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State of Utah v. Jonathan Eric Zaragoza : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. JONATHAN ERIC ZARAGOZA, Defendant/Appellant.	No. 20100749 Appeal from Third Judicial District Court, Honorable Dennis M. Fuchs, District Court No. 091904897

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

Mr. Zaragoza currently is incarcerated in connection with this matter.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES AND RULES

Introduction

This court should reverse Mr. Zaragoza's conviction and remand for a new trial on two grounds: (i) violation of the confrontation clauses and (ii) the refusal to give a lesser-included instruction concerning aggravated kidnapping and aggravated assault.

First, the conviction is based upon inadmissible hearsay statements the admission of which violated Mr. Zaragoza's confrontation rights. The trial court admitted the hearsay on the ground that Mr. Zaragoza forfeited his confrontation rights. In making its forfeiture ruling, the trial court disregarded the fact that Mrs. Zaragoza (the witness whose hearsay was admitted) consulted independent counsel prior to her invoking the spousal privilege not to testify, concluding instead that "[t]he fact that [Mrs. Zaragoza] is unavailable is what is the important point here." (R. 47, 272:102.)

In defending the trial court's ruling, the State suggests the Utah Supreme Court has adopted a minimal standard for wrongdoing, where rights are forfeited based on "pressure, manipulation, and threats." (Resp.Br. 42 (internal quotation marks omitted).) What the State fails to appreciate is that the trial court rejected a legal standard that would have required a finding of pressure, manipulation, and threats, leaving no basis for the State's argument. The State also contends that Mr. Zaragoza cured the confrontation clause violation when he called his wife as a witness. (Id. 34-35.) But the U.S. Supreme Court recently rejected that position, again leaving no basis for the State's argument.

Second, the jury should have been instructed on the relationship between aggravated kidnapping and aggravated assault. The jury heard varying accounts of whether Mrs. Zaragoza was detained for a substantial period of time after the alleged assault. Two witnesses testified that there was no detention. Mrs. Zaragoza testified that

she was never restrained, locked in the room, or threatened if she tried to leave. (R. 251:197-98.) That account is consistent with what she was said to have told Officer Smalley after the incident: "[o]nce [Mr. Zaragoza] had stopped hitting her . . . he left the room." (R. 251:70.) In light of that evidence, the jury had reason to believe that Mr. Zaragoza committed aggravated assault but that his conduct did not satisfy the detention element of aggravated kidnapping. Mr. Zaragoza requested a jury instruction that would have informed the jury of the relationship between those two offenses, but the trial court did not give that instruction. (R. 252:219.)

In response, the State assumes that Mr. Zaragoza advances a merger argument, rather than a lesser-included-offense argument, and therefore responds to a claim that is not at issue. That leaves the merits of the lesser-included-offense argument unopposed.

Otherwise, the State makes little effort to respond to the merits of the issues in the opening brief, instead focusing on preservation, marshaling, and the adequacy of briefing. The court should reject those challenges. As to preservation, the State acknowledges that the instruction Mr. Zaragoza says should have been given was, in fact, the instruction he requested in the trial court. (Resp.Br. 13.) As to marshaling, the trial court never entered any findings of fact that could trigger a marshaling obligation. (R. 156.) As to inadequate briefing, the State contends that the opening brief fails to direct the court to the trial court's forfeiture ruling. (Resp.Br. 37.) But both the opening brief and response brief direct the court to the same oral ruling on forfeiture, which is all there is since the trial court never entered findings of fact or a written order on the forfeiture issue.

In short, this court should decline the State's invitation to avoid the merits of this appeal, merits that are virtually unopposed by the State in the response brief. This court should reverse Mr. Zaragoza's conviction and remand for a new trial.

Argument

This court should reverse for two reasons. First, the trial court refused to instruct the jury on the lesser-included relationship of aggravated kidnapping and aggravated assault. Where two offenses overlap, and the evidence creates a rational basis for the jury to conclude the defendant committed the lesser offense, the court must give an instruction that explains the relationship between the offenses if the defendant requests one. Here, there was overlap because aggravated assault and aggravated kidnapping are identical except that aggravated kidnapping requires detention. And the evidence on detention was sparse, providing the jury a rational basis to convict of aggravated assault only. The State barely addresses that argument, instead asserting the issue was not preserved and that any error was not plain. Because the issue was preserved, this court should reverse.

Second, the trial court erred in concluding that Mr. Zaragoza forfeited his confrontation rights when Mrs. Zaragoza exercised her spousal privilege. A defendant must engage in wrongdoing to forfeit confrontation rights, but Mr. Zaragoza's conduct did not constitute wrongdoing. He spoke with his wife over the telephone to discuss their relationship in light of his case. He informed her of her constitutional privilege not to testify against him. Then, with the assistance of independent counsel, Mrs. Zaragoza elected not to testify. Deeming Mr. Zaragoza's conduct wrongful without finding that he procured Mrs. Zaragoza's absence through "pressure, manipulation, and threats," relaxes the standard for forfeiture beyond what the federal and state constitutions will allow. A

review of the trial court's ruling reveals that the State is simply mistaken that the court found "pressure, manipulation, and threats" in this case, leaving the State's argument without any factual basis. (Resp.Br. 42 (internal quotation marks omitted).)

In this reply, Mr. Zaragoza first will address the jury instruction issue and then will address the trial court's forfeiture ruling and the reasons why Mr. and Mrs. Zaragoza's phone conversations do not constitute wrongdoing sufficient for forfeiture of constitutional rights. Finally, Mr. Zaragoza will address the State's numerous contentions that this court should avoid deciding the merits of his claims.

