingly have denied this claim on this basis. *See Geukgeuzian*, 2004 UT 16, ¶ 9; *Alfatlawi*, 2006 UT App 511, ¶ 26.

Granted, the State did not argue invited error below. However, this was because defense counsel never raised this claim on appeal. Instead, he argued only that Instruction 14(2) (regarding simple assault) was incorrect. *See* Aplt. Br. 21-23. To the extent that this was raised at all, it was only raised in *Anders* portion of the brief. As near as the State can determine, Defendant did not ever raise this claim in his initial *Anders* brief. Instead, the only place where Defendant even arguably raised that issue was on page 3 of addendum B, which was his pro se “response” to the *Anders* brief filed by counsel. There, he apparently argued for the first time that Instruction 27 was incorrect because it “fails to define [the crime] specifically to intentionally causes serious bodily injury.” Aplt. Br., addendum B (3). But Defendant did not specifically claim that he received ineffective assistance of counsel with respect to that claim. Moreover, as noted above, the State was not required to offer a substantive response to arguments made in his *Anders* brief, let alone arguments that had been raised for the first time in what was essentially Defendant’s *reply* to his counsel’s objections. *See State v. Clayton*, 639 P.2d 168, 170

(Utah 1981) (“Because of the special nature of the *Anders* brief, the attorney general [is not] expected to file a responsive brief.”).

In short, as a result of defense counsel’s conscious decision at trial not to object to Instruction 27, the invited error doctrine applied. And as a result of the invited error doctrine, Defendant could obtain review of that instruction only by alleging ineffective assistance of counsel. Given that neither Defendant nor his counsel raised any ineffective assistance claim regarding Instruction 27 in the briefing below, the court of appeals should not have reviewed this claim at all. But having chosen to do so, it should have recognized that any error was invited. This Court may therefore affirm on that alternate basis.<sup>10</sup>

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<sup>10</sup> In its opinion, the court of appeals suggested that although Defendant had “failed to object to these *instructions* in the trial court,” the State had not “contest[ed] [its] review of these *issues*” for plain error. *Hutchings*, 2009 UT App 330 at \* 2 n.1 (emphasis added). In its brief, however, the State only substantively responded to the single claim raised by defense counsel – i.e. that Instruction 14(2) inaccurately set forth the mental state for simple assault. Aplee. Br. 4-6. Given that settled precedent controlled that issue, the State did indicate that it was not arguing invited error regarding that particular instruction. Aplee. Br. 4 n.2.

But as noted above, Defendant’s claim here is not based on Instruction 14. To the contrary, he agrees that that instruction was correct. Pet. Br. 7. Instead, his claim is based on Instruction 27, which was neither challenged nor argued in the briefing below. The State’s limited concession below therefore does not apply.

## II.

### **DEFENDANT HAS NOT SHOWN THAT HE RECEIVED INEFFECTIVE ASSISTANCE WHEN HIS TRIAL COUNSEL DID NOT OBJECT TO THE JURY INSTRUCTIONS**

This Court also granted certiorari to review “[w]hether Petitioner’s trial counsel was ineffective.” Addendum D. In his brief, Defendant raises only one claim of ineffective assistance: that his trial counsel was ineffective for not objecting to Instruction 27. Pet. Br. 6-14. As discussed above, however, Defendant never raised that claim in the trial court, nor did he or his counsel brief it in the hybrid *Anders* brief that was filed with the court of appeals. This Court should accordingly decline to address this issue now.

But even if reached, the claim should be rejected on its merits. To establish ineffective assistance of counsel, Defendant must show: (1) that trial counsel’s performance was deficient—i.e, that it did not meet an objective standard of reasonableness; and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Defendant’s claim fails under both prongs.

First, counsel did not perform deficiently. When assessing deficient performance claims, there is a “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *State v. Cruz*, 2005 UT 45, ¶ 38, 122 P.3d 543 (quotations and citation omitted). Defense counsel does not perform deficiently by not filing a futile motion. *See, e.g., State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546; *State v. Whittle*, 1999 UT 96, ¶ 34, 989 P.2d 52.

As explained above, Instruction 27 tracked the statutory language and was a correct statement of the law. Moreover, it did not incorrectly modify the mental state required for aggravated assault. There was accordingly no basis for counsel to have objected, and Defendant’s deficient performance claim should therefore be rejected for that reason.

Second, Defendant has not shown that any deficient performance prejudiced him. Under *Strickland*’s prejudice prong, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Strickland*, 466 U.S. at 693. Rather, Defendant must demonstrate that “a reasonable probability exists that but for the deficient conduct [he] would have obtained a more favorable outcome at trial.” *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

Defendant claims that if Instruction 27 had been omitted or modified, the jury “likely would have concluded that the evidence [did] not support an aggravated assault conviction.” Pet. Br. 13. Defendant is wrong for two reasons.

