2010

State of Utah v. Leonel Garcia-Vargas, Jr. : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
LEONEL GARCIA-VARGAS, JR.,	:	Case No. 20100996-CA Appellant is incarcerated.
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for one count of Robbery, a second degree felony, in violation of Utah Code section 76-6-301, one count of Aggravated Robbery, a first degree felony, in violation of Utah Code section 76-6-302, and one count of Possession of Burglary Tools, a Class B Misdemeanor, in violation of Utah Code section 76-6-205, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Ann Boyden, presiding.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for one count of Robbery, a second degree felony, in violation of Utah Code section 76-6-301, one count of Aggravated Robbery, a first degree felony, in violation of Utah Code section 76-6-302, and one count of Possession of Burglary Tools, a Class B Misdemeanor, in violation of Utah Code section 76-6-205, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Ann Boyden, presiding. See Addendum A (Sentence, Judgment, Commitment). This case was transferred from the Utah Supreme Court to this Court. This Court has jurisdiction pursuant to Utah Code section 78A-4-103(2)(j).

ISSUE AND STANDARD OF REVIEW

Issue: Whether the trial court erred when it denied Mr. Vargas Garcia's request for jury instructions related to the lesser offenses of theft, assault, and two variants of aggravated assault (serious bodily injury and dangerous weapon) against both victims,

which Mr. Vargas Garcia claims are included in the charged offenses of aggravated robbery. Crucial to this inquiry is whether the trial court erred when it reasoned that force Mr. Vargas Garcia admitted to using merged with a theft to which he also admitted to create robbery.

Standard of Review: "Whether a jury instruction on a lesser included offense is appropriate presents a question of law." State v. Spillers, 2007 UT 13, ¶ 10, 152 P.3d 315 (citing State v. Hamilton, 827 P.2d 232, 238 (Utah 1992)). When this Court considers "whether a defendant is entitled to a lesser included offense jury instruction," it "'view[s] the evidence and the inferences that can be drawn from it in the light most favorable to the defense.'" Id. (quoting State v. Crick, 675 P.2d 527, 539 (Utah 1983)). "In addition, when the defense requests a jury instruction on a lesser included offense, the requirements for inclusion of the instruction 'should be liberally construed.'" Id. (quoting State v. Hansen, 734 P.2d 421, 424 (Utah 1986)).

Preservation: This issue was preserved when defense counsel requested jury instructions related to the lesser-included offenses of theft, aggravated assault (both serious-bodily-injury and dangerous-weapon variants), and assault. R. 48–53, 144:6–19. But even if it had not been preserved, this issue can also be reviewed for plain error. See State v. Holgate, 2000 UT 74, ¶ 13, 10 P.3d 346.

STATUTORY PROVISIONS AND RULES

The following provisions are relevant to the issue on appeal. Their text is provided in full in Addendum B.

Utah Code Ann. § 76-1-402 (2008).

Utah Code Ann. § 76-1-601 (2008).

Utah Code Ann. § 76-2-202 (2008).

Utah Code Ann. § 76-5-102 (2008).

Utah Code Ann. § 76-5-103 (2008).

Utah Code Ann. § 76-6-205 (2008).

Utah Code Ann. § 76-6-301 (2008).

Utah Code Ann. § 76-6-302 (2008).

Utah Code Ann. § 76-6-404 (2008).

STATEMENT OF THE CASE

An information was filed on October 29, 2009, that charged Mr. Vargas Garcia with two counts of Aggravated Robbery, first degree felonies, in violation of Utah Code section 76-6-302, two counts of Aggravated Assault, one a second degree felony for allegedly inflicting serious bodily injury, and one a third degree felony for allegedly using a dangerous weapon, in violation of Utah Code section 76-5-103, and Unlawful Possession of Burglary Tools, a class B misdemeanor in violation of Utah Code section 76-6-205. R. 1–4.

The State filed an amended information on September 13, 2010, and, with a stipulation by defense counsel, amended the information again on September 21, 2010. R. 28–31, 37–39. The most recent amended information retained the original information's two Aggravated Robbery charges and Possession of Burglary Tools charge, but removed

the Aggravated Assault charges because the State felt "they would have merged [with the Aggravated Robbery charges] if a conviction were to occur." R. 37–39, 143:3.

A jury trial was held on the second amended information's charges on September 21 and 22, 2010. See R. 143–44. During the trial, defense counsel requested that the court instruct the jury on the elements of several lesser offenses defense counsel maintained were included in the aggravated robbery charges against each victim, including robbery, theft, aggravated assault (both serious-bodily-injury and dangerous-weapon variants), and assault. R. 48–53, 144:6–19 (the requested instructions are attached as Addendum C). Defense counsel also asked the trial court to provide the jury with a self-defense instruction. R. 52, 144:7. The trial court agreed to give the lesser included instruction on robbery, but denied Mr. Vargas Garcia's request for instructions on theft, assault, and aggravated assault. R. 144:52–53. When the trial court denied the assault instructions, Mr. Vargas Garcia withdrew his request for a self-defense instruction. R. 52, 144:66.

The jury found Mr. Vargas Garcia guilty of one count of Aggravated Robbery, one count of Robbery, and one count of Unlawful Possession of Burglary Tools. R. 123–24. On November 8, 2010, the trial court sentenced Mr. Vargas Garcia to an indeterminate term of one to fifteen years for his Robbery conviction, and an indeterminate term of five years to life for his Aggravated Robbery conviction. R. 130–31.

On December 1, 2010, Mr. Vargas Garcia filed a timely notice of appeal. R. 132. The Utah Supreme Court transferred the case to this Court. R. 140–41. This appeal follows.

STATEMENT OF FACTS

Mr. Vargas Garcia's version of the facts, as presented to the jury through the testimony of Detective Carr, the detective who interviewed Mr. Vargas Garcia after his arrest, is as follows: Mr. Vargas Garcia was at his girlfriend's house where he met someone named "Freakin' Freddy." R. 144:24–25. Mr. Vargas Garcia was a regular methamphetamine user and Freakin' Freddy provided Mr. Vargas Garcia with methamphetamine, which they used together. R. 144:25. The next morning, Freakin' Freddy asked Mr. Vargas Garcia if he would like to get some more methamphetamine, but Mr. Vargas Garcia didn't have much money. R. 144:25–26, 38. Freakin' Freddy told Mr. Vargas Garcia that he could obtain more meth from a source of his and Mr. Vargas Garcia agreed to go with Freakin' Freddy to procure the meth. R. 144:38. When they arrived at the source's house, they knocked on the front door, but there was no answer, so they went around to the back of the house. R. 144:26, 39. Here, a "Mexican in red" appeared in a window and gestured for them to come in through the garage door in the back. R. 144:39. While in the garage and out of sight of the house's inhabitants, Mr. Vargas Garcia saw two cell phones and, intending to steal them, put them in his backpack. R. 144:40. Still intent on having Freakin' Freddy make a drug deal with the sources, Mr. Vargas Garcia followed Freakin' Freddy into the house. R. 144:40–41.

But then, to Mr. Vargas Garcia's surprise, Freakin' Freddy freaked out and began ransacking the place and asking where the drugs were. R. 144:28–29, 41. Mr. Vargas Garcia didn't know what to do. R. 144:42. Freakin' Freddy told Mr. Vargas Garcia to

"watch the Mexican in red," who was on the floor because Freakin' Freddy had already hit him. R. 144:29–30. The man in red began to get up and Mr. Vargas Garcia turned downstairs and alerted Freakin' Freddy to this fact. R. 144:30. The man in red then hit Mr. Vargas Garcia in the back and Mr. Vargas Garcia turned around and punched the man in the face. R. 144:30–31. Mr. Vargas Garcia then went downstairs where he saw Freakin' Freddy throw a dumbbell at a "Mexican in orange." R. 144:31. Freakin' Freddy then continued to assault the man in orange. R. 144:31. Mr. Vargas Garcia noticed an open cell phone and feared that the police might have been called, so he told Freakin' Freddy that they needed to get out of there and he tossed the cell phone at the man in orange. R. 144:31–32, 43–44. Seeing people he thought were of Mexican descent in front, Mr. Vargas Garcia ran out the back door and climbed some fences to get away. R. 144:44. He was soon apprehended by the police. R. 144:46. At this time, he had three cell phones in his possession—his own cell phone that didn't function and the two cell phones he had stolen from the garage. R. 144:32.

The people in the house told the story differently. Gabriel Tellez, the man in red, said that he was in bed watching television when Mr. Vargas Garcia and Freakin' Freddy entered his bedroom. R. 143:119–20. He said he had never seen either of them before. R. 143:120. He said that Mr. Vargas Garcia threatened him with a knife and demanded money. R. 143:120–21. Freakin' Freddy had a screwdriver. R. 143:126. When he replied that he didn't have anything, he said that Mr. Vargas Garcia hit him in the jaw with his fist, causing him to lose consciousness. R. 143:121–22. When he regained consciousness,

he couldn't see because he had a bedspread covering him. R. 143:122–23. When he took it off, he could tell that the place had been ransacked. R. 143:123. He tried to get up, but Mr. Vargas Garcia and Freakin' Freddy came back and asked for money. R. 143:123. When he responded that he didn't have any, he said that Mr. Vargas Garcia hit him again with his hand in the face. R. 143:124. Freakin' Freddy threw a nightstand and hit him. R. 143:125. Mr. Tellez did not see Mr. Vargas Garcia or Freakin' Freddy leave, but noticed that two cell phones were missing, as well as some of his brother's gold and money. R. 143:127–28, 137.