I. Mr. Zaragoza Was Entitled to a Jury Instruction Explaining the Relationship Between Aggravated Kidnapping and Aggravated Assault in this Case

The trial court should have given Mr. Zaragoza's requested instruction on the relationship between the charges of aggravated kidnapping and aggravated assault. As a matter of due process, a defendant is entitled to a lesser-included-offense instruction, if he requests it and if the evidence at trial and the relationship between the offenses warrants it. State v. Baker, 671 P.2d 152, 157-59 (Utah 1983). The purpose for such an instruction is to permit the jury to convict on "any offense that fits the facts proved at trial, rather than forcing it to elect between the charges the prosecutor chooses to file and an acquittal." State v. Hansen, 734 P.2d 421, 424-25 (Utah 1986) (plurality opinion). The rule reflects the reality that a jury given the all-or-nothing choice between conviction and acquittal is likely to choose conviction where the prosecution has proved some offense, though not the one it charged. Baker, 671 P.2d at 157 ("'To expect a jury to . . . find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment

from the reality of human experience.'" (quoting Beck v. Alabama, 441 U.S. 625, 642 (1980))).[1] If the defendant elects to minimize that risk by instructing the jury that it may choose to convict, not of the charged offense, but of a lesser offense that fits the facts, the court must give the instruction. Id.

A lesser-included-offense instruction must be given when (i) there is "some overlap" in the elements of two crimes and (ii) the evidence provides a rational basis for the jury to acquit on the greater offense and convict of the lesser offense. Id. at 158-59. In Utah, the elements of assault and aggravated kidnapping share the necessary overlap. State v. Brown, 694 P.2d 587, 589-90 (Utah 1984) (per curiam) ("[T]he offenses must be related in some way; there must be some overlap in the definitions of the two crimes, even though they need not meet the totally "included" standard." (emphasis added)).

That standard was satisfied here. Relevant to this case, kidnapping is an unlawful substantial detention of a person against that person's will or a detention exposing the person to risk of bodily injury. Utah Code Ann. § 76-5-301(1). Kidnapping is aggravated under two circumstances related to aggravated assault: where the actor (i) possesses or uses a dangerous weapon; or (ii) acts with intent to inflict bodily injury on . . . the victim. Id. § 76-5-302(1)(a) & -302(1)(b)(iii). Those two aggravators track the State's theories for aggravated assault: (i) assault with a dangerous weapon not

[1] See also Baker, 671 P.2d at 156-57 ("True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged . . . the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction-in this context or any other-precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." (quoting Keeble v. United States, 412 U.S. 205, 212-13 (1973))).

causing serious bodily injury; or (ii) assault causing serious bodily injury. Id. § 76-5-103(1)(a) & -103(2)(b); (R. 178, 183.). Aggravated assault is a lesser-included offense of aggravated kidnapping because aggravated assault, if accompanied by a detention, can support a conviction of aggravated kidnapping. This is more than merely some overlap, which is all that need exist before a jury instruction is required. State v. Spillers, 2005 UT App 283, ¶15, 116 P.3d 985.

As to the detention element, the evidence gave the jurors reason to convict only on aggravated assault. In evaluating the evidence, this court views the facts and inferences in the light most favorable to the defendant. Id. ¶13. Here, a State's witness, Officer Smalley, testified that Mr. Zaragoza left Mrs. Zaragoza alone in the hotel room "[o]nce he had stopped hitting her," at which point "he left the room." (R. 251:70.) When Mr. Zaragoza returned, Mrs. Zaragoza "determined that she did need to call the police and . . . was able to call 911." (Id.) That is consistent with Mrs. Zaragoza's testimony that she was not locked in the room, threatened with harm if she attempted to leave, or physically restrained. (R. 251:197-98.) That testimony gave the jury a rational basis to doubt the detention element and to convict Mr. Zaragoza of aggravated assault instead of aggravated kidnapping. The jury should have been, but was not, instructed that it could convict of aggravated assault as an alternative to aggravated kidnapping.

In its response, the State largely does not address that argument, though the State does argue the error was harmless because the jury was instructed on aggravated assault and kidnapping, even if it was not told that the law permitted it to choose between the two. (Resp.Br. 15.) That reasoning disregards the basis for giving lesser-included-offense instructions: when an inappropriate all-or-nothing choice is given, it is no answer

to say that the jury selected 'all' instead of 'nothing.' Perhaps recognizing as much, the State claims that no special instruction was needed because the jury had an implicit choice between the two offenses. (Id.) In fact, the instructions implied the opposite. They expressly informed the jury that it could choose between two degrees of aggravated assault, but did not provide a similar choice between aggravated assault and aggravated kidnapping.[2] (R. 183.) Rather than informing the jury of the "option of acquitting Defendant of aggravated kidnapping and convicting him only of aggravated assault," the instructions impliedly foreclosed that choice. (Resp.Br. 15.).

The State then responds to a merger argument Mr. Zaragoza does not make in the opening brief. (Id. 15-19.) Offenses merge when, under the facts of the case, the defendant could not possibly have committed the lesser offense separately from also committing the greater offense. State v. Finlayson, 956 P.2d 283, 287-88 (Utah 1998). In those circumstances, only the conviction of the greater offense can be sustained. Id. at 288. Though the doctrines are related such that analysis of one issue bears on the other,[3] jury instructions related to lesser-included offenses should be offered even if the offenses do not merge. State v. Lopez, 2004 UT App 410, ¶9, 103 P.3d 153. Where, as here, two overlapping offenses were sent to the jury, the jury should have been instructed on its

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[2] There was a lesser-included-offense issue with respect to the aggravated assault charges because of the factual issues regarding the extent of Mrs. Zaragoza's injuries.

