

2010

Utah v. Larry Lewis Hutchings : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

v.

LARRY LEWIS HUTCHINGS,

Defendant/Appellant.

No. 20100024-SC

No. 20080681-CA

Appeal from Third Judicial District
Court, Salt Lake County Honorable
Dennis M. Fuchs,
District Court No. 061902496

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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

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Introduction

This appeal hinges on two questions: (i) whether the trial court failed to instruct the jury adequately on the specific intent element of aggravated assault and (ii) whether the trial court's failure to do so was prejudicial. The answer to both questions is yes.

The jury instructions presented jurors with the option of finding Mr. Hutchings guilty of aggravated assault if it found only that he had a general intent to engage in conduct that, in fact, resulted in serious bodily injury. The instructions did not require the jury to find that Mr. Hutchings had a specific intent to cause serious bodily injury. The court of appeals recognized that the jury instructions allowed the jury to convict Mr. Hutchings based only upon a general intent to engage in conduct. The court of appeals affirmed the conviction, however, because it held that a general intent instruction was appropriate. The State concedes in the response brief that the court of appeals was incorrect because aggravated assault was a specific intent crime.

The State instead argues that no reasonable juror—a class that, according to the State's logic, excludes the court of appeals' panel—could have misunderstood the jury instructions as permitting a conviction based only upon a general intent to engage in conduct. The State's argument presupposes that, in reviewing the jury instructions, the jury understood and correctly applied a distinction drawn by logicians between the inclusive disjunction and exclusive disjunction. The State's 5-page explanation of how the instructions can be reconciled employing that distinction is so complex that it cannot be ascribed to jurors. And because the jury instructions allow for conviction based upon a general intent, not only was it plain error for the trial court to give the instructions, but

there also is no conceivable strategic reason for trial counsel to have agreed to them, leaving trial counsel's doing so constitutionally ineffective representation.

The jury instructions were prejudicial. At trial, Ms. Cuddeback (the victim) testified that when she was assaulted, she clawed at Mr. Hutchings' face, causing Mr. Hutchings to push her hand away. In the process of having her hand pushed away from his face, Ms. Cuddeback's hand struck a bookshelf and bones in her hand were broken. For that to constitute aggravated assault, the jury must have found (i) that her injury of a broken hand constituted "serious bodily injury" under the aggravated assault statute and (ii) that when Mr. Hutchings pushed Ms. Cuddeback's hand away from his face, he acted with the specific intent to cause that injury rather than with the general intent to push her hand away from his face or a specific intent to cause an injury less than a "serious bodily injury." In this case, allowing the jury to convict if it found only that Mr. Hutchings intended the conduct, not serious bodily injury, was prejudicial.

The State attempts to avoid this straightforward analysis by asserting that the prosecution's representations to the jury throughout trial were so clear that the jury could not have been confused by the instructions. The State overstates the clarity of the prosecutor's representations, especially during closing arguments when the prosecutor stated, for example, "He takes her right hand as [sic] she's been using to scratch at him, takes her right hand and throws it back, intentionally throws it back, not accidentally, but intentionally throws it back, intentionally causing the serious bodily injury where her hand is broken." (R. 271:206-07.) That statement is far from clear concerning whether the jury could convict Mr. Hutchings if it found only that he "intentionally throws it

back” without also finding that he “intended serious bodily injury.” The State’s attempt to supplement the confusing jury instructions with closing arguments fails.

As a final alternative, the State argues that the issues presented in the opening brief are not properly before the court because they were raised in an Anders brief before the court of appeals. To understand the flaw in the State’s argument, consider what happened in the court of appeals. Mr. Hutchings understood the problems with the jury instructions and included it in his supplement to the Anders brief, but (i) appellate counsel who is charged with providing effective assistance did not, (ii) the State which reviewed the Anders brief and Mr. Hutchings’ submission and responded to part of it did not, and, most important, (iii) the court of appeals which is charged with identifying meritorious claims in Anders briefs and Mr. Hutchings’ submission did not. It would be cruel indeed if the issue were somehow beyond this court’s review because trial counsel, the trial court, appellate counsel, the State, and the court of appeals all missed an issue that was not only meritorious but, as the State concedes by declining to defend the court of appeals’ opinion, was correct. Because Mr. Hutchings raised the issue himself, the issue is properly before this court.