On cross-examination, defense counsel pointed out that in his initial statement to the police, Mr. Tellez had not mentioned that his assailants had used a knife. R. 143:131. Mr. Tellez also stated that the back door to their house looked like it had been lifted and it had some marks. R. 143:136.

Ruben Sanchez, the man in orange, stated that he was watching television and organizing his clothes when Mr. Vargas Garcia came in alone, holding a knife. R. 143:147–48. Mr. Sanchez claimed Mr. Vargas Garcia threatened him with the knife, demanded money and a phone from his dresser. R. 143:148–49. Mr. Sanchez said Mr. Vargas Garcia hit him with his fist, searched his dresser drawers, and hit him with a nine-inch-long steel tool. R. 143:149–50. He claimed this instrument was left on the carpet in his room. R. 143:170. Then Mr. Sanchez claimed that Freakin' Freddy came in and that he and Mr. Vargas Garcia started hitting him. R. 143:150–51. Freakin' Freddy got a dumbbell from the other room and threw it at him. R. 143:152–53. It hit and dislocated

his shoulder, after which Freakin' Freddy went upstairs. R. 143:153–54. Mr. Sanchez testified that Mr. Vargas Garcia told him to get on the ground or things would get worse. R. 143:154. Mr. Sanchez stated that Mr. Vargas Garcia then went upstairs and Mr. Sanchez followed him, without Mr. Vargas Garcia noticing. R. 143:155. Mr. Sanchez said that Freakin' Freddy took around $450 and a camera, and that Mr. Vargas Garcia took a cell phone, a translator, and some other money. R. 143:159–62. He said they both had backpacks and were putting things in them. R. 143:164. He also said that someone had stolen $2,000 from one of his housemates named Raul. R. 143:170. Mr. Tellez and Mr. Sanchez both denied being drug dealers. R. 143:113, 156–57. Mr. Tellez testified that his shoulder no longer functions as it did before, that he can't lift things, and that he lost his job as a result. R. 143:155–56.

On cross-examination, defense counsel pointed out that Mr. Sanchez had not written that one of the assailants had a knife in his original statement to the police. R. 143:168. Mr. Sanchez explained that the reason he did not write all of the details was because he did not have room on the sheet of paper he was provided to tell the whole story, and he didn't ask for another. R. 143:171–72.

Several police officers testified. One officer testified that Mr. Vargas Garcia arrived at the scene in a patrol car and a victim pointed at him, identifying him, and that Mr. Vargas Garcia appeared to be shouting and making faces from inside the car. R. 143:179. He testified that when he went into the victims' house, the house appeared ransacked. R. 143:179. He saw blood downstairs on the floor and on a bed. R. 143:180.

Another officer likewise testified that the upstairs had been ransacked and that there was blood on the stairs' railing and downstairs. R. 143:184–85. While the upstairs appeared ransacked, the downstairs appeared untouched. R. 143:194. They did not find any items of evidentiary value in the house. R. 143:185–86. Specifically, they did not find a bloody, nine-inch-long tool on the floor downstairs. R. 143:193.

About three feet away from the back door to the garage, officers found a backpack with an Overstock.com logo on it. R. 143:187, 191. Inside that backpack was another smaller backpack. R. 143:188. Mr. Vargas Garcia admitted that he had worked at Overstock.com, but denied that either of the backpacks were his and said that the smaller backpack belonged to Freakin' Freddy. R. 144:33–34. The smaller backpack contained three screwdrivers, a pair of pliers, and a pair of gloves. R. 143:190. None of these tools had blood on them. R. 143:195. The larger backpack also contained two cell phones, an English-to-Spanish translator, a knife, a pair of underpants, and a baby's diaper. R. 143:191. Mr. Vargas Garcia admitted the knife was his, but denied having any weapons in his hands during the course of his encounter with Mr. Tellez and Mr. Sanchez. R. 144:34, 36–37. The bags did not contain money, jewelry, or a camera. R. 143:192–93. Additionally, the officer found an orange soda can near the fence he was told the suspects had jumped over that matched a six pack of orange soda found in the garage, but found no other items that matched those alleged stolen from the house. R. 143:195–96.

Finally, the officer that apprehended Mr. Vargas Garcia, approximately two minutes after being called and less than a block from the house where the incident

occurred, testified that he was in possession of a paint can opener and keys that, based on the officer's training and experience, looked like they had been modified for use as burglary tools. R. 143:198–203; State's Ex. 20 (large overhead photograph of neighborhood). None of the officers reported any indication of forcible entry.

After hearing all of these facts, the trial court addressed jury instructions Mr. Vargas Garcia had requested earlier regarding the lesser-included offenses of robbery, theft, assault, and aggravated assault, as well as a self-defense instruction. R. 48–53, 144:52–53 (attached as Addendum C). The trial court granted Mr. Vargas Garcia's request that the jury be instructed as to the elements of robbery, but denied his request that the jury hear instructions on the elements of theft, aggravated assault, and assault. R. 48–53, 144:52–53. The court made the following ruling:

> I am denying the defendant's motion to give the additional [instruction] of theft and assault. The reason I am doing that is because the parties have agreed that under the theor[ies] of robbery that are available by law, those two elements merge and that there is not a separate offense of theft or a separate offense of assault under the theory of robbery. Robbery can be committed as the State has argued by the combination of a theft combined with force or fear; or in the course of committing a theft, and I do find that the elements do not sufficiently overlap according to the Baker standard with respect to being able to give separate offenses, that the testimony that has come in, the defendant's admissions to . . . Detective Carr . . . , that he did take those cell phones, that he entered the home with the intent of getting dope there and that he took the cell phones and that force was used, simply do not provide a rational basis for finding independent offenses of theft and/or assaultive behavior. That, in fact, those are the elements of robbery; they are naturally merged together and that under the evidence that came in through the Detective Carr of the defendant's

> statements, there simply is not a rational basis for separating them into individual offenses. And because I am ruling on that on the aggravated assault, I am continuing that same ruling and not giving the requested lesser included instructions as to assault with substantial bodily injury or simple assault with bodily injury that is being requested by the defense as well. R. 144:53–54.

When the trial court denied the assault instructions, Mr. Vargas Garcia withdrew his request for a self-defense instruction. R. 52, 144:66. The jury was instructed on the elements of aggravated robbery, R. 99, and robbery, R. 100, and received a party liability instruction. R. 109. The jury convicted Mr. Vargas Garcia of aggravated robbery against Mr. Sanchez, robbery against Mr. Tellez, and possession of burglary tools. R. 144:136.

SUMMARY OF THE ARGUMENT

Mr. Vargas Garcia argues that the district court erred when it denied his request that the jury be instructed on the lesser-included offenses of theft, assault, and aggravated assault (both dangerous-weapon and serious-bodily-injury variants), and that this Court should reverse his convictions for aggravated robbery and robbery. Specifically, Mr. Vargas Garcia argues that, under the facts of this case, theft, assault, and both variants of aggravated assault are included in the charged offense of aggravated robbery and that there was a rational basis for convicting him of the lesser offenses but acquitting him of aggravated robbery. To this end, Mr. Vargas Garcia argues that the trial court erred when it ruled that a theft admitted to by Mr. Vargas Garcia necessarily merged with his later admitted use of force to constitute robbery.

ARGUMENT

I. THIS COURT SHOULD REVERSE MR. VARGAS GARCIA'S CONVICTIONS FOR AGGRAVATED ROBBERY AND ROBBERY AND REMAND SO THAT HE MAY RECEIVE JURY INSTRUCTIONS ON THE LESSER-INCLUDED OFFENSES OF THEFT, ASSAULT, AND TWO VARIANTS OF AGGRAVATED ASSAULT.

The trial court committed reversible error when it denied Mr. Vargas Garcia's request to instruct the jury on the elements of the lesser-included offenses of theft, assault, and aggravated assault because Mr. Vargas Garcia was entitled to those instructions under the Utah and U.S. constitutions and under section 76-1-402 of the Utah Code. "'[I]t is now beyond dispute that [a] defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" State v. Baker, 671 P.2d 152, 158 (Utah 1983) (quoting Keeble v. United States, 412 U.S. 205, 208 (1973)). And under Utah law, to determine whether a defendant is entitled to a lesser-included-offense instruction, this Court engages in an evidence-based "two-pronged analysis [hereinafter, the "Baker analysis"] that mirrors the statutory framework set out in [the Utah Code]." State v. Kruger, 2000 UT 60, ¶ 12, 6 P.3d 1116. If each of the elements of the analysis is met, the defendant is entitled to a jury instruction. Id. ¶ 15.

In the first prong of the analysis, the court must determine whether the claimed lesser offense is "included" in the charged offense—that is, whether it fits one of the definitions of "included" provided in section 76-1-402 of the Utah Code. Id. ¶ 12. In this case, the relevant statutory definition provides that an offense is included if "[i]t is

established by proof of the same or less than all the facts required to establish the commission of the offense charged." Utah Code Ann. § 76-1-402(3)(a) (2008). The elements of the lesser offense do not need to be completely contained within the charged offense; rather the two offenses are related under this prong if "'some of their statutory elements overlap, and the evidence at the trial of the greater offense involves proof of some or all of those overlapping elements.'" State v. Piansiaksone, 954 P.2d 861, 869 (Utah 1998) (quoting Baker, 671 P.2d at 159).