First, the State’s theory of the case – and, thus, the resulting conviction – was always predicated on the correct assertion that Defendant had to intend to inflict serious bodily injury. During opening statement, the prosecutor explained that the jury must decide whether Defendant’s “intent” was to injure his victim, “such as the breaking of her metacarpal” bones. R. 272: 12. The prosecutor also argued that after hearing the evidence, the jury would be “convinced that [Defendant] intended to cause serious bodily injury.” R. 272: 15. During closing argument, the prosecutor again stressed that the jury had to decide whether Defendant had “intentionally caused serious bodily injury” to the victim, and, more specifically, whether he had “intentionally [broken] Debby’s hand.” R. 271: 178, 179. The prosecutor thus asked the jury to convict Defendant because he had “intentionally caused the serious bodily injury.” R. 271: 178.

The State never argued that Defendant should be convicted of aggravated assault merely because he intended the conduct, and nothing in Instruction 27 suggested that the jury should disregard Instruction 14(4)’s clear command that he had to intend to inflict serious bodily injury. Thus, if Instruction 27 had been

omitted or modified, the evidentiary picture, Defendant's arguments, and the State's arguments would all have remained the same. Given this, there is no reasonable probability that the verdict would have somehow been different.

Second, the evidence in this case overwhelmingly supported the conclusion that Defendant intended to cause serious bodily injury. Intent can be proven through circumstantial evidence, and it can also be "inferred from the actions of the defendant or from surrounding circumstances." *State v. Colwell*, 2000 UT 8, ¶ 43, 994 P.2d 177; *see also State v. Emmett*, 839 P.2d 781, 784 (Utah 1992). Moreover, "a person is presumed to intend the natural and probable consequences of his acts." *State v. Sisneros*, 631 P.2d 856, 859 (Utah 1981); *see also 6A C.J.S. Assault* § 95 (2004) (stating that an accused may be held liable for injuries that are "the natural and probable consequence of the wrongful act").

Defendant was "very angry and screaming and yelling" when he approached Deborah's door and kicked it out of its frame. R. 272: 50-51. He then grabbed her by the neck, threw her over a couch, and began choking her. R. 272: 51. When she told him that "he was hurting [her]," Defendant responded that he "was going to kill" her. R. 272: 51-52. After "almost black[ing] out" from lack of oxygen, Deborah managed to temporarily escape by jabbing at Defendant's face with her fingernails. R. 272: 52-53. But Defendant then chased her, tackled her, and began attacking her

again. R. 272: 53. During the ensuing struggle, Defendant “grabbed [her] wrist and threw [her] hand backwards,” smashing it into a large wooden object against the wall. R. 272: 55-56. He did so with enough force that the bone beneath her index finger was “shattered into dozens of pieces” and was “displaced.” R. 271: 39.

When reviewing a jury verdict, “appellate courts may rely on the presumption that the jury properly took into account conflicting evidence and believed the evidence that supported the verdict.” *State v. Gardner*, 2007 UT 70, ¶ 4, 167 P.3d 1074. Here, a “natural and probable consequence[ ]” of intentionally slamming a person’s hand against a hard object with great force is that the person’s hand will be broken, thereby supporting a presumption that Defendant intended that result. *Sisneros*, 631 P.2d at 859. When viewed in light of that presumption, Defendant’s “actions” and the “surrounding circumstances” show that Defendant intended to inflict serious bodily injury. *Colwell*, 2000 UT 8, ¶ 43. Specifically, Defendant was extremely angry from the outset of their confrontation, showed a willingness to use force when he kicked Deborah’s door out of its frame, and showed an intent to harm, if not kill, Deborah when he attacked her, choked her to the point of almost blacking out, as well as by telling her that he intended to kill her.

In response, Defendant now suggests that the jury might have thought he was acting in self-defense when he slammed Deborah’s hand back against the wooden

object. Pet. Br. 13. But that is contrary to the account he gave at trial. There, Defendant never acknowledged grabbing Deborah's hand and slamming it back at all, but instead claimed that she had hurt her hand by punching him. R. 271: 116-20. As evidenced by the verdict, the jury did not believe Defendant. In any event, the jury was specifically instructed that Defendant was entitled to act in self-defense. R. 191-93. In spite of this instruction, the jury convicted Defendant—thereby necessarily rejecting any claim that Defendant was acting in self defense.