[3] Both doctrines consider the similarity in the elements of crimes and potential for double punishment. Utah Code Ann. § 76-1-402(3) ("A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense."); State v. Lee, 2006 UT 5, ¶32, 128 P.3d 1179 ("If one conviction is a lesser included offense of another conviction . . . the convictions merge."); Finlayson, 956 P.2d at 287-88 (to determine merger, the court may compare the statutory elements or "consider the evidence to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial").

ability to choose between the offenses if it doubted the State's evidence with respect to the greater charge.

Though Mr. Zaragoza explained in his opening brief that he does not argue merger on appeal, the State nonetheless addresses merger. (Op.Br. 17 & n.5; Resp.Br. 15-19.) In addressing a merger argument that was not made, the State argues that the proposed instruction was properly denied because only the court should decide merger, and only after the verdict. "Otherwise," the State argues, "the court 'would deprive the jury of a legitimate option and create a new danger' in that the jury 'would not have the choice to convict on the [lesser] charge and acquit on the [greater].'" (Resp.Br. 18 (quoting Lopez, 2004 UT App 410, ¶9).)

That argument reinforces the need to send the lesser-included-offense issue to the jury in this case. The case on which the State relies, State v. Lopez, addressed whether a court errs when it rules on merger prior to instructing the jury on the lesser-included relationship between charged offenses. Lopez, 2004 UT App 410, ¶¶1-2. A premature ruling on merger there would have precluded the jury examining the lesser-included relationship between murder and kidnapping because the merger ruling would have resulted in only the murder charge being sent to the jury. Id. ¶9. The Lopez court concluded that merger should be decided after the jury has already returned convictions, to preserve the jury's "choice to convict on the [lesser] charge and acquit on the [greater] charge." Id. That is, even when apparent that two offenses will merge, the court should give a lesser-included instruction to allow the jury to return a verdict on the lesser charge.

That choice is important for the other reasons discussed above: it advances the policy of ensuring that jury verdicts conform to the facts of the case and it avoids the

impermissible risk that a jury presented with the choice between aggravated kidnapping and nothing will choose aggravated kidnapping even if the State has, in fact, proven aggravated assault instead. Hansen, 734 P.2d at 424-25; Baker, 671 P.2d at 156-57. The State's merger argument demonstrates the lesser-included-offense issue should have been sent to the jury. Mr. Zaragoza was deprived of the protections required when lesser-included offenses are at issue and his sentence should, therefore, be reversed. Mr. Zaragoza will next turn to the trial court's erroneous forfeiture ruling.

II. The Trial Court Erred in Concluding That Mr. Zaragoza Forfeited His Confrontation Rights

The trial court's forfeiture ruling does not satisfy constitutional standards. In State v. Poole, 2010 UT 25, ¶17, 232 P.3d 519, the Utah Supreme Court adopted the forfeiture by wrongdoing doctrine. Under that doctrine, a defendant may forfeit his confrontation right if he intentionally procures a witness's absence at trial through "wrongdoing." Id. The court in Poole was faced with a defendant who "'worked in conjunction with his wife' to 'pressure,' 'manipulate,' and 'threaten,'" a witness into refusing to testify against him. Id. ¶6. The State argues that Poole requires this court to uphold the forfeiture ruling because "that case did not involve violence or murder but, rather, 'pressure,' 'manipulat[ion],' and 'threats.'" (Resp.Br. 42 (quoting Poole, 2010 UT 25, ¶6).) If the State's reading of Poole is correct, the trial court did not apply the proper legal standard because it did not find that Mr. Zaragoza used threats, pressure, and manipulation to procure Mrs. Zaragoza's unavailability. Under the State's reading of Poole, the absence of any finding of threats is determinative of the issue here. Further, the State's arguments

regarding Poole do not address the need for a unique forfeiture inquiry where a claim of spousal privilege is asserted.

Beyond arguing that the Poole court opted for a relaxed forfeiture standard, the State also argues that the confrontation clause violation in this case was cured when Mrs. Zaragoza testified as a witness for the defense. As discussed here, that argument is incompatible with United States Supreme Court precedent. Mr. Zaragoza will respond to the State's arguments as follows: (i) the trial court's forfeiture decision does not comport with Poole and does not reflect the role of Utah's constitutional spousal privilege; and (ii) Mrs. Zaragoza's election to testify did not cure the constitutional violation, it shifted to Mr. Zaragoza the burden to produce evidence that should have rested on the State.

A. The Trial Court's Forfeiture Ruling Fails to Satisfy the Standard Established in Poole and Fails to Accommodate the Role of Utah's Constitutional Spousal Testimonial Privilege

Mr. Zaragoza's conduct was not wrongful within the meaning of Poole, especially in light of the spousal privilege at issue in this case. Here, Mr. Zaragoza will first discuss the State's interpretation of Poole and will then address the need for a specialized inquiry when a claim of spousal privilege is at issue.