In the second prong of the analysis, the court must determine whether the evidence offered provides "'a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.'" Kruger, 2000 UT 60, ¶ 13 (quoting Utah Code Ann. § 76-1-402(4)); see also Baker, 671 P.2d at 159. In making this rational basis determination, a trial court may not weigh the credibility of the evidence, and must instead determine "whether there is 'a sufficient quantum of evidence' to send this issue to the jury." Kruger, 2000 UT 60, ¶ 14 (quoting Baker, 671 P.2d at 159). The trial court must "'view the evidence and the inferences that can be drawn from it in the light most favorable to the defense.'" Id. (quoting State v. Crick, 675 P.2d 527, 532 (Utah 1983)). "[W]hen the evidence is ambiguous and therefore susceptible to alternative interpretations, and one alternative would permit acquittal of the greater offense and conviction of the lesser, a jury question exists and the court must give a lesser included offense instruction at the request of the defendant." Baker, 671 P.2d at 159. Even the self-serving testimony of a defendant can provide a rational basis for a jury to acquit of an

offense. See State v. Crick, 675 P.2d 527, 533 (Utah 1983) ("Defendant's testimony obviously provided a basis upon which the jury could have acquitted them of second degree murder.").

Because each of the claimed lesser offenses on which Mr. Vargas Garcia requested jury instructions and the facts surrounding them satisfy the two elements of this analysis, Mr. Vargas Garcia was entitled to instructions on these offenses. In this case, Mr. Vargas Garcia was charged with two counts of Aggravated Robbery, one count each for Mr. Tellez and Mr. Sanchez. R. 37–38. Mr. Vargas Garcia requested instructions on the following lesser offenses included in the aggravated robbery charges: robbery, which the trial court granted; and theft, aggravated assault involving serious bodily injury, aggravated assault involving a dangerous weapon, and assault, all of which the trial court denied. R. 50–51, 144:53–54; Addendum C. The analysis below first addresses (A) the requested theft instruction and then addresses (B) the requested assault-related instructions. It shows that each of these lesser offenses have elements that overlap with the charged aggravated robbery offenses that can be proved by the same evidence and that when the evidence is viewed in the light most favorable to Mr. Vargas Garcia, there is a rational basis for believing he was guilty of the lesser offenses, but not guilty of the charged offenses. Thus, Mr. Vargas Garcia was entitled to each of the requested instructions and this Court should reverse.

A. Mr. Vargas Garcia Was Entitled to a Lesser-Included-Offense Instruction for the Crime of Theft Because Theft Is Included in Aggravated Robbery and There Is a Rational Basis to Believe Mr. Vargas Garcia Is Guilty of Theft, But Not Aggravated Robbery.

Theft is included in aggravated robbery, and when the evidence is viewed in the light most favorable to Mr. Vargas Garcia, there is a rational basis to believe that Mr. Vargas Garcia committed theft, but did not commit aggravated robbery; thus, the two Baker elements are satisfied and Mr. Vargas Garcia is entitled to an instruction on theft. Each of these elements is addressed in turn below.

1. The Lesser Offense of Theft Is Included in Each Aggravated Robbery Charge.

First, theft is included in aggravated robbery, the offense with which Mr. Vargas Garcia was charged, because "[i]t is established by proof of the same or less than all the facts required to establish the commission of" aggravated robbery. Utah Code Ann. § 76-1-402(3)(a). Aggravated robbery is defined in Utah by statute. Its elements are as follows:

> (1) A person commits aggravated robbery if in the course of committing robbery, he:
> (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;
> (b) causes serious bodily injury upon another; or
> (c) takes or attempts to take an operable motor vehicle.
> (2) Aggravated robbery is a first degree felony.
> (3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Utah Code Ann. § 76-6-302 (2008) (emphasis added). Aggravated robbery explicitly includes the elements of robbery, which means that the facts adduced at trial must

necessarily prove the elements of robbery before a defendant may be convicted of aggravated robbery. Robbery is also defined by statute in Utah:

> (1) A person commits robbery if:
> (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or
> (b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.
> (2) An act is considered to be "in the course of committing a theft or wrongful appropriation" if it occurs:
> (a) in the course of an attempt to commit theft or wrongful appropriation;
> (b) in the commission of theft or wrongful appropriation; or
> (c) in the immediate flight after the attempt or commission.
> (3) Robbery is a felony of the second degree.

Utah Code Ann. § 76-6-301 (2008) (emphasis added). This statute offers two paths to a conviction for robbery: first, a defendant may be found guilty for taking personal property from the person or immediate presence of another by force or fear; or second, a defendant may be convicted for using force or the fear of force "in the course of committing a theft or wrongful appropriation." Id. (emphasis added). Thus, the entire crime of theft is explicitly incorporated as an element of the second type of robbery. And since theft is committed when a person "obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof," Utah Code Ann. § 76-6-404 (2008), theft also almost certainly occurs under the first prong of robbery, as well, when a defendant

takes the property of another with a purpose to deprive the person permanently or temporarily thereof.

Thus, under almost any set of facts, theft "is established by proof of the same or less than all the facts required to establish the commission of" aggravated robbery and, per statute and Utah case law, is included in the charged offense. Utah Code Ann. § 76-1-402(3)(a); see also Kruger, 2000 UT 60, ¶ 12. Looking to the facts of this case, theft could definitely be established by proof of the same or less facts than might be used to prove Mr. Vargas Garcia guilty of aggravated robbery. Mr. Vargas Garcia freely admitted to taking cell phones from the victims with the intent to deprive them thereof, and so, by his own admission, he is guilty of theft against each victim. R. 144:40. The proof of an additional element of the use of force in the commission of this theft or in flight from the theft would establish robbery. See Utah Code Ann. § 76-6-301. Robbery could also be established if additional facts showed that the items stolen were taken forcibly from Mr. Tellez and Mr. Sanchez. See id. If additional facts showed that a dangerous weapon had been used or serious bodily injury had been caused, the facts would constitute aggravated robbery. See Utah Code Ann. § 76-6-302(1)(a). Mr. Tellez and Mr. Sanchez have each testified to facts that a jury could find elevate Mr. Vargas Garcia's lesser offense of theft to the more serious offense of aggravated robbery, while Mr. Vargas Garcia disputes the allegations. R. 143:119–28, 147–57; 144:24–44. Since conflicting evidence was offered on each of these additional elements at trial, under the facts of this case, theft could be proved by the same or fewer facts than the charged offenses of aggravated robbery—

namely that Mr. Vargas Garcia stole cell phones. Thus, theft is included in those offenses and the first element of the Baker analysis is satisfied. See Utah Code Ann. § 76-1-402 (3)(a); Kruger, 2000 UT 60, ¶ 12.

2. *There Is a Rational Basis for Convicting Mr. Vargas Garcia of Theft Against Each Victim, But Acquitting Him of Each Aggravated Robbery Charge.*

And so the only remaining question under the Baker analysis is whether, viewing all evidence in the light most favorable to Mr. Vargas Garcia, there is a rational basis for convicting him of theft and not of aggravated robbery. See Kruger, 2000 UT 60, ¶¶ 13–14. This rational basis exists because, under Mr. Vargas Garcia's version of the facts, any force he used after he committed theft was not used in the course of committing the theft and thus does not constitute robbery under section 76-6-301 of the Utah Code. The trial court denied Mr. Vargas Garcia's request for jury instructions on theft and assault because, it reasoned, under the theory that robbery occurs when force is used "in the course of committing a theft," Mr. Vargas Garcia had admitted to committing robbery by admitting to both theft and the use of force at some time after the theft had occurred. R. 144:53–54. Based on this broad interpretation of the phrase "in the course of committing a theft," the trial court reasoned that the two crimes merged and there was no rational basis for the jury to believe he had not committed robbery.

But section 76-6-301's use of the phrase "in the course of committing a theft" cannot be read as broadly as the trial court's interpretation. Specifically, as the discussion below will illustrate, if a thief is to be found guilty of robbery for force used "in the commission of a theft" or "in the immediate flight after the attempt or commission," the

force must be used in a manner causally related to the theft—either to retain possession of the property, resist apprehension, facilitate escape, etc.—and that is not why Mr. Vargas Garcia claims he used force. Whether the trial court correctly concluded that Mr. Vargas Garcia's admission to theft and the use of force at some point after the theft constitutes an admission to robbery under section 76-6-301 is a question of statutory interpretation that this court reviews for correctness. See State v. Johnson, 2007 UT App 392, ¶ 5, 174 P.3d 654 (citing State v. Graham, 2006 UT 43, ¶ 16 n.7, 143 P.3d 268).

This Court's "primary objective when interpreting statutes is to give effect to the legislature's intent." State v. Harker, 2010 UT 56, ¶ 12, 240 P.3d 780 (internal quotation marks omitted). This means first looking "to the statute's plain language[,] . . . presum[ing] that the legislature used each word advisedly[,] and read[ing] each term according to its ordinary and accepted meaning." Id. (internal quotation marks omitted). Here, the statute's plain language indicates that robbery occurs when force is used in "an attempt to commit theft or wrongful appropriation," Utah Code Ann. § 76-6-301(2)(a), or "in the commission of theft or wrongful appropriation," Utah Code Ann. § 76-6-301(2)(b), or "in the immediate flight after the attempt or commission," Utah Code Ann. § 76-6-301(2)(c).