In short, Defendant's argument ultimately rests upon the assertion that while he was willing to break down Deborah's door, attack her, and potentially kill her by choking her, he never intended to inflict serious bodily injury. The existing record shows that the jury disagreed, and there is no reasonable probability that the verdict would have been different if Instruction 27 had been altered. Defendant's ineffective assistance claim should accordingly be rejected.<sup>11</sup>

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<sup>11</sup> In his brief, Defendant additionally claims that the trial court committed plain error by not striking Instruction 27 *sua sponte*. Pet. Br. 11. As discussed above, however, Defendant invited any error by approving that instruction. As a result, he cannot obtain relief under the plain error doctrine.

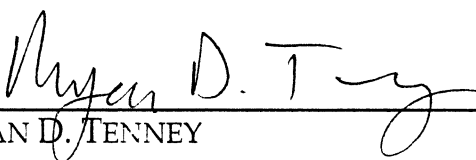


## CONCLUSION

For the foregoing reasons, the Court should affirm Defendant's conviction for aggravated assault.

Respectfully submitted January 11, 2011.

MARK L. SHURTLEFF  
Utah Attorney General

  
\_\_\_\_\_  
RYAN D. TENNEY  
Assistant Attorney General  
Counsel for Respondent

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In any event, even if the plain error doctrine is properly at issue, it does not provide a basis for relief. Specifically, there was no obvious error with respect to Instruction 27, because Instruction 27 was a verbatim recitation of a controlling statute that did not even purport to modify the elements instruction that defined aggravated assault. In addition, even if Instruction 27 was obviously incorrect, Defendant still suffered no prejudice because the State never relied on the incorrect interpretation of it in this case.

## CERTIFICATE OF SERVICE

I certify that on January 11, 2011, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

Troy L. Booher  
Snell & Wilmer L.L.P.  
15 West South Temple, Suite 1200  
Salt Lake City, UT 84101

A digital copy of the brief was also included: ☒ Yes ☐ No

Melissa Freyer

## Addenda

## Addendum A

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20080681-CA
v.	)	
	)	F I L E D
Larry Lewis Hutchings,	)	(November 13, 2009)
	)	
Defendant and Appellant.	)	<div style="border: 1px solid black; padding: 2px;">2009 UT App 330</div>

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Third District, Salt Lake Department, 061902496  
The Honorable Dennis M. Fuchs

Attorneys: Ronald Fujino, Salt Lake City, for Appellant  
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City,  
for Appellee

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Before Judges Bench, Thorne, and McHugh.

McHUGH, Judge:

Larry Lewis Hutchings appeals his convictions for aggravated assault and criminal mischief. Hutchings raises multiple issues on appeal, challenging his convictions. With respect to all but one of those issues, Hutchings's lawyer has filed an Anders brief, and Hutchings has filed a memorandum to supplement counsel's brief. See generally Anders v. California, 386 U.S. 738 (1967) (describing the procedures that appointed counsel must follow when he believes his client's claims on appeal are frivolous); State v. Clayton, 639 P.2d 168, 169-70 (Utah 1981) (adopting Anders requirements "as an expression of the requirements of due process of law" under the Utah Constitution). Because our independent review convinces us that the issues identified by Hutchings's counsel in the Anders brief (the Anders issues) are indeed frivolous, see generally State v. Romano, 29 Utah 2d 237, 507 P.2d 1025, 1025 (1973) (defining "frivolous" as "having no basis in fact or law"), we do not consider those issues further. See Clayton, 639 P.2d at 170 (holding that an appellate court may grant a withdrawal and affirm a conviction if it unanimously determines that an appeal is wholly frivolous).

Apart from the Anders issues, appellate counsel argues that the trial court incorrectly instructed the jury on the culpable mental state required for aggravated assault and the definition of "intentional."<sup>1</sup> "Whether a jury instruction correctly states the law presents a question of law which we review for correctness." State v. Miller, 2008 UT 61, ¶ 13, 193 P.3d 92.

The jury instruction on aggravated assault provided,

Before you can convict . . . HUTCHINGS  
. . . of Aggravated Assault, . . . you must  
find from all of the evidence and beyond a  
reasonable doubt, each and every one of the  
following elements of that offense:

1. That on or about April 6, 2006, in  
Salt Lake County, Utah, . . . HUTCHINGS;
2. Intentionally or knowingly;
3. Committed an assault on [his  
girlfriend]; and
4. Intentionally caused serious bodily  
injury to her.

We agree with the State that the jury instruction correctly listed the elements of aggravated assault, including the culpable mental states.