First, the State argues that Poole would permit a finding of forfeiture had the trial court found pressure, manipulation, and threats. If the State is correct about that, Mr. Zaragoza's conviction should be reversed because the trial court did not find that Mr. Zaragoza threatened Mrs. Zaragoza.[4] Rather, the court employed a legal standard under which it concluded it need not find threats or manipulation. Though the court initially

[4] Counsel for Mr. Zaragoza attempted to call Mrs. Zaragoza during the forfeiture hearing to testify regarding whether she had ever been threatened but the trial court would not permit Mr. Zaragoza to "[have] it both ways." (R. 272:28).

indicated that the State must prove that Mr. Zaragoza engaged in "threatening behavior" or the "wrongful intent to pressure," in order to justify forfeiture, the court later "changed [its] mind." (R. 272:11, 101-02.) The court then applied a standard for wrongdoing that is coextensive with "instances of witness tampering," and concluded that that standard was satisfied. (R. 272:103.) The basis for that conclusion was that, in several phone calls between Mr. and Mrs. Zaragoza, they had discussed their relationship in light of his offense and his upcoming trial. In the court's words, those calls contained "plenty of influence [and] reminders of the past." (Id.) The calls contained "offers" and "withdrawals of forgiveness," indications that "Mr. Zaragoza is changing, that he's trying to change," and "indication of God or a higher power [and] discussion of the relationship." (Id.)

But the court did not find that Mr. Zaragoza threatened or physically harmed Mrs. Zaragoza to keep her away at trial, or secreted her away beyond the State's subpoena power. Instead, based on conversations she had with her husband about their relationship and his upcoming trial, Mrs. Zaragoza consulted independent counsel through whom she invoked her constitutionally protected spousal privilege. (R. 47-52.) Her decision does not make Mr. Zaragoza's conduct wrongful, though that is apparently what the trial court concluded when it stated that "[t]he fact that she is unavailable is what is the important point here." (R. 272:102.)

Notably, the trial court did not find facts to satisfy the State's proposed test because it actually made no findings here. Though the trial court tasked the State with preparing findings of fact and conclusions of law with respect to forfeiture, the State prepared only a summary order, which was never signed. (R. 146, 272:109.) That failure

alone requires reversal, because it demonstrates the trial court's "failure . . . to address the factual questions . . . that were a prerequisite to the admission of [testimony] essential to the conviction." State v. Ramirez, 817 P.2d 774, 788-89 (Utah 1991). Nor can the court's failure be remedied by remanding for findings now. Id. ("To ask the court to address the admissibility question now would be to tempt it to reach a post hoc rationalization for the admission of the pivotal evidence."). Instead, "[t]he only fair way to proceed is to vacate defendant's conviction and remand the matter for retrial." Id.

The State also advocates for a standard even more relaxed than the holding it mines from Poole[5] on the basis that three cases cited therein upheld "a finding of wrongdoing [without] evidence of threats, violence, or murder." (Resp.Br. 42.) The State's position should not be indulged. First, the State quotes Vasquez v. People as stating that "'[c]riminal conduct is not required for forfeiture,'" but that quote is dicta because the wrongdoing at issue in Vasquez was the murder of the State's witness.[6] Vasquez v. People, 173 P.3d 1099, 1104-05 (Colo. 2007) (en banc). The State then relies on Reynolds v. United States, 98 U.S. 145 (1878). As discussed in Mr. Zaragoza's opening brief, that case involved a defendant who actively hid his wife from law enforcement to prevent her from complying with a subpoena, not a claim of privilege or a spouse who obtains independent counsel prior to invoking that privilege. Reynolds, 98

[5] The holding in Poole was that the trial court prematurely made its unavailability determination. Poole, 2010 UT 25, ¶¶2, 28. The court did not impliedly uphold the trial court's forfeiture ruling, as the State suggests, because in light of its holding on unavailability, it did "not need to analyze the [wrongdoing] element[]" of the forfeiture test. Id. ¶28. The Supreme Court purported only to give the trial court "guidance" and "direction," in the event the forfeiture ruling would be revisited on remand. Id. ¶¶2, 21.

[6] The State quotes from Vasquez: "'wrongdoing is implicit in the procuring of the witness's absence.'" (Resp.Br. 42 (quoting Vasquez, 173 P.3d at 1104).) Counsel has been unable to find that language in any case cited in Poole.

U.S. at 148-50. Finally, the State relies on Commonwealth v. Edwards, 830 N.E.2d 158 (Mass. 2005). But the court in that case expressly disclaimed any suggestion that "informing a witness of the right to remain silent, guaranteed by the Fifth Amendment to the United States Constitution, will be sufficient to constitute forfeiture." Id. at 171 n.23. That disclaimer carries greater force with respect to a claim of spousal privilege because the union meant to be protected by the spousal privilege has, as one of its members, the defendant whose confrontation rights are subject to forfeiture. The Poole court's citation to those cases does not show that that court would uphold a finding of wrongdoing in the circumstances presented here.

Second, the circumstances presented here are also unique by virtue of the role of the spousal privilege. The State misapprehends Mr. Zaragoza's argument regarding the spousal privilege. Mr. Zaragoza has argued that although the privilege not to testify rests with the witness spouse, the defendant who discusses that privilege with the witness spouse should not be deemed to have engaged in wrongdoing. For instance, in light of the federal common law spousal privilege, the United States Supreme Court has held that a defendant who successfully persuades his spouse to invoke privilege has not met the "corrupt persuasion" element of the federal witness tampering statute. Arthur Andersen LLP v. U.S., 544 U.S. 696, 703-04 (2005); United States. v. Doss, 630 F.3d 1181, 1189-90 (9th Cir. 2011); see also Edwards, 830 N.E.2d at 171 n.23. The State asserts that some federal courts have left open the possibility that a defendant who coerces his spouse into invoking privilege might be guilty of witness tampering. (Resp. Br. 41 & n.2.) But the State cites no case holding that a defendant forfeits his confrontation clause rights by discussing his case with his spouse in light of a constitutional spousal privilege. Instead,

rather than responding to Mr. Zaragoza's arguments regarding spousal privilege, the State argues that the privilege did not require exclusion of recorded phone calls during the forfeiture hearing. (Resp.Br. 43-50.)