Based on this plain language, any force Mr. Vargas Garcia admitted to using in his interview with the detective was not used "in the course of committing a theft." Certainly, Mr. Sanchez and Mr. Tellez told very different stories than the one told by Mr. Vargas Garcia. But the trial court's duty was to "'view the evidence and the inferences that can

be drawn from it in the light most favorable to the defense.'" Kruger, 2000 UT 60, ¶ 14 (quoting State v. Crick, 675 P.2d 527, 532 (Utah 1983)). Thus, a correct analysis must examine the facts in the light most favorable to Mr. Vargas Garcia. As Mr. Vargas Garcia told the detective who interviewed him, the primary purpose of his visit to Mr. Tellez and Mr. Sanchez's house was to pick up methamphetamine, as he believed them to be drug dealers with connections to Freakin' Freddy. R. 144:38–39. After being gestured in by Mr. Tellez, Mr. Vargas Garcia committed a theft of opportunity by pocketing cell phones in the garage, out of sight of the phone's owners. R. 144:39–40. Under Utah law, the theft was complete the moment he took the phones without the owners' authorization with the intent to deprive them thereof. See State v. Eagle, 611 P.2d 1211, 1213 (Utah 1980) ("Theft occurs when one obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." (citing Utah Code Ann. § 76-6-404)).

After he had stolen the phones, he followed Freakin' Freddy into the house so that he could proceed with the drug deal he thought Freakin' Freddy had set up. See R. 144:40. But then, to his surprise, Freakin' Freddy did not initiate a drug deal and instead began to assault Mr. Tellez, asking him where the drugs were. R. 144:41. At one point, Freakin' Freddy hit Mr. Tellez so hard that Mr. Tellez ended up on the ground. R. 144:41–42. Mr. Vargas Garcia did not know what to do. See R. 144:42. Freakin' Freddy ordered him to watch the man on the ground while he went downstairs. R. 144:42. Mr. Tellez began to get up and Mr. Vargas Garcia went downstairs to alert Freakin' Freddy to this fact. R. 144:42. But then, Mr. Tellez hit Mr. Vargas Garcia in the back, and Mr.

Vargas Garcia retaliated by punching Mr. Tellez in the face. R. 144:42–43. Mr. Vargas Garcia then went downstairs and saw Freakin' Freddy throwing a dumbbell at Mr. Sanchez. R. 144:43. Seeing an open cell phone, Mr. Vargas Garcia suspected the police might have been called, so he threw the cell phone at Mr. Sanchez and told Freakin' Freddy that they had to get out of there. R. 144:43. Mr. Vargas Garcia left the house and was apprehended with the two cell phones he had taken from the garage. R. 144:32, 46. At no point in his interview with the detective did Mr. Vargas Garcia indicate that Mr. Tellez or Mr. Sanchez were aware that he had stolen the phones.

When the facts are viewed in the light most favorable to Mr. Vargas Garcia—that is, when discrepancies between his statement to the detective and the testimonies of Mr. Tellez and Mr. Sanchez are resolved in favor of Mr. Vargas Garcia's version of events—he certainly committed the crime of theft the moment he pocketed the cell phones in the garage. See Utah Code Ann. § 76-6-404; Eagle, 611 P.2d at 1213. But he did not commit robbery under the plain language of any of the subsections of section 301. Subsection 2(a) does not apply, because Mr. Vargas Garcia did not attempt to commit theft; he did commit theft. And by the time Mr. Vargas Garcia entered the house, he had already committed theft, so any force he used, by subsection (2)(b)'s plain language, was no longer being used "in the commission of theft," as that phrase is ordinarily understood in common usage and under Utah law, since the theft had already been accomplished in the garage by the time Mr. Vargas Garcia used force in the house, and the force was not used to maintain possession of the stolen phones since neither Mr. Sanchez nor Mr. Tellez

knew the phones had been stolen. Nor was it used "in the immediate flight" from the theft, as described in subsection (2)(c), because Mr. Vargas Garcia was not fleeing at the time he used force, but was responding to violence started by Freakin' Freddy and continued by Mr. Tellez. Thus, viewing the facts in the light most favorable to Mr. Vargas Garcia, force was not used in any of the three situations that comprise the definition of "in the course of committing a theft" contained in section 301. Utah Code Ann. § 76-6-301. Therefore, there is a rational basis for a jury to find that Mr. Vargas Garcia committed theft, but not aggravated robbery, so he was entitled to his requested lesser-included instruction under section 301's plain language.

But even if there is some ambiguity to the phrase "in the course of committing a theft," and it can be read more broadly than the plain language indicates, it cannot be read as broadly as the trial court read it—that is, as an unrelated use of force at some point recently after a theft has occurred. When a statute's meaning cannot be discerned by its plain language, this Court may look to legislative history, case law, sister state law, and relevant policy considerations to aid its interpretation. Arbogast Family Trust v. River Crossings, LLC, 2010 UT 40, ¶ 19, 238 P.3d 1035; American Bush v. City of South Salt Lake, 2006 UT 40, ¶ 87, 140 P.3d 1235; State v. Ostler, 2001 UT 68, ¶ 7, 31 P.3d 528. Each of these other sources support interpreting section 301's "in the course of committing a theft" language to mean only force used in a manner causally related to the theft—to retain possession of stolen property, resist apprehension, or facilitate escape, etc.—and not any force used at some point recently after a theft has been committed.

In fact, this Court has already examined the Legislature's adoption of the "in the course of committing a theft" language in its 1996 case, State in re D.B., 925 P.2d 178, 181–82 (Utah Ct. App. 1996). There, this Court explained that the adoption of this language into the Utah Code in 1995, which closely mirrors similar language in the Model Penal Code, means "that force need not be exerted at the beginning of the theft to qualify as a robbery; force need only be exerted at sometime during the entire course of the transaction. This definition of robbery is known as the 'transactional' approach to robbery." In re D.B., 925 P.2d at 181–82; compare Utah Code Ann. § 76-6-301 (Supp. 1996) with Model Penal Code § 222.1 (1981) ("A person is guilty of robbery if, in the course of committing a theft, he . . . threatens another with or purposely puts him in fear of immediate serious bodily injury . . . . An act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit theft or in flight after the attempt or commission."). This Court held that this is the view of robbery the Legislature intended to codify when it amended the robbery statute in 1995, citing a statement by Representative Patricia Larsen during the bill's floor debates that "made clear the amendment was an attempt to clarify Utah's law on robbery as covering a broad transactional approach." In re D.B., 925 P.2d at 182 n.5 (citing Tape of Utah House Floor Debates, 51st Legislature, General Session (March 1, 1995) (Statement of Rep. Patricia Larsen)).

Looking at the entirety of Representative Larsen's statement examined by this Court in In re D.B., the contours of the transactional approach to robbery become even clearer:

> Substitute House Bill #37 makes a technical change in the definition of robbery. Under current law, robbery covers only the taking of property by force or fear, and not enough cases where force or fear is used to actually maintain the possession of stolen property. I'll give you a little example . . . . A suspect walks into a minimart and shoplifts a six pack of beer by concealing it under his coat, and on the way out of the store, a store employee comes to stop the suspect and recover the beer. The suspect threatens the employee, hits him, and flees with the beer. Now, in the example, the taking of the beer has actually occurred without force or fear. And the suspect could be charged with the theft without ever having left the store under Utah case law. However, the suspect's maintaining the possession of the thus stolen beer was accomplished by means of force and fear. And this conduct should be treated in the same manner as a person who initially takes the property by force or fear. Now there are some courts that have ruled that this is a robbery, but other courts have ruled that no robbery has occurred and have instead charged the suspect with two misdemeanors—theft and assault. This legislation makes it clear that if one steals or attempts to steal property by using force or fear, he is actually guilty of robbery and not simple misdemeanor offenses. Robbery is a very confrontational crime and should be treated as such. Either case should be classified as a robbery and it's more of a crime against a person than a crime against the property. This piece of legislation attempts to address the violent offenders.

Tape of Utah House Floor Debates, 51st Legislature, General Session (March 1, 1995) (Statement of Rep. Patricia Larsen) (emphases added), available at http://le.utah.gov/asp/audio/index.asp?Sess=1995GS&Day=0&Bill=HB0037&House=H.

Representative Larsen's statement shows that the amendment to the robbery statute was

meant to expand punishment to the kind of confrontational behavior used when a person "steals or attempts to steal property by using force or fear." Id. When one is willing to use force to effect a theft, it makes little difference if that force is used initially to obtain the property, or later to maintain possession of the property—both are confrontational acts viewed by our Legislature as moral equivalents to "be treated in the same manner." Id.

What is not equivalent is theft followed by the use of force brought on by some other intervening event when the thief has not even been confronted about the stolen property. This violence cannot be said to be part of the same transaction. It is completely unrelated to the theft and is not equivalent to someone using force to obtain or maintain wrongful possession of another's property, as in Representative Larsen's example. It is not "steal[ing] property by using force or fear" and thus is not part of the transaction. Since in this case, Mr. Vargas Garcia claims to have only used force in reaction to a melee started by Freakin' Freddy, under Representative Larsen's explanation of the statute, Mr. Vargas Garcia's force was not used to maintain possession of the stolen property or to effect the theft, and thus was not used in the course of committing a theft. Indeed, since Messrs. Tellez and Sanchez were allegedly unaware of Mr. Vargas Garcia's theft, it cannot be said that force or fear were used to steal the property, which is the criminal action Representative Larsen stated the amendment was designed to address. Thus, section 301's legislative history weighs in favor of categorizing Mr. Vargas Garcia's description of his actions as theft but not robbery.