Aggravated assault requires that a person commit "assault as defined in [Utah Code s]ection 76-5-102, and . . . intentionally cause[] serious bodily injury to another." Utah Code Ann. § 76-5-103(1)(a) (2008) (emphasis added).<sup>2</sup> An "[a]ssault is . . . an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another." Id. § 76-5-102. Because the assault statute does not provide the culpable mental state required to support a

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<sup>1</sup>Although Hutchings failed to object to these instructions in the trial court, he requests that we review them under the plain error doctrine. The State does not contest our review of these issues.

<sup>2</sup>Because it is irrelevant to this appeal, we need not address the alternative element of aggravated assault, that is, the use of a dangerous weapon or other means likely to produce death in the commission of the assault, see Utah Code Ann. § 76-5-103(1)(b) (2008).

conviction, "intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Id. § 76-2-102. To be liable for aggravated assault, however, the defendant must also have intentionally caused serious bodily injury. See id. § 76-5-103(1)(a). Thus, there are actually two mens rea requirements that must be met to convict a defendant of aggravated assault: the first is the intent, knowledge, or recklessness included in a simple assault charge; the second is the requirement that the defendant intentionally cause serious bodily injury. The challenged jury instruction correctly identified each of these mental state requirements.<sup>3</sup> Accordingly, we reject counsel's claim that the jury instruction was erroneous.<sup>4</sup>

Finally, Hutchings challenges the instruction to the jury that defined "intentional" conduct. That instruction stated, "A person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result." Hutchings argues that to be guilty of aggravated assault he must have intended to cause the serious bodily injury suffered by the victim, not simply the conduct that resulted in the serious bodily injury. We disagree. It is enough to satisfy the mens rea requirement if the defendant intends the act that results in serious bodily injury. See State v. Fontana, 680 P.2d 1042, 1044 n.1 (Utah 1984) (upholding nearly identical instructions for intent).

Because counsel has complied with the requirements of Anders v. California, 386 U.S. 738 (1967), and because we confirm that the Anders issues are frivolous, we grant counsel's request to withdraw with respect to the Anders issues only and affirm the trial court's rulings with respect to those issues. In addition, the jury instructions properly informed the jury of the elements

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<sup>3</sup>Indeed, by not including recklessness as a basis for a finding of assault, the State was held to a higher standard of proof for that mens rea element than required by the statute.

<sup>4</sup>Because we conclude that the jury instruction was proper, we need not address Hutchings's claim that he received ineffective assistance of counsel when his trial lawyer failed to object to the instruction.

of aggravated assault, including the mental states required.  
Accordingly, we affirm the convictions.

\_\_\_\_\_  
Carolyn B. McHugh, Judge

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I CONCUR:

\_\_\_\_\_  
Russell W. Bench, Judge

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I CONCUR IN THE RESULT:

\_\_\_\_\_  
William A. Thorne Jr., Judge



## Addendum B

## Utah Code Annotated § 76-2-103 (West 2003) Definitions

A person engages in conduct:

- (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
- (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
- (3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.
- (4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

## **Utah Code Annotated § 76-5-102 (West 2003) Assault**

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

(a) the person causes substantial bodily injury to another; or

(b) the victim is pregnant and the person has knowledge of the pregnancy.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

# **Utah Code Annotated §76-5-103 (West 2003) Aggravated assault**

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

## Addendum C

**THIRD DISTRICT COURT, STATE OF UTAH**  
**SALT LAKE COUNTY, SALT LAKE DEPARTMENT**

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STATE OF UTAH,	)	JURY INSTRUCTIONS
Plaintiff,	)	
vs.	)	Case No. 061902496 FS
LARRY LEWIS HUTCHINGS,	)	
Defendant,	)	Honorable Dennis M. Fuchs

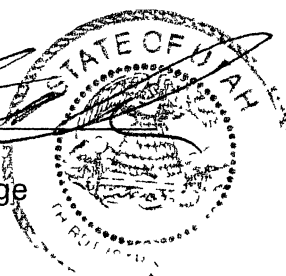
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The Court, in its charge to the jury, gives the following instructions numbered one (1) through

forty (40) inclusive.

Dated this 5 day of Sept, 2007.

  
Dennis M. Fuchs  
Third District Court Judge



INSTRUCTION NO. 1

This is a criminal case.

The defendant, Larry Lewis Hutchings, has been charged in a duly filed Information with the offense(s) of Aggravated Burglary, Aggravated Assault, Criminal Mischief, on or about April 6, 2006 in Salt Lake County, Utah.

This Information only alleges the defendant committed the offense and is not to be regarded as a statement of facts proved in this case.

The defendant has pled Not Guilty . This plea casts upon the prosecution the full burden of proving beyond a reasonable doubt each of the elements of each crime charged.

The fact that the defendant has been charged is not evidence of guilt. No inference or presumption adverse to the defendant or State should be drawn because of it.