The State's arguments—focused as they are on whether the phone calls should have been played at the forfeiture hearing—do not address the constitutional nature of the spousal privilege and the confrontation clause. Nor do the State's arguments address the role of a constitutional privilege in relation to the forfeiture doctrine. The purpose behind the doctrine is to "strike[] an appropriate balance between protecting the integrity of the criminal process . . . and the right [to cross-examination] guaranteed by article I, section 12 of the Utah Constitution." Poole, 2010 UT 25, ¶20. The confrontation clause guarantees that a defendant may not be convicted without the opportunity to cross-examine those giving testimonial statements against him. Crawford v. Washington, 541 U.S. 36, 68 (2004). The spousal privilege prohibits the State from compelling one spouse to testify against the other. State v. Timmerman, 2009 UT 58, ¶20, 218 P.3d 590. In both instances, the framers of the Utah Constitution elevated certain individual rights above the State's interest. Further, the purpose of the spousal privilege "is to foster the harmony and sanctity of the marriage relationship"—a purpose that cannot be fulfilled if spouses may not discuss whether the privilege should be invoked. Id. (internal quotation marks omitted). When the court makes an "'essentially equitable'" forfeiture determination, it should accommodate the role of the spousal privilege—and the need for discussions about that privilege—in balancing the competing interests at hand. See Poole, 2010 UT 25, ¶10 (quoting Crawford, 541 U.S. at 62). The court may not do what

the trial court did here: conclude that "offers of forgiveness" and "reminders of the past," were wrongful because they led to Mrs. Zaragoza exercising her privilege. (R. 272:103.)

Because the State misapprehends Mr. Zaragoza's arguments, its brief contains no arguments responsive to Mr. Zaragoza's arguments related to the spousal privilege. The trial court's forfeiture ruling deemed Mr. Zaragoza's conduct wrongful without adequate consideration for the role of that privilege.

B. Mrs. Zaragoza's Decision to Testify After the Confrontation Clause Violation Was Complete Did Not Cure That Violation

The trial court's error in admitting Mrs. Zaragoza's out-of-court statements was not cured by Mrs. Zaragoza testifying. The right to cross-examine a witness cannot be distorted to place on the defendant the burden to call a witness to avoid a constitutional violation. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2540 (2009), is instructive. There, the court concluded that a defendant's confrontation rights are violated when a state introduces certificates of analysis as evidence to show that a substance the defendant possessed was examined and found to contain an illicit substance. Id. at 2530. The state argued that, even if the certificates attested to by a non-testifying witness constituted testimonial hearsay, the defendant's confrontation rights were not violated because the defendant could have called the attesting analysts to the stand. Id. at 2540. The court rejected the state's attempt to "[c]onvert[] the prosecution's duty under the Confrontation Clause into the defendant's privilege," because it would "shift[] the consequences of adverse-witness no-shows from the State to the accused." Id. The court stated "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." Id. (emphasis added).

Here, the forfeiture ruling violated Mr. Zaragoza's confrontation clause rights by permitting the State to rely on out-of-court testimonial statements instead of requiring it to produce the testifying witness against Mr. Zaragoza. Consistent with Melendez-Diaz, that violation was not cured when Mrs. Zaragoza took the witness stand to mitigate the harmful effects of the court's forfeiture ruling. United States v. Ruffin, 575 F.3d 346, 358-59 (10th Cir. 1978) (the court must "ponder[] all that happened without stripping the erroneous action from the whole" (internal quotation marks omitted)).

Further, even if Mrs. Zaragoza's trial testimony cured the constitutional violation, her decision to testify did not retroactively make admissible the State's hearsay evidence. Mr. Zaragoza was entitled to a trial free from inadmissible hearsay. West Valley City v. Hutto, 2000 UT App 188, ¶25, 5 P.3d 1. The statements attributed to Mrs. Zaragoza by the State's witnesses were hearsay because they are out-of-court statements offered to prove the truth of the matter asserted. Utah R. Evid. 801. Yet the trial court foreclosed any hearsay objection, by concluding that Mr. Zaragoza forfeited the right to any hearsay objections along with his confrontation clause rights. (R. 272:105.) Because the trial court collapsed the two inquiries, its forfeiture ruling was also an evidentiary error that pervaded the whole trial. State v. Byrd, 967 A.2d 285, 297-98 (N.J. 2009) (absent controlling evidentiary rule, defendant who forfeits confrontation right does not forfeit hearsay objections); Vasquez, 173 P.3d at 1106 ("The fact that the defendant has forfeited his confrontation rights . . . does not render the evidence reliable"). And the statements were not admissible under any hearsay exception.[7] Under rule 801(d)(1), for a

[7] Due to the forfeiture ruling, the State did not have to justify the admissibility of the hearsay. That was harmful error. Mrs. Zaragoza's statements to officers regarding what happened in the hotel room were not present sense impressions or excited utterances, as

witness's prior inconsistent statements to be admissible, the defendant must "testif[y] at the trial," something Mrs. Zaragoza would not have done. The trial court's evidentiary error was not cured by Mrs. Zaragoza's testifying.