In addition to addressing section 301's legislative history in In re D.B., this Court also examined similar law from other jurisdictions. In defining the transactional approach to robbery, which this Court held applied in the robbery statute both before and after the 1995 amendment, this Court relied on reasoning from State v. Handburgh, a case from Washington that set forth the policy behind the transactional approach. In re D.B., 925 P.2d at 181 & n.4–5 (citing 830 P.2d 641, 644–45 (Wash. 1992)) (holding that the amended version of the statute merely clarified the Legislature's intent that Utah use the transactional approach). In that case, the Washington court had to decide whether a robbery had occurred when the defendant stole a girl's bicycle outside of the girl's presence, but then threw rocks at her and punched her when she tried to retrieve it—that is, the court had to determine if a robbery occurs not only when force is used during a theft, but also when force is used immediately after a theft to retain the stolen goods. Handburgh, 830 P.2d at 641–42. The court held that such facts do constitute robbery under Washington's statute, which uses language "similar to the Model Penal Code" and Utah's current robbery statute. See id. at 645.

Quoting the same language from Model Penal Code commentaries that this Court did in In re D.B., the court explained that the primary reason for allowing a conviction of robbery for using force in the course of, or in flight from, a theft (as Utah's robbery statute allows) is that """"the thief's willingness to use force against those who would restrain him in flight suggests that he would have employed force to effect the theft had the need arisen."""" In re D.B., 925 P.2d at 182 n.4 (emphasis added) (quoting

Handburgh, 830 P.2d at 645 (quoting W. LaFave & A. Scott, Criminal Law § 8.11, at 786 (2d ed. 1986) (quoting 2 American Law Institute, Model Penal Code & Commentaries § 222.1, at 104 (Official Draft & Rev. Comments, 1980)))). Thus, the Supreme Court of Washington reasoned, "it is sufficient to sustain a robbery conviction if force is used to retain possession of the property, resist apprehension, or facilitate escape." Handburgh, 830 P.2d at 645 (emphasis added). It concluded, "the force necessary to support a robbery conviction need not be used in the initial acquisition of the property. Rather, the retention, via force against the property owner, of property initially taken peaceably or outside the presence of the property owner, is robbery." Id. (emphasis added). Of crucial import to the issue in this case is the way the Washington court limits robbery under the transactional approach to situations where force is used to help "effect [a] theft [if] the need arise[s]," such as when force is used to retain possession of stolen property, resist apprehension, or facilitate escape. Id. Such an approach demands that a court look to the context in which force is used, not just its timing.

And the Washington court is not alone in its approach. Handburgh cites a litany of cases from states that have adopted the transactional approach, all supportive of the position that the context in which force is used matters to a crime's characterization as robbery. See Williams v. Commonwealth, 639 S.W.2d 786, 788 (Ky. Ct. App. 1982) (considering "the time, place and circumstances surrounding a theft" to find robbery where a thief used a knife to dissuade pursuit by a store employee who saw him steal clothes (emphasis added)), overruled by Hobson v. Commonwealth, 306 S.W.3d 478,

482–83 (Ky. 2010) (holding that force can only elevate theft to robbery if used with intent to accomplish theft); Winborne v. State, 455 A.2d 357, 359 (Del.1982) (holding that a robbery occurred where a car thief strangled a victim "to prevent or overcome her resistance to the theft of the automobile" (emphasis added)); State v. Mirault, 457 A.2d 455 (N.J. 1983) (finding an assault took place "in the course of committing a theft" because the assault and the theft were "closely connected in point of time, place, and causal connection and are integral parts of one continuous transaction" (emphases added)); People v. Anderson, 414 P.2d 366, 369 (Cal. 1966) (finding robbery occurred where defendant used "force or fear in removing, or attempting to remove, the property from the owner's immediate presence" (emphasis added)); People v. Kennedy, 294 N.E.2d 788, 790 (1973) (finding robbery where force was used "to complete the taking of the money from the possession and custody of its custodian, and was a means used to accomplish such taking" (emphasis added)); Patterson v. Sheriff, 562 P.2d 1134, 1135 (Nev. 1977) (holding that the use of force "to prevent an immediate retaking" of a stolen purse constitutes robbery (emphasis added)); Lightner v. State, 535 S.W.2d 176, 178 (Tex. Crim. App. 1976) (finding robbery where the defendant "injured [a] police officer in an effort to maintain control of the stolen property while in immediate flight from the theft" (emphasis added)).

Defining and limiting robbery, as the Washington court did and these other courts have done, to the use of force for very specific purposes causally related to accomplishing a theft—such as retaining stolen property, avoiding apprehension, or facilitating escape—

is beneficial for three reasons. First, it effectively addresses Representative Larsen's concern that a thief's willingness to use force or fear to steal property ought to be punished the same regardless of when the force occurs. But second, limiting the use of force to specific situations related to the theft ensures that only thieves who are willing to use force or fear to effect a theft are punished as robbers. If some intervening event unrelated to a theft occurs that the thief feels necessitates a forceful response, the force the thief then uses is not evidence of the thief's willingness or intent to use force to effect the theft (Representative Larsen's concern), it is rather evidence of the thief's intent to use force to respond to the intervening event. Thus, the Washington court's limitations most accurately address Representative Larsen's concerns because they do not allow for punishing a thief additionally for using force in some proximate but unrelated confrontation as this force is not evidence of willingness to use force to effect a theft.[1] Finally, this clear line of demarcation avoids vagueness and the potential danger of inconsistent interpretation and enforcement of the robbery statute. The policy behind this approach is supported by the plain language of Utah's robbery statute, the explanation of the representative who argued on its behalf, this Court's interpretation of the statute, the

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1 For instance, if "in the course of committing a theft" were defined as meaning merely "at some point in time near the theft," and was not limited, as by the Washington court, to force used to retain stolen property, resist apprehension, or facilitate escape, a shoplifter could be punished as a robber for using force to defend a child from a kidnapper in the store from which he is shoplifting. But this use of force, however proximate in time to the shoplifter's theft, does not indicate a willingness to use force to accomplish the theft and thus should not be punished as robbery.

Washington court's interpretation of its similar statute, and many other states' interpretations of their transactional robbery statutes.[2]

Perhaps the most on-point application of this approach to a set of facts similar to the present case is State v. Villanueva, a New Jersey case decided after this Court issued In re D.B. and after the Washington court decided Handburgh. 862 A.2d 1195 (N.J. Super. Ct. App. Div. 2004). New Jersey's robbery statute, much like the Utah statute, follows the transactional approach in that a person is guilty of robbery if "in the course of committing a theft . . . he uses force upon another," where "in the course of committing a theft" means "in an attempt to commit theft or in immediate flight after the attempt or commission." N.J. Stat. Ann. § 2C:15-1 (West 2011); see also State v. Grissom, 790 A.2d 928, 935 (N.J. Super. Ct. App. Div. 2002) (reversing for a lesser included instruction where "[t]here [was] sufficient evidence . . . from which a jury could conclude

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2 In fact, Kentucky has incorporated language similar to Representative Larsen's explicitly into its robbery statute, which reads that "'[a] person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.'" Hobson v. Commonwealth, 306 S.W.3d 478, 482 (Ky. 2010) (quoting KRS 515.020; KRS 515.030). The Kentucky court used this language to hold that a defendant who used force after his attempt at theft had been foiled to avoid arrest and prosecution was not guilty of robbery because the defendant no longer had any intention to "accomplish the theft." Id. at 483. While this result would likely not obtain under Utah law—because our robbery statute also punishes force used in an escape from an attempt to commit theft, Utah Code Ann. § 76-6-301(2)(c)—the focus on intent is important as it shows that the purpose of the transactional approach is to punish those who would use force to accomplish theft. Or, in the words of Representative Larsen, "[t]his legislation makes it clear that if one steals or attempts to steal property by using force or fear, he is actually guilty of robbery." Tape of Utah House Floor Debates, 51st Legislature, General Session (March 1, 1995) (Statement of Rep. Patricia Larsen).

that defendant's pointing of his handgun at the taxi driver was part of the continuous transaction of refusing to pay the fare and accomplished before his flight was complete, and convict him of first-degree armed robbery," but there was "also sufficient evidence in the record from which the jury could have concluded that defendant reached a point of at least temporary safety . . . when he exited the cab and that his pointing of the gun was a separate offense" (emphasis added)). In Villanueva, the defendant admitted to attempting to steal a car radio when he was interrupted and confronted by the victim. 862 A.2d at 1197. At this point, the testimony of the victim and the defendant diverged—the victim alleged that the defendant exited feet first out of the vehicle, was chased by the victim, and swung at the victim, at which point, the victim put the defendant in a choke hold. Id. at 1197–98. The defendant alleged that the victim initiated the confrontation by hitting him in the head with a wooden bat while he was trying to steal the victim's radio. Id. at 1199. The defendant ran and the victim and his father gave chase and threw a bat at the defendant. Id. At this point, the defendant alleged he stopped to give up, but that the victim lunged at the defendant and put him in a choke hold. Id. The defendant was able to free himself, but got hit again and was immobilized. Id.