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INSTRUCTION NO. 2

A person charged with a crime is presumed to be innocent until proven guilty beyond a reasonable doubt. The presumption of innocence is not a mere term to be disregarded by the jury at pleasure. It is a substantial, essential part of the law, and is binding upon the jury. This presumption is intended, so far as human agency is capable, to guard against the danger of an innocent person being unjustly punished. The presumption of innocence must continue to prevail in the minds of the jury unless and until the jury is satisfied beyond a reasonable doubt of the guilt of the defendant. Where there is reasonable doubt, the defendant is entitled to an acquittal.

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INSTRUCTION NO. 3

The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is the proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

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INSTRUCTION NO. 7

It is my responsibility as judge to insure that (1) evidence is presented according to law, (2) to instruct the jury as to the law, and (3) to rule on objections made by the attorneys during the trial.

No statement or ruling I make is intended to indicate any opinion I have concerning the facts of the case. Disregard any expression seeming to indicate such an opinion. You are the exclusive judges of the facts.

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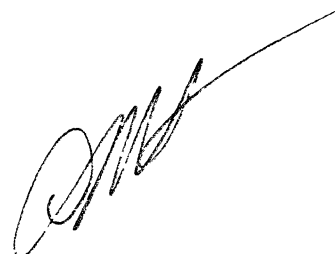
INSTRUCTION NO. 5

At time throughout the trial I rule whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether or not evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, I do not determine what weight should be given such evidence; or pass on the credibility of the witness. You are not to consider evidence offered but not admitted, nor any evidence stricken. Where an objection was sustained, do not speculate about the answer might have been or the reason for the objection.

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INSTRUCTION NO. 6

It is your responsibility as jurors to (1) determine the facts from the evidence, (2) to follow the law as instructed by me, and (3) to reach a verdict based upon the evidence, matters judicially noticed, or stipulations of the parties.

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INSTRUCTION NO. 7

Before you can convict the defendant, LARRY HUTCHINGS, of the offense of Aggravated Burglary as charged in count I of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

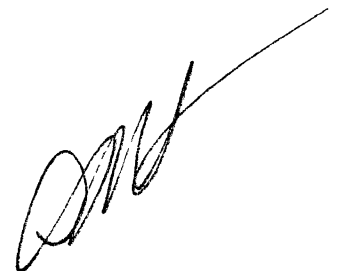
1. That on or about April 6, 2006, in Salt Lake County, Utah, the defendant, LARRY HUTCHINGS;
2. Intentionally or knowingly;
3. Entered or remained unlawfully in the dwelling of Deborah Cuddeback;
4. With the intent to commit an assault on any person; and
5. That in attempting, committing or fleeing from a burglary the defendant caused bodily injury to Deborah Cuddeback, who was not a participant in the crime.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Burglary as charged in count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count I.

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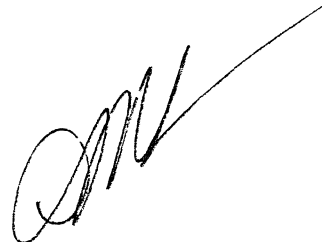
INSTRUCTION NO. 9

“Dwelling” means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

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INSTRUCTION NO. 10

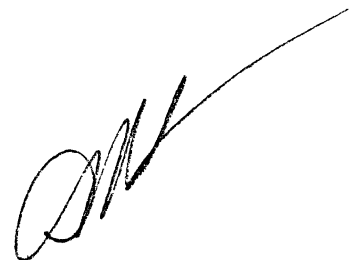
A person “enters or remains unlawfully” in or upon premises when the premises or any portion thereof at the time of the entry or remaining are not open to the public and when the actor is not otherwise licensed or privileged to enter or remain on the premises or such portion thereof.

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INSTRUCTION NO. 11

“Enter” means:

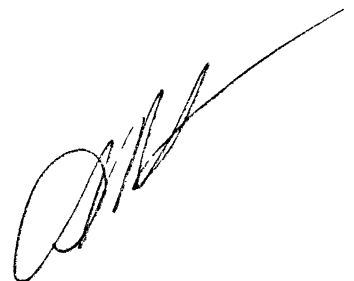
- (a) intrusion of any part of the body; or
- (b) intrusion of any physical object under control of the actor

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INSTRUCTION NO. 12

When a person unlawfully enters a building with the intent to commit an assault on any person, the crime of burglary is committed and successful completion of the intended assault need not be shown.