III. This Court is Not Barred From Reaching Mr. Zaragoza's Claims

The court should reach the merits of Mr. Zaragoza's claims. As mentioned at the outset of this brief, the State proposes various reasons why this court should not decide the issues before it. The State argues that both the jury instruction claim and the spousal privilege arguments are unpreserved, even though the State acknowledges the jury instruction was proposed below and the trial court considered and rejected the privilege arguments in making its forfeiture ruling. Then, as to the confrontation clause claim, the State argues that the court should decline to review the trial court's decision because Mr. Zaragoza failed to marshal the evidence supporting the trial court's findings, even though the court entered no findings of fact. Finally, the State argues that Mr. Zaragoza failed to brief his confrontation clause claim adequately, finding fault in Mr. Zaragoza citing to the same portions of the record on which the State relies. Here, Mr. Zaragoza will show that

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the events in question had already concluded by the time officers arrived. Utah R. Evid. 803(1) to 803(2). Nor were they statements regarding then existing mental, emotional, or physical conditions, as "statement[s] of memory . . . offered to prove the fact remembered" are expressly excluded from that exception. Utah R. Evid. 803(3). The statements to police officers were not "for purposes of medical diagnosis or treatment," nor were they limited to "describing medical history." Utah R. Evid. 803(4). Nor were Mrs. Zaragoza's statements "records," "learned treatises," "statements in documents," "judgments," or statements of "reputation." Utah R. Evid. 803(5) to 803(23). Finally, even though Mrs. Zaragoza was unavailable under rule 804, the statements do not satisfy the exceptions for "former testimony," because the statements were not made at a prior proceeding under oath, were not a "statement under belief of impending death," a "statement against interest," or a "statement of personal or family history." Utah R. Evid. 804(b). Nor, given the inconsistencies among the statements attributed to Mrs. Zaragoza, could they be said to exhibit independent guarantees of trustworthiness, such that the residual hearsay exception applies. Utah R. Evid. 807.

this court can, and should, resolve the merits of this dispute because: (i) his claims are preserved; (ii) the marshaling requirement does not apply here; and (iii) Mr. Zaragoza's brief adequately directed this court to the record and relevant legal authority.

A. Mr. Zaragoza's Claims Are Preserved

Mr. Zaragoza's jury instruction claim and his arguments regarding the spousal privilege are preserved. A party preserves an issue by raising an error "to a level of consciousness" sufficient to give the trial court "an adequate opportunity to address it." State v. Worwood, 2007 UT 47, ¶16, 164 P.3d 397 (internal quotation marks omitted). The preservation requirement is founded on two policies: requiring that issues be raised below (i) gives the trial court the opportunity to address and correct errors, and (ii) prevents a defendant from strategically foregoing an objection, "and then, if that strategy fails, . . . claim[ing] on appeal that the Court should reverse." State v. Holgate, 2000 UT 74, ¶11, 10 P.3d 346 (internal quotation marks omitted)). Here, Mr. Zaragoza will separately address preservation of the jury instruction claim and the spousal privilege arguments.

1. Mr. Zaragoza Preserved His Jury Instruction Claim By Proposing the Instruction He Claims Should Have Been Given

Mr. Zaragoza preserved the jury instruction issue by proposing an instruction that would have explained to the jury the lesser-included relationship between aggravated kidnapping and aggravated assault. Proposing precisely the instruction that Mr. Zaragoza argues on appeal should have been given gave the trial court an opportunity to address that issue, which the trial court did. (R. 252:219.) Mr. Zaragoza did not strategically forego an objection to enhance his odds at trial.

The State implies that Mr. Zaragoza did not preserve his lesser-included-offense argument because the proposed instruction does not contain the words 'lesser-included.' That argument does not account for the other language of the instruction or the sequence of events below. Although trial counsel argued merger, the trial court rejected that argument, concluding these offenses can never merge because "there is no detention that is necessarily incidental to the crime of aggravated assault." (R. 252:218.) Trial counsel then made clear that he was proposing a jury instruction in response to "the Court's ruling that the case is not appropriately merged." (R. 252:219.) That is the context for trial counsel's proposal to instruct the jury that it could not "find the defendant guilty of both a kidnapping charge and an assault charge unless [the jury] find[s] beyond a reasonable doubt that any detention . . . was independent of and not merely incidental to any assault of Ms. Zaragoza." (Id.) And through that language, the proposed instruction raises the central issue with respect to lesser-included offenses—whether the prosecution proved all the elements of the greater crime or only a less severe alternative.

The State assumes its preservation challenge will be successful, and so argues in the context of plain error that Mr. Zaragoza has not shown the jury instruction error was obvious, which is not the standard because the issue was preserved. The State claims that the opening brief "provides no analysis of the relevant statutes to support" the proposition that there is overlap between the crimes of aggravated kidnapping and aggravated assault. (Resp.Br. 14.) The State also contends that Mr. Zaragoza did not show that the evidence gave the jury a rational basis for acquitting of the kidnapping charge and convicting of the assault charge. (Resp.Br. 14.) The State is incorrect because the discussion above—explaining how the testimony of Officer Smalley and Mrs. Zaragoza provided a rational

basis for convicting of only the aggravated assault charge—was set forth on pages 11-12 and 18-19 of Mr. Zaragoza's opening brief. Mr. Zaragoza also showed that the element of substantial detention separates the offenses and that, to convict, the jury was required to find "that Mrs. Zaragoza was detained substantially longer than necessary to commit the assault." (Op.Br. 17.) Mr. Zaragoza also cited to controlling precedent, State v. Brown, 694 P.2d 587, 589-90 (Utah 1984), establishing that aggravated kidnapping and assault have the overlap in elements that supports instructing the jury on the relationship between the two offenses. (Op.Br. 15.) Were the court to reach the issue in the context of plain error—which is unnecessary because the issue is preserved[8]—the failure to follow controlling precedent is a sufficiently obvious error to warrant reversal.