This court should vacate the aggravated assault conviction and remand for a new trial on that charge.

Argument

I. The Jury Instructions Did Not Accurately State the Law

The law concerning specific intent was not adequately conveyed to the jury. As a matter of constitutional law, “[t]he jury must be instructed with respect to all the legal elements that it must find to convict of the crime charged, and the absence of such an instruction is reversible error as a matter of law.” State v. Bluff, 2002 UT 66, ¶ 26, 52 P.3d 1210; see also Middleton v. McNeil, 541 U.S. 433, 437 (2004) (“In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement.”)

To be adequate, jury instructions taken as a whole must “fairly instruct the jury on the applicable law.” Cheves v. Williams, 1999 UT 86, ¶ 37, 993 P.2d 191. But where an element of an offense is especially important, jury instructions must do more than simply recite black-letter law or statutory language. State v. Jeffs, 2010 UT 49, ¶ 30, 243 P.3d 1250. Rather, a jury instruction must be evaluated “in light of” the statutory elements of an offense “to determine whether [the instructions] adequately stated the State’s burden.” Id. ¶ 22. The court has recognized that the concept of specific intent—a concept generations of law students have had difficulty grasping—requires particular precision to avoid juror confusion “with respect to the issue of intent.”¹ Id. ¶ 51. The inquiry is

¹ In State v. Jeffs, the court rejected a jury instruction related to specific intent where “the jury could have convicted [the defendant] if it found that [the defendant] intentionally did some act, and such intentional act unintentionally ‘aided’” the principal in committing the underlying offense. Id. ¶ 52; see also State v. Potter, 627 P.2d 75, 78 (Utah 1981) (“When a court is called upon to tender [general intent and specific intent instructions], it must take specific care that the instructions remain distinct and cannot be confused or misapplied. Because the instructions . . . failed to explain adequately the distinction between the general and specific intent requirements or relate those requirements to the facts of the case and the different crimes charged, they were misleading and confusing.”).

whether there is a “reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.” Middleton, 541 U.S. at 437 (internal quotation marks omitted) (emphasis added).

In relevant part, the jury instruction explaining specific intent to the jury here stated: “A person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.” (R. 198, hereinafter “Instruction 27” (emphasis added).) To use the type of logical analysis in the State’s brief, the placement of the word “or” in the emphasized portion of Instruction 27 makes it unclear whether the prior modifiers—intentionally, willfully, desire, conscious objective—modify the phrase “cause the result” or modify only the phrase “to engage in the conduct.” That ambiguity results from the mixed use of the “inclusive ‘or’” and the “exclusive ‘or’” within Instruction 27.² Because of that ambiguity, a straightforward reading of Instruction 27 promotes the understanding that Mr. Hutchings need not have intended serious bodily injury to be guilty of aggravated assault.

Perhaps the best evidence of that ambiguity is how it was understood by the court of appeals. Even with training in the art of splicing legal syntax and the complexities surrounding general and specific intent, the court understood the instructions to authorize a conviction based on general intent. State v. Hutchings, 2009 UT App 330, ¶ 4 (Mem.

² Compare Wikipedia: “Exclusive or,” available at http://en.wikipedia.org/wiki/Exclusive_or (last accessed Feb. 3, 2011) (“The logical operation exclusive disjunction, also called exclusive or . . . is a type of logical disjunction on two operands that results in a value of true if exactly one of the operands has a value of true.”) with Wikipedia: “Logical disjunction,” available at http://en.wikipedia