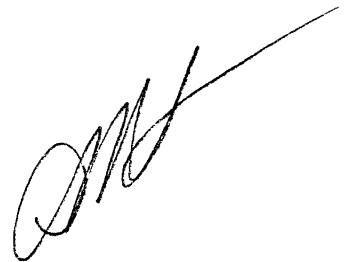
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INSTRUCTION NO. 19

Before you can convict the defendant, LARRY HUTCHINGS, of the crime of Aggravated Assault, as charged in count II of the information, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:

1. That on or about April 6, 2006, in Salt Lake County, Utah, the defendant, LARRY HUTCHINGS;
2. Intentionally or knowingly;
3. Committed an assault on Deborah Cuddeback; and
4. Intentionally caused serious bodily injury to her.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Assault as charged in count II of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count II.

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INSTRUCTION NO. 15

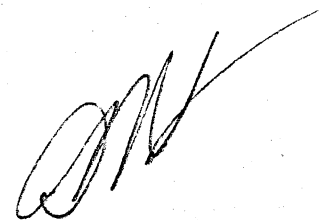
Assault is

- (a) an intentional attempt, with unlawful force or violence, to do bodily injury to another, or
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily to another: or
- (c) an act, committed with unlawful force or violence, that causes bodily injury to another.

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INSTRUCTION NO. 16

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

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INSTRUCTION NO. 18

"Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

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INSTRUCTION NO. 19

Before you can convict the defendant, LARRY HUTCHINGS, of the crime of Criminal Mischief, as charged in count III of the information, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:

1. That on or about April 6, 2006, in Salt Lake County, Utah, the defendant, LARRY HUTCHINGS;
2. Intentionally or knowingly;
3. Damaged, defaced, or destroyed;
4. The property of Deboarah Cuddeback; and
5. That the pecuniary loss was less than \$300.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Criminal Mischief as charged in count III of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count III.

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INSTRUCTION NO. 21

(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2) A person is not justified in using force under the circumstances specified if he or she:

(a) Initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(b) Is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(c) (i) Was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force; and

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(ii) for purposes of Subsection (i) the following do not, by themselves, constitute "combat by agreement":

(A) voluntarily entering into or remaining in an ongoing relationship; or

(B) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(c).

(4) For purposes of this section, a forcible felony includes aggravated assault. Any other felony which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

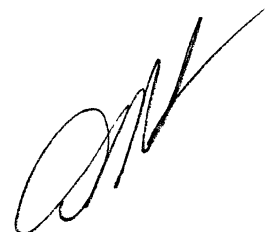
(a) the nature of the danger;

(b) the immediacy of the danger;

(c) the probability that the unlawful force would result in death or serious bodily injury;

(d) the other's prior violent acts or violent propensities;

(e) any patterns of abuse or violence in the parties' relationship.

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INSTRUCTION NO. 22

You are instructed that laws of Utah do not require a defendant to establish self-defense by a preponderance or greater weight of the evidence. The laws of Utah require the defendant to bring forward some evidence which tends to show self-defense. If the defendant has done this, and if such evidence of self-defense when considered in connection with all other evidence in this case raises a reasonable doubt as to the defendant's guilt or if it raises a reason to believe that the defendant acted in self defense you must find him not guilty. The defendant has no particular burden of proof but is entitled to an acquittal if there is any basis in the evidence from either side sufficient to create a reasonable doubt.

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INSTRUCTION NO. 23 .

A separate crime or offense is charged in each count of the information. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

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INSTRUCTION NO. 29

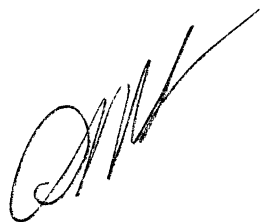
The intent with which an act is done denotes a state of mind and connotes a purpose in so acting. Intent, being a state of mind, is seldom susceptible of proof by direct and positive evidence and may ordinarily be inferred from acts, conduct, statements and circumstances.

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INSTRUCTION NO. 25

Intent and motive should never be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which an act is done or omitted.

Motive is not an element of any offense, and hence need not be proven. The motive of an accused is immaterial except insofar as evidence of motive may aid in your determination of state of mind or intent.

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INSTRUCTION NO. 26

To constitute the crime charged in the information there must be the joint operation of two essential elements: conduct prohibited by law and the appropriate culpable mental state or states with regard to the conduct prohibited by law.

Before a defendant may be found guilty of a crime, the evidence must prove beyond a reasonable doubt that the defendant was prohibited from committing the conduct charged in the information and that the defendant committed such conduct with the culpable mental state required for such offense.

"Conduct" means an act or omission.

"Act" means a voluntary bodily movement and includes speech.


"Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.