Even though "defense counsel inexplicably did not seek an attempted theft charge at the conclusion of the trial," the appellate court found that the lower court committed plain error by "failing to charge theft" because "the jury could have viewed the defendant's conduct after he was discovered in [the victim's] car as causally unrelated to the theft or as justified on the grounds of self-defense." Id. at 1199–1200 (emphasis

added); accord Williams v. State, 314 S.W.3d 45, 51–53 (Tex. App. 2010) ("[Defendant's] testimony that his use of force was not done with the intent to facilitate a theft but rather to fend off an unprovoked assault may be weak evidence, and it was certainly contradicted by the testimony of the [victims]. But it is sufficient for a jury who believed it to conclude that [defendant] was guilty of theft but not robbery. . . . Accordingly, [defendant] was entitled to have the jury instructed on the lesser included offense of theft.") Applying this logic to the case at hand and viewing the facts in the light most favorable to Mr. Vargas Garcia, there is a rational basis for finding him guilty of theft, but not of aggravated robbery, because he alleges that any force he used was "causally unrelated" to the theft.

Whether Mr. Vargas Garcia's punch or throwing of the cell phone constituted assault, they did not constitute the use of force in the commission of the theft he had admitted to because the theft had already occurred and the force was not "causally related" to the theft—that is, it was not used to retain the stolen property, resist apprehension, or facilitate escape. Indeed, according to Mr. Vargas Garcia, the only reason he had used force at all was because Freakin' Freddy's unexpected violent outburst resulted in a melee that left him confused and needing to defend himself. In fact, Mr. Vargas Garcia says that he only hit Mr. Tellez after Mr. Tellez punched him. The purpose of the punch was in no way related to the theft as Mr. Tellez did not even know he had stolen the phones, but was to retaliate or even to defend himself against being punched. The punch and the throwing of the cell phone were not intended to retain stolen

property, resist apprehension, or facilitate escape. In fact, Mr. Vargas Garcia fully intended not to run away after stealing the phones, because, as the court acknowledged, "he entered the home with the intent of getting dope there." R. 144:53–54.

The policy behind the transactional approach—punishing the thief for the willingness to use force to effect a theft had the need arisen—is also not served here. Mr. Vargas Garcia's use of force to defend himself or to retaliate against being punched after Freakin' Freddy unexpectedly "freaked out" does not demonstrate a willingness to use force to effect a theft. Thus, Mr. Vargas Garcia's version of the events indicates that the force he used was not used in the commission of a theft or in flight therefrom, and as such, does not merge with the theft to create robbery.

Just as in Villanueva, under Mr. Vargas Garcia's version of the events, there is a rational basis to believe he committed theft, but that he did not use force in the commission of the theft or in flight therefrom, and thus did not commit robbery or aggravated robbery. See Kruger, 2000 UT 60, ¶¶ 13–14. Thus, the facts of this case satisfy both of the Baker requirements for a lesser-included instruction, because theft is included in aggravated robbery and there is a rational basis for a jury to find Mr. Vargas Garcia guilty of theft but not guilty of aggravated robbery. And so it was error for the trial court not to instruct the jury on theft.

Additionally, "when an element of the crime is in dispute, and the evidence is consistent with both the defendant's and the State's theory of the case, failing to instruct on the lesser included offense presumptively affects the outcome of the trial and [this

Court's] confidence in the verdict is undermined." State v. Spillers, 2007 UT 13, ¶ 24, 152 P.3d 315 (internal quotation marks omitted). Because the use of force in the commission of the theft is in dispute and certain evidence is consistent with both Mr. Vargas Garcia's and the State's versions of the case, these elements are met and the trial court's failure to instruct the jury on the lesser-included offense presumptively affected the outcome of the trial. Thus, this court should reverse and remand so that Mr. Vargas Garcia may receive a new trial with a lesser-included instruction regarding theft.[3]

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3 The arguments regarding all of the lesser-included instructions addressed in this brief were preserved when defense counsel specifically moved for those instructions. R. 48–53, 144:6–19. But even if they were not preserved, this Court may reach the arguments because the error of merging theft and a later use of force not related to that theft into robbery is plain error; as is denying a defendant a lesser-included instruction when there is a rational basis for that instruction. See State v. Holgate, 2000 UT 74, ¶ 13, 10 P.3d 346. Plain error exists if there is an error that should have been obvious to the district court that is harmful to the defendant. Id. "An error is obvious if the law on the area was 'sufficiently clear or plainly settled[.]'" State v. Larsen, 2005 UT App 201, ¶ 5, 113 P.3d 998 (quoting State v. Dean, 2004 UT 63, ¶¶ 16-17, 95 P.3d 276). The wealth of case law illustrating that there must be some causal connection between a theft and a subsequent use of force to constitute robbery under the transactional approach shows that the law in this area is plainly settled. See pp. 23-32 supra. When those elements are not merged as the trial court mistakenly held they were, there is a rational basis for convicting Mr. Vargas Garcia of each of the requested lesser-included offenses, but not of aggravated robbery. See Part I.A., supra, Part I.B. infra. It is plainly settled in Utah that when there is "'a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense,'" he is entitled to that instruction. Kruger, 2000 UT 60, ¶ 13 (quoting Utah Code Ann. § 76-1-402(4) (2008)). Thus, it was plain error for the trial court not to offer the requested instructions. See Villanueva, 862 A.2d 1195, 1199–1200 (holding it was plain error not to offer a lesser-included instruction on attempted theft when "the jury could have viewed the defendant's conduct after he was discovered in [the victim's] car as causally unrelated to the theft or as justified on the grounds of self-defense." (emphasis added)).

B. Mr. Vargas Garcia Was Entitled to a Lesser-Included-Offense Instruction for the Crimes of Aggravated Assault (Both Dangerous-Weapon and Serious-Bodily-Injury Variants) and Assault Because Those Crimes Are Included in Aggravated Robbery and There Is a Rational Basis to Believe Mr. Vargas Garcia Is Guilty of Those Crimes, But Not Aggravated Robbery.

Aggravated assault and assault are included in aggravated robbery, and "'the evidence would permit a jury rationally to find'" Mr. Vargas Garcia guilty of assault or aggravated assault against both victims, but not of aggravated robbery; thus, the two Baker elements are satisfied and Mr. Vargas Garcia is entitled to instructions on aggravated assault and aggravated robbery. See State v. Baker, 671 P.2d 152, 158 (Utah 1983) (quoting Keeble v. United States, 412 U.S. 205, 208 (1973). Each of these elements is addressed in turn below.

1. The Lesser Offenses of Aggravated Assault and Assault Are Included in Aggravated Robbery

First, aggravated assault and assault are included in aggravated robbery, the offenses with which Mr. Vargas Garcia was charged, because they are "established by proof of the same or less than all the facts required to establish the commission of" aggravated robbery. Utah Code Ann. § 76-1-402(3)(a). Aggravated robbery is defined in Utah by statute and its elements are detailed in full in Part I.A, supra. The elements relevant to the lesser offenses of aggravated assault and assault are: "A person commits aggravated robbery if in the course of committing robbery, he: (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601; [or] (b) causes serious bodily injury upon another . . . ." Utah Code Ann. § 76-6-302 (emphases added). Aggravated robbery explicitly includes the elements of robbery, which means that the facts adduced at trial

must necessarily prove the elements of robbery before a defendant may be convicted of aggravated robbery. Part I.A, supra, also fully details the elements of robbery. The elements relevant to aggravated assault and assault are:

> (1) A person commits robbery if:
> (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or
> (b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

Utah Code Ann. § 76-6-301 (emphasis added).

While the crime of theft is explicitly incorporated as an element of at least one way to commit robbery, the crimes of assault and aggravated assault are not. Thus, it is necessary to look at the elements of those crimes to illustrate how the same or fewer facts necessary to prove Mr. Vargas Garcia guilty of aggravated robbery might have been used in this case to prove guilt of those crimes. See Utah Code Ann. § 76-1-402(3)(a); Kruger, 2000 UT 60, ¶ 12. Aggravated assault is defined by statute in Utah. Its elements are:

> (1) A person commits aggravated assault if the person commits assault as defined in Section 76-5-102 and uses:
> (a) a dangerous weapon as defined in Section 76-1-601; or
> (b) other means or force likely to produce death or serious bodily injury.
> (2)(a) A violation of Subsection (1) is a third degree felony, except under Subsection (2)(b).
> (b) A violation of Subsection (1) that results in serious bodily injury is a second degree felony.

Utah Code Ann. § 76-5-103 (2008) (emphases added). Assault is explicitly included as a

necessary element of aggravated assault, which means that aggravated assault is never committed unless assault is also committed. Thus, assault is always proved by the same or fewer facts as aggravated assault, and is thus an included offense, because aggravated assault is always assault with the additional facts of the use of a dangerous weapon or the use of other means or force likely to produce death or serious bodily injury. In Utah,

> (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.

Utah Code Ann. § 76-5-102 (2008).

The elements of assault not only overlap with, but also nearly perfectly match an element of robbery and aggravated robbery. And the elements of aggravated assault also overlap with the elements of aggravated robbery such that "the evidence at the trial of the [aggravated robbery] involves proof of some or all of those overlapping elements.'" See State v. Piansiaksone, 954 P.2d 861, 869 (Utah 1998) (quoting Baker, 671 P.2d at 159). This is easily illustrated in the present case: Mr. Vargas Garcia was charged with the aggravated robberies of both Messrs. Tellez and Sanchez. In his interview with the detective, Mr. Vargas Garcia admitted to punching Mr. Tellez and throwing a phone at Mr. Sanchez. R. 144:30–31, 43–44. If a jury believed these actions were unlawful attempts to do bodily injury to Mr. Tellez and Mr. Sanchez, the proof of these facts would establish assault against each victim. See Utah Code Ann. 76-5-102(1)(a). But Mr.