2. Mr. Zaragoza Preserved His Arguments Regarding the Spousal Privilege By Raising Them During the Forfeiture Hearing

With respect to how the spousal privilege impacts the forfeiture analysis, the issue is preserved because trial counsel raised the argument and the trial court expressly considered the issue in making its forfeiture ruling. Early in the forfeiture hearing, trial counsel stated "I think the Court's hit it on the head, and I think that there's a reason for espousal [sic] privilege. It's a different relationship than a relationship with any, any other person. . . . And society has a certain interest in maintaining the relationship between man and wife." (R. 272:12-13.) Trial counsel later argued that "the whole reason for the marital privilege is to preserve marriages." (R. 272:28.) Those statements brought the issue to the trial court's attention and gave the court a chance to consider Mr.

[8] Though unnecessary, this court reserves the right to reach an issue under the plain error doctrine, if "proper disposition" of the case requires it, regardless of how or when it is raised. Romrell v. Zions First Nat. Bank, N.A., 611 P.2d 392, 395 (Utah 1980).

Zaragoza's arguments. And the court did consider the privilege arguments, stating that "in a situation like this where the . . . spouse has invoked the marital privilege, the whole purpose—and we talked a lot about this . . . is to protect the marital institution." (R. 272:103-04.); State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991) (even where counsel does not raise an issue, the trial court's reaching the issue sua sponte preserves the issue for review). The State is aware that the trial court considered the spousal privilege arguments in deciding the forfeiture issue—the State cites this discussion in its brief. (Resp.Br. 33.) Mr. Zaragoza preserved his spousal privilege arguments.

B. The Marshaling Requirement Does Not Apply Here Because The District Court Made No Findings

Mr. Zaragoza has no duty to marshal the evidence because there are no factual findings to challenge or to marshal evidence to support. In addition, under Poole, forfeiture rulings are questions of law: "the district court's decision to admit testimony that may implicate the confrontation clause is . . . a question of law reviewed for correctness." Poole, 2010 UT 25, ¶8. The State does not address the legal nature of Mr. Zaragoza's confrontation clause claim, asserting instead that "no standard of review applies." (Resp.Br. 2.) Even if there were findings of fact here, the marshaling requirement would not impact this court's ability to address whether the trial court applied the proper legal standard—i.e., finding the pressure, manipulation, and threats that would support a finding of wrongdoing.

Moreover, there are no fact findings with respect to the forfeiture ruling.[9] (R. 156.) Even if the State were correct that Mr. Zaragoza had a duty to marshal evidence,

[9] Nor would the failure to marshal be a bar to this court's considering the issue. This court always retains discretion to determine if the trial court's decision has adequate

the consequence would be for this court to "accept the trial court's findings of fact as valid" and then "review the trial court's ultimate legal conclusions." Kimball v. Kimball, 2009 UT App 233, ¶22, 217 P.3d 733. But there are no findings for this court to accept. As discussed, the court never signed the summary order prepared by the State, which order only indicates that "by a preponderance of the evidence [the court finds] that the Defendant engaged in witness tampering [that procured] the unavailability of Christine Zaragoza . . . . As a result, the Defendant has forfeited his right to confront [her]." (R. 156.) The question at hand is whether the legal standard applied by the trial court satisfies the constitutional requirements articulated in Poole.

To the extent that answering that question requires reference to findings of fact, the trial court's failure to enter such findings is itself grounds for reversal. Ramirez, 817 P.2d at 789. The State is correct when it states that "the forfeiture doctrine 'requires a case-specific and careful analysis of the specific acts of the defendant.'" (Resp.Br. 38 (quoting Poole, 2010 UT 25, ¶25).) Though the State suggests that quote demonstrates a need to marshal, the quote is directed to district courts and the evidentiary standard they should apply when extinguishing confrontation rights. Poole, 2010 UT 25, ¶¶22-26. In that passage, the court also cautioned against what apparently occurred here: concluding "that a defendant's right to confrontation is easily forfeited" and "summarily dispos[ing]" of a "weighty matter." Id. ¶25. The marshaling requirement does not apply here, and is certainly not a bar to this court reaching the merits.

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factual support. Martinez v. Media-Paymaster Plus, 2007 UT 42, ¶20, 164 P.3d 384.

C. Mr. Zaragoza Adequately Briefed His Claims

Mr. Zaragoza's opening brief is not inadequate. A brief is adequate under rule 24(a)(9), "where the 'brief as a whole [is] supported by the record and the [appellant makes] good faith arguments that [are] adequately supported by case law.'" Cabaness v. Thomas, 2010 UT 23, ¶21, 232 P.3d 486 (quoting Carrier v. Salt Lake County, 2004 UT 98, ¶19, 104 P.3d 1208). Mr. Zaragoza's opening brief satisfies that standard. There he discusses the conclusion reached by the trial court—i.e., Mr. Zaragoza forfeited his confrontation rights through phone calls to his wife, which the court concluded constituted witness tampering. (Op.Br. 3-5, 31.) To provide this court with meaningful analysis in the relative absence of Utah jurisprudence, Mr. Zaragoza contrasts that reasoning with the reasoning employed by courts considering forfeiture issues in other jurisdictions and with the standards set forth in Poole. (Id. 13-14, 20-29). That analysis addresses what sort of conduct traditionally has been held to constitute wrongdoing and how the trial court's result conflicts with the historical application of the doctrine and the standards articulated in Poole. (Id.) In setting forth that analysis, Mr. Zaragoza directs this court, with citation, to relevant cases, the forfeiture hearing transcript, and other portions of the record on which he relies. (Id.) That briefing is adequate.