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INSTRUCTION NO. 27

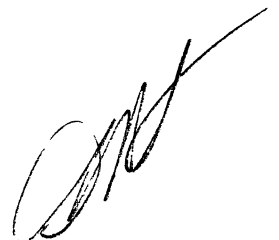
A person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

A person engages in conduct knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

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INSTRUCTION NO. 28

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study, and experience has become an expert in any art, science or profession, and who is called as a witness, may give an opinion as to any such matter in which the witness is qualified as an expert and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such opinion. You should give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if, in your judgment, the reasons given for it are unsound.

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INSTRUCTION NO. 29

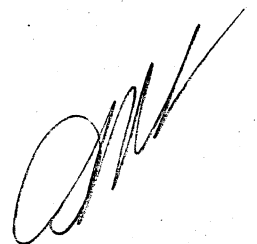
You are the exclusive judges of the credibility of the witnesses and the weight of the evidence. In judging the weight of the testimony and credibility of the witnesses you have a right to take into consideration their bias, their interest in the result of the suit, or any probable motive for their testimony. You may consider the witnesses' deportment upon the witness stand, the reasonableness of their statements, their frankness or candor, or the want of it, their opportunity to know, their ability to understand, and their capacity to remember. You should consider these matters together with all of the other facts and circumstances which you believe have a bearing on the truthfulness or accuracy of the witnesses' statement.

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INSTRUCTION NO. 30

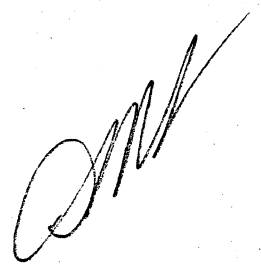
You are instructed that the defendant is a competent witness in his own behalf and his testimony should be received and given the same consideration as you give to that of any witness. The fact that a defendant stands accused of a crime is not evidence of guilt and is no reason for rejecting the testimony. Weigh this testimony the same as you weigh the testimony of any other witness.

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INSTRUCTION NO. 31

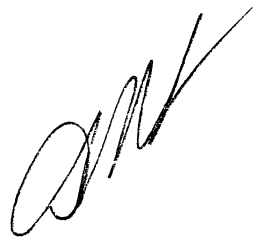
You have heard the testimony of a law enforcement official. The fact that a witness may be employed by the federal, state or local government as a law enforcement official does not mean that testimony is deserving of more or less consideration than that of any other witness.

It is your decision, after reviewing all of the evidence, to give law enforcement testimony, and all other testimony, the weight you find it deserves.

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INSTRUCTION NO. 32

It is the responsibility of the attorneys to present evidence, to examine and cross-examine witnesses, and to argue the evidence. No statement or argument of the attorneys is itself evidence.

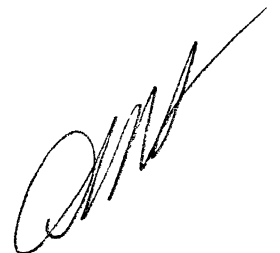
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INSTRUCTION NO. 33

Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, juries lawfully may base their findings, whether favorable to the State or to the defendant, provided, however, that to support a verdict of guilt the evidence, whether of one kind or the other or a combination of both, must carry the convincing quality required by law.

One type of evidence is known as direct and the other as circumstantial. The law makes no distinction between the two classes as to the degree of proof required for conviction or as to their effectiveness in defendant's favor, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

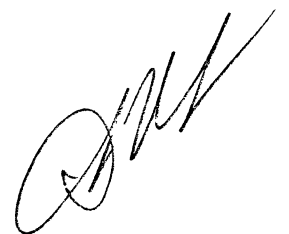
Direct evidence of a person's conduct at any time in question consists of the testimony of every witness who, with any of his own physical senses, perceived such conduct or any part thereof, and which testimony describes or relates what thus was perceived. All other evidence admitted in the trial is circumstantial in relation to such conduct, and, insofar as it shows any act, statement or other conduct, or any circumstance of fact, tending to prove by reasonable inference the innocence or guilty of the defendant, it may be considered by you in arriving at a verdict.

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INSTRUCTION NO. 34

Where there is a conflict in the evidence you should reconcile such conflict as far as you reasonably can. Where the conflict cannot be reconciled, you are the final judges and must determine from the evidence what the facts are. There are no definite rules governing how you shall determine the weight or convincing force of any evidence, or how you shall determine what the facts in this case are. Conscientiously consider all of the testimony, and all of the facts and circumstances, which have a bearing on any issue; then determine what the facts are from that.

You are not bound to believe all that the witnesses have testified to unless such testimony is reasonable and convincing in view of all of the facts and circumstances in evidence. You may believe one witness as against many, or many as against a fewer number in accordance with your honest convictions. The testimony of a witness known to have made false statements on one matter is naturally less convincing on other matters. If you believe a witness has testified falsely as to any material fact in this case, you may disregard the whole of that testimony or give it such weight as you think it entitled.