Sanchez and Mr. Tellez also testified (and Mr. Vargas Garcia denies) that this and other uses of force, including threatening with a knife, were used in the course of unlawfully demanding and taking their property. If these additional facts were established, they would constitute aggravated robbery against each victim. See Utah Code Ann. § 76-6-301(1)(a)–(b). Thus, in this case, assault can be proved by the same or fewer facts than aggravated robbery.

And since Mr. Sanchez and Mr. Tellez testified that Mr. Vargas Garcia threatened them with a knife, a dangerous weapon under Utah Code section 76-1-601 (an "item capable of causing death or serious bodily injury," Utah Code Ann. § 76-1-601(5)(a) (2008)), such a threat would constitute the dangerous-weapon variant of aggravated assault against each victim. See Utah Code Ann. § 76-5-103(1)(a). If the prosecution were able to establish that the knife was used in the course of unlawfully demanding and taking the property of Messrs. Tellez and Sanchez, as they allege, these facts would constitute the charged offenses of aggravated robbery against each victim. See Utah Code Ann. § Utah Code Ann. § 76-6-302(1)(a)–(b). Thus, the dangerous-weapon variant of aggravated assault can be established by proof of the same or fewer facts than aggravated robbery.

Additionally, if the jury were to believe that Mr. Vargas Garcia intentionally aided Freakin' Freddy in his assaults on Messrs. Tellez and Sanchez as they were instructed by the court to consider, R. 109, and as the State argued for in its closing, R. 144:99–100, the jury might also believe that Mr. Sanchez's shoulder dislocation constituted "serious bodily injury" and that the nightstand Freakin' Freddy threw at Mr. Tellez was likely to

cause serious bodily injury. Upon finding such facts, the jury could find Mr. Vargas Garcia guilty of the serious-bodily-injury variant of aggravated assault against each victim. Utah Code Ann. § 76-5-103(1)(b). If the State were able to additionally prove that Freakin' Freddy used the force for the assault in the course of unlawfully taking property, and that the nightstand did cause Mr. Tellez serious bodily injury, and that Mr. Vargas Garcia "had the mental state required to commit the offense[s]" of aggravated robbery, R. 109; see Utah Code Ann. §76-2-202 (2008) (party liability statute), those facts would establish the charged offenses of aggravated robbery against each victim. Thus, the serious-bodily-injury variant of aggravated assault can be established by the same or fewer facts than aggravated robbery.

A fact-intensive analysis reveals that, in this case, the requested lesser offenses of assault, aggravated assault (dangerous weapon variant), and aggravated assault (serious bodily injury variant) could have been "established by proof of the same or less than all the facts required to establish the commission of" aggravated robbery. Utah Code Ann. § 76-1-402(3)(a); Piansiaksone, 954 P.2d at 869 (quoting Baker, 671 P.2d at 159). Thus, those lesser offenses are included in the charged offenses of aggravated robbery and the first of the two Baker elements is satisfied.

2. *There Is a Rational Basis for Convicting Mr. Vargas Garcia of Assault and Each Variant of Aggravated Assault Against Each Victim But Acquitting Him of Aggravated Robbery.*

Mr. Vargas Garcia's request for jury instructions on the lesser-included crimes of assault and both variants of aggravated assault satisfies the second element of the Baker

analysis because there is a rational basis to find Mr. Vargas Garcia guilty of the lesser-included assault crimes, but not guilty of aggravated robbery. See Utah Code Ann. § 76-1-402(4); Kruger, 2000 UT 60, ¶ 13; Baker, 671 P.2d at 159. Because both elements of the Baker analysis are satisfied with regard to the assault crimes, Mr. Vargas Garcia was entitled to jury instructions on those offenses. See Kruger, 2000 UT 60, ¶ 15. This section proceeds by analyzing the rational basis for conviction of each of the denied assault-related offenses and resolves all evidentiary ambiguities in favor of the interpretation of the evidence that would "permit acquittal of the greater offense and conviction of the lesser," Baker, 671 P.2d at 159, which sometimes is consistent with Mr. Vargas Garcia's version of events, and sometimes is consistent with Messrs. Tellez and Sanchez's version. See State v. Hayes, 860 P.2d 968, 972 (Utah Ct. App. 1993) ("The jury is free to believe or disbelieve all or part of any witness's testimony.").[4] This section presumes as true the argument in Part I.A.2, supra, that theft followed by a merely temporally proximate use of force is not robbery, but potentially theft and assault, or theft and aggravated assault.

First, there is a rational basis to find that Mr. Vargas Garcia committed the crime of assault, but did not commit the crime of aggravated robbery. Accepting Mr. Vargas Garcia's version of events as true, he admitted to punching Mr. Tellez and throwing a phone at Mr. Sanchez. R. 143:30–31, 43–44. A jury could consider either of these "act[s], committed with unlawful force or violence, that . . . creates a substantial risk of bodily

4 Because the rational basis for these instructions involves accepting certain of Messrs. Tellez and Sanchez's allegations and rejecting certain of Mr. Vargas Garcia's defenses, it is important to note that admitting there is a rational basis to find Mr. Vargas Garcia

injury to another. Utah Code Ann. § 76-5-102. Mr. Vargas Garcia never gives a lawful reason for throwing the cell phone at Mr. Sanchez, and although Mr. Vargas Garcia claimed to the detective that punching Mr. Tellez was an act of self-defense and has not admitted to assault, given Mr. Tellez's testimony to the contrary, a jury could rationally believe Mr. Vargas Garcia assaulted both Messrs. Sanchez and Tellez. Accepting those facts as true, there is a rational basis for finding that the charged offenses of robbery and aggravated robbery were not committed because Mr. Vargas Garcia denies taking any property from Messrs. Tellez and Sanchez except the cell phones he found in the garage, and the force that Mr. Vargas Garcia used was not related to that theft, but was related to the melee started by Freakin' Freddy. See supra Part I.A.2. Thus, there is a rational basis for convicting Mr. Vargas Garcia of assault against both victims, but not aggravated robbery.

Alternatively, a jury could believe that, in addition to throwing the cell phone at Mr. Sanchez and the punch at Mr. Tellez, Mr. Vargas Garcia also threatened them with a knife, since both Messrs. Tellez and Sanchez testified to that effect. R. 143:120–21, 148–49. Although Mr. Vargas Garcia denied using a knife and denies committing aggravated assault, R. 144:34, 36–37, based on Messrs. Tellez and Sanchez's testimony to the contrary, there is a rational basis to believe that, after stealing the cell phones in the garage, Mr. Vargas Garcia intended to buy drugs, but when Freakin' Freddy freaked out, he threatened Messrs. Sanchez and Tellez with a knife in the ensuing melee. But, as

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guilty of the lesser offenses is not an admission of guilt to those offenses.

discussed in Part I.A.2, supra, these facts would not constitute aggravated robbery because the assaults were not committed in the course of committing a theft. See Utah Code Ann. § 76-6-301(1)(b). They would, however, constitute aggravated assault, i.e., a threat, accompanied by a show of immediate force and a dangerous weapon. See § 76-5-103(1)(a). Thus, there was also a rational basis for the jury to find Mr. Vargas Garcia not guilty of aggravated robbery of both victims, but guilty of the dangerous-weapon variant of aggravated assault against both victims.

Finally, although Mr. Vargas Garcia told the detective that when Freakin' Freddy freaked out, he didn't know what to do and, by virtue of his not-guilty plea, denies being Freakin' Freddy's accomplice, R. 144:42, both victims alleged they acted together, see, e.g., R. 143:123–24, 150–51, and Mr. Vargas Garcia admitted to taking an order from Freakin' Freddy and watching Mr. Tellez. R. 144:29–30. This evidence provides a rational basis for finding that Mr. Vargas Garcia was Freakin' Freddy's accomplice in his assaults against Messrs. Tellez and Sanchez because it is circumstantial evidence that Mr. Vargas Garcia "had the mental state required to commit" assault. See Utah Code Ann. §76-2-202. The jury was instructed that Mr. Vargas Garcia could be liable for Freakin' Freddy's actions, R. 109, and the State argued for such liability in its closing, R. 144:99–100. Since a jury could find that Mr. Tellez's dislocated shoulder constituted serious bodily injury, and could also find that when Freakin' Freddy threw the nightstand at Mr. Sanchez, it was "likely to produce . . . serious bodily injury," there is a rational basis for finding Mr. Vargas Garcia guilty of the serious-bodily-injury variant of aggravated assault

as Freakin' Freddy's accomplice. Utah Code Ann. § 76-5-103(1)(b). Taking Mr. Vargas Garcia at his word that he truly expected a peaceful drug deal and was only reacting to Freakin' Freddy's attacks, there is also a rational basis to believe that he did not know that Freakin' Freddy also intended to rob the victims, and thus lacked "the mental state required to commit" any robbery Freakin' Freddy may have committed. Thus, there is a rational basis for finding Mr. Vargas Garcia guilty of the serious-bodily-injury variant of aggravated assault for both victims and not guilty of aggravated robbery for both victims.

Thus, the facts of this case satisfy both of the Baker requirements for lesser-included instructions related to assault and both aggravated assault variants, because those crimes are included in aggravated robbery and there is a rational basis for a jury to find Mr. Vargas Garcia guilty of those crimes (even if he did not admit to them) but not guilty of aggravated robbery. Thus, it was error for the trial court not to instruct the jury on the assault-related lesser-included offenses and this Court should reverse.