The State's arguments regarding inadequacy focus on two alleged shortcomings. First, the State contends that Mr. Zaragoza "fail[ed] to identify the test the [trial] court applied or the full breadth of the court's ruling." (Resp.Br. 37.) To the contrary, Mr. Zaragoza's opening brief directs the court to the trial court's oral ruling on forfeiture. (Op.Br. 4-5.) Notably, the State's response brief directs the court to the same oral ruling

to identify the test the trial court applied. (Resp.Br. 33.)[10] That similarity is unsurprising since no written order expounds on that oral ruling. Mr. Zaragoza directed this court to the substance of the trial court ruling by citing to the same portions of the record on which the State relies. (Op.Br. 3-5.)[11]

Second, the State claims that Mr. Zaragoza's argument "rests entirely on conclusory statements for which he provides no record support." (Resp.Br. 38.) But the statements the State identifies are from the introductory paragraphs of Mr. Zaragoza's forfeiture discussion or the conclusion of a subsection. (Op.Br. 21-22, 32.) Between the introduction and the conclusion are pages of analysis, supported by citation, that the State does not acknowledge. (Id. 30-32.) The opening brief is adequate, and the State provides no reason for disregarding the substance of Mr. Zaragoza's appeal.

Finally, the State suggests that this court need not address Mr. Zaragoza's claim regarding the standard the trial court employed because the court employed a higher standard. (Resp.Br. 41.) The State quotes from the first few moments of the forfeiture hearing, where the trial court indicated that it would not find forfeiture unless the State "present[ed] evidence 'other than the suggestion' by Defendant that Christine 'do

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[10] The State invites the court to compare page four of the opening brief with section II.A. of the State's response. (Resp.Br. 37.) But section II.A of the State's response contains no reference to the court's ruling. The State apparently meant to refer to its section II.B.

[11] Consider the State's invitation to compare its brief with Mr. Zaragoza's opening brief to contrast the quality. (Resp.Br. 37.) In section II.B of its brief, the State directs the court to the very same passages referred to or quoted in Mr. Zaragoza's opening brief, including the oral ruling explaining why the trial court found wrongdoing. (Compare Resp.Br. 33 with Op.Br. 4-5.) The State also quotes the trial court's conclusions regarding the spousal privilege, referenced on page 30 of Mr. Zaragoza's opening brief. As to that reference, Mr. Zaragoza cited to a case the trial court quoted in issuing its ruling, instead of the page from the hearing transcript, R. 272:104, the same page from which the State quotes and which is cited elsewhere in the opening brief. (Op.Br. 3-5.)

something that she is legally entitled to do,'" and required proof of "'emotional manipulation,' or 'a discussion between the two of them, an understanding, a recognition that her invoking the privilege is going to render the State's case null.'" (Id. (quoting R. 272:16-17, 37).)

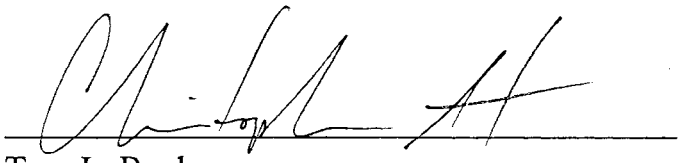
Those preliminary statements do not reflect the standard the trial court actually applied. Though the trial court initially indicated that it would apply a strict forfeiture standard, it later returned from a short recess and announced that "[w]hen we started this hearing, I indicated that it was my understanding . . . [that] Ms. Zaragoza's decision to invoke the marital privilege must have been wrongfully brought to bear by Mr. Zaragoza." (R. 272:100-02.) The court then stated "I have changed my mind to the extent that I don't believe that . . . the State has to prove that the wrongful intent to pressure, to bribe, to encourage Ms. Zaragoza not to testify is linked to her indication of the marital privilege." (Id. (emphasis added).) The court then concluded, "[t]he fact that she is unavailable is what is the important point here." (Id.) As Mr. Zaragoza argued in his opening brief, the trial court conflated wrongdoing and intended unavailability, even unavailability resulting from exercising a constitutional privilege. (Op.Br. 23-24.) Mr. Zaragoza's brief was not inadequate. It raised and adequately addressed issues that this court should now resolve.

Conclusion

For the foregoing reasons, Mr. Zaragoza respectfully requests that the court reverse Mr. Zaragoza's conviction and remand for a new trial.

DATED this 27 day of February, 2012.

ZIMMERMAN JONES BOOHER LLC



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CERTIFICATE OF SERVICE

This is to certify that on the 27 day of February, 2012, two true and correct copies of the foregoing Reply Brief of Appellant were sent via U.S. Mail, postage prepaid, to the following:

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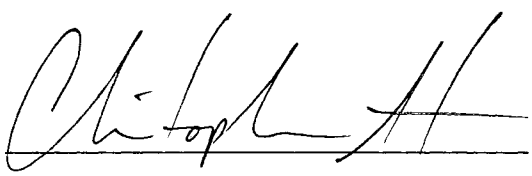

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