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INSTRUCTION NO.

35

It is your sworn duty as jurors to follow the law as the Court states it to you, even though you think it is, or ought to be, otherwise.

You should not be governed in your deliberations by sentiment, sympathy, prejudice, or public feeling. You must conscientiously and dispassionately consider and weigh the evidence, apply the law to the case, and reach a just verdict regardless of what the consequences may be.

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INSTRUCTION NO. 36

Do not consider the subject of penalty or punishment in your deliberations. Such issues lie with the Court, and must not in any way affect your decision as to the guilt or innocence of a defendant.

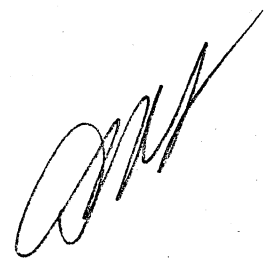
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INSTRUCTION NO. 37

I have endeavored to give you instructions embodying all rules of law necessary to your reaching a verdict. The applicability of some of these instructions will depend upon what you find the facts are. The fact that an instruction is given does not indicate it will always be necessary. If an instruction applies only to a state of facts you find does not exist, disregard the instruction.

Do not single out any certain sentence, individual point or instruction. Consider the instructions as whole and in light of each other.

The order in which the instructions are given has no significance as to their relative importance.

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INSTRUCTION NO. 38

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors. You should not hesitate to change an opinion if convinced that it is erroneous.

However, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

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INSTRUCTION NO. 39

The attitude of jurors at the beginning of deliberations is very important. It is rarely productive for a juror, upon entering the jury room, to emphatically express an opinion on the case or to announce a determination to stand for a certain verdict.

You are not partisans or advocates in this matter. You are judges. The final test of the quality of your service lies in the verdict you return, not in any opinions you hold as you retire. Your sworn obligation is to arrive at a just and proper verdict.

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INSTRUCTION NO. 40

When you retire to deliberate, appoint one of your number as foreperson.

This being a criminal case it requires unanimous concurrence of all the jurors to find a verdict.

Your verdict must be in writing, signed by your foreperson and when found must be returned by you into the Court.

Your verdict in this case must be:

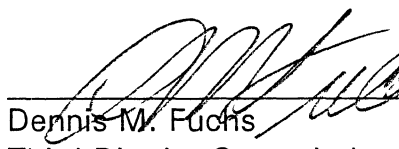
GUILTY, as charged in the information,

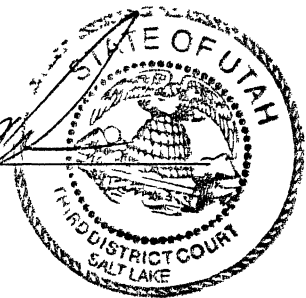
OR

NOT GUILTY, as your deliberations may determine.

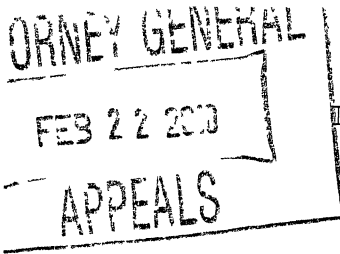
When you have reached a verdict, notify the bailiff that your are ready to report to the Court.

Dated: Sept 5, 2007

  
Dennis M. Fuchs  
Third District Court Judge



## Addendum D



IN THE SUPREME COURT OF THE STATE OF UTAH

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FILED  
UTAH APPELLATE COURT

FEB 18 2010

*med*

State of Utah,

Plaintiff and Respondent,

v.

Case No. 20100024-SC

Larry Lewis Hutchings,

Defendant and Petitioner.

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**ORDER**

This matter is before the court upon a Petition for Writ of Certiorari, filed on January 7, 2010.

IT IS HEREBY ORDERED, pursuant to Rule 51 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issues.

1. Whether the court of appeals erred in affirming the district court's instruction defining intentional conduct in relation to causation of serious bodily injury under Utah Code Ann. § 76-5-103(1)(a).

2. Whether Petitioner's trial counsel was ineffective.

A briefing schedule will be established hereafter.

For The Court:

Dated

2-16-10

Matthew B. Durrant  
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2010, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in the Interdepartmental mail service, or hand delivered to the parties listed below:

LARRY LEWIS HUTCHINGS 68427  
PO BOX 250  
DRAPER UT 84020

RYAN D TENNEY  
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Dated this February 18, 2010.

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Utah Supreme Court Case No. 20100024  
THIRD DISTRICT, SALT LAKE Case No. 061902496  
Court of Appeals Case No. 20080681