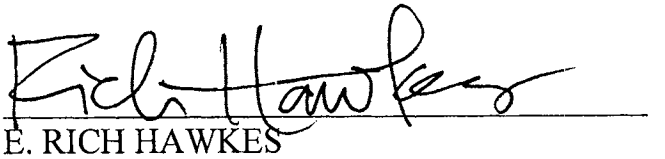
Additionally, "when an element of the crime is in dispute, and the evidence is consistent with both the defendant's and the State's theory of the case, failing to instruct on the lesser included offense presumptively affects the outcome of the trial and [this Court's] confidence in the verdict is undermined." Spillers, 2007 UT 13, ¶ 24 (internal quotation marks omitted). Because Mr. Vargas Garcia disputes that he either forcibly and unlawfully took property from Messrs. Sanchez and Tellez or used force in the commission of theft against them, and certain evidence is consistent with both Mr. Vargas Garcia's and the State's versions of the case, Spillers's elements are met and the trial

court's failure to instruct the jury on the lesser-included offenses presumptively affected the outcome of the trial. Further, prejudice exists even if this Court should find that there is only a rational basis for one of the lesser-included instructions, but not the others, since it still denies Mr. Vargas Garcia the opportunity to present his "theory of the case." See id. Thus, this court should reverse and remand so that Mr. Vargas Garcia may receive a new trial with lesser-included instructions regarding theft, assault, and both variants of aggravated assault.

CONCLUSION

Because the crimes of theft, assault, dangerous-weapon aggravated assault, and serious-bodily-injury aggravated assault are all included in aggravated robbery, and because there is a rational basis to believe that Mr. Vargas Garcia committed the lesser crimes but not the charged crimes of aggravated robbery, Mr. Vargas Garcia was entitled to instructions on each of those lesser offenses. Because the trial court denied his request for those instructions, this Court should reverse his convictions and remand for a new trial so that the jury may be instructed on the lesser offenses.

RESPECTFULLY SUBMITTED this 20 day of April, 2011.



E. RICH HAWKES
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, E. Rich Hawkes, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 20 day of April, 2011.

E. RICH HAWKES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this 20 day of April, 2011.

Tab A

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

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 091908593 FS
LEONEL GARCIA JR VARGAS, Defendant.	:	Judge: ANN BOYDEN Date: November 8, 2010

PRESENT
Clerk: patd
Prosecutor: MAY, THADDEUS J
Defendant
Defendant's Attorney(s): WILSON, SCOTT A

DEFENDANT INFORMATION
Date of birth: September 3, 1988
Audio
Tape Number: S42 Tape Count: 1110-1127

CHARGES
1. ROBBERY (amended) - 2nd Degree Felony
   Plea: Not Guilty - Disposition: 09/22/2010 Guilty
2. AGGRAVATED ROBBERY - 1st Degree Felony
   Plea: Not Guilty - Disposition: 09/22/2010 Guilty
3. MANUFACTURE/POSSESS BURGLARY TOOLS - Class B Misdemeanor
   Plea: Not Guilty - Disposition: 09/22/2010 Guilty

SENTENCE PRISON

Based on the defendant's conviction of ROBBERY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

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

COMMITMENT is to begin immediately.

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

Case No: 091908593 Date: Nov 08, 2010

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Run Concurrently With Each Count and Concurrently With #101901947, #101902125, #101905027

ALSO KNOWN AS (AKA) NOTE

LEO GARCAS
LEONEL GARCIA-VARGAS
ALEJANDRO SALINAS

SENTENCE JAIL SERVICE NOTE

Defendant Given Credit for Time Served on Count 3 for Time Served in Adult Detention Center
Restitution
The amount of Restitution is still to be determined.

Date: 11/8/10

Ann Boyden
ANN BOYDEN
District Court Judge
By _____
STAMP USED AT DIRECTION OF JUDGE

Tab B

UTAH CODE ANN. § 76-1-402 (2008)

§ 76-1-402. Separate offenses arising out of single criminal episode--Included offenses

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such Provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(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. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

UTAH CODE ANN. § 76-1-601 (2008)

§ 76-1-601. Definitions

Unless otherwise provided, the following terms apply to this title:

(1) "Act" means a voluntary bodily movement and includes speech.

(2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.

(3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.

(4) "Conduct" means an act or omission.

(5) "Dangerous weapon" means:

(a) any item capable of causing death or serious bodily injury; or

(b) a facsimile or representation of the item, if:

(i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

(6) "Grievous sexual offense" means:

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

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

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

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

(e) forcible sodomy, Subsection 76-5-403(2);

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

(g) aggravated sexual abuse of a child, Subsection 76-5-404.1(4);

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

(i) any felony attempt to commit an offense described in Subsections (6)(a) through (h);

or

(j) an offense in another state, territory, or district of the United States that, if committed in Utah, would constitute an offense described in Subsections (6)(a) through (i).

(7) "Offense" means a violation of any penal statute of this state.

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

(9) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.

(10) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.

(11) "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.

(12) "Substantial bodily injury" means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.

(13) "Writing" or "written" includes any handwriting, typewriting, printing, electronic storage or transmission, or any other method of recording information or fixing information in a form capable of being preserved.

UTAH CODE ANN. § 76-2-202 (2008)

§ 76-2-202. Criminal responsibility for direct commission of offense or for conduct of another

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

UTAH CODE ANN. § 76-5-102 (2008)

§ 76-5-102. 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 ANN. § 76-5-103 (2008)

§ 76-5-103. Aggravated assault

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

(a) a dangerous weapon as defined in Section 76-1-601; or

(b) other means or force likely to produce death or serious bodily injury.

(2)(a) A violation of Subsection (1) is a third degree felony, except under Subsection (2)(b).

(b) A violation of Subsection (1) that results in serious bodily injury is a second degree felony.

UTAH CODE ANN. § 76-6-205 (2008)

§ 76-6-205. Manufacture or possession of instrument for burglary or theft

Any person who manufactures or possesses any instrument, tool, device, article, or other thing adapted, designed, or commonly used in advancing or facilitating the commission of any offense under circumstances manifesting an intent to use or knowledge that some person intends to use the same in the commission of a burglary or theft is guilty of a class B misdemeanor.

UTAH CODE ANN. § 76-6-301 (2008)

§ 76-6-301. Robbery

(1) A person commits robbery if:

(a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or

(b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

(2) An act is considered to be "in the course of committing a theft or wrongful appropriation" if it occurs:

(a) in the course of an attempt to commit theft or wrongful appropriation;

(b) in the commission of theft or wrongful appropriation; or

(c) in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

UTAH CODE ANN. § 76-6-302 (2008)

§ 76-6-302. Aggravated robbery

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes serious bodily injury upon another; or

(c) takes or attempts to take an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

UTAH CODE ANN. § 76-6-404 (2008)

§ 76-6-404. Theft--Elements

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Tab C

SCOTT A. WILSON (#10486)
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	**JURY INSTRUCTIONS**
Plaintiff,	
vs.	Case No. 091908593FS
LEONEL GARCIA VARGAS, JR.,	JUDGE ANN BOYDEN
Defendant.	

The defendant, LEONEL GARCIA VARGAS, JR., by and through his attorney of record, SCOTT A. WILSON, respectfully requests this court in its charge to submit the attached Jury Instruction.

DATED this 17th day of September, 2010.

RESPECTFULLY SUBMITTED,

SCOTT A. WILSON
Attorney for Defendant

CERTIFICATE OF SERVICE

DELIVERED a copy of the foregoing Jury Instructions to the office of the Salt Lake City District Attorney, 111 East Broadway, Suite 400, Salt Lake City, Utah 84111, this _____ day September, 2010.

_____

INSTRUCTION NO.

Under the evidence presented to you in this case, you may find Leonel Garcia Vargas, Jr., guilty or not guilty of one of the following:

1. Aggravated Robbery of Ruben Sanchez, in Instruction No. _____

1a. Aggravated Robbery of Gabriel Tellez, in Instruction No. _____

or

2. Robbery of Ruben Sanchez in Instruction No. _____

2a. Robbery of Gabriel Tellez in Instruction No. _____

or

3. Theft from Ruben Sanchez in Instruction No. _____

3a. Theft from Gabriel Tellez in Instruction No. _____

You may also find Leonel Garcia Vargas, Jr. guilty or not guilty of one of the following:

4. Aggravated Assault of Ruben Sanchez, serious bodily injury, in Instruction No. _____

4a. Aggravated Assault of Gabriel Tellez, serious bodily injury, in Instruction No. _____

or

5. Aggravated Assault of Ruben Sanchez, dangerous weapon, in Instruction No. _____

5a. Aggravated Assault of Gabriel Tellez, dangerous weapon, in Instruction No. _____

or

6. Assault with Substantial Bodily Injury of Ruben Sanchez No. _____

6a. Assault with Substantial Bodily Injury of Gabriel Tellez No. _____

or

7. Assault with Bodily Injury of Ruben Sanchez in Instruction No. _____

7a. Assault with Bodily Injury of Gabriel Tellez in Instruction No. _____

However, you shall not find him guilty of Assault in Instruction Nos _____, if you find him guilty of Aggravated Robbery in Instruction Nos._____, or Robbery in Instruction Nos. _____.

INSTRUCTION NO.

A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such force is necessary to defend himself against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself.

Conduct which is justified is a defense to prosecution. Therefore, if you find that the defendant acted in self-defense or in the defense of a third party, he is entitled to an acquittal.

9/22/10
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INSTRUCTION NO.

An act committed or an omission made under an ignorance or mistake of fact which disproves the culpable mental state is a defense for the crime.

Thus a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.

Denied – no basis for the existence of certain facts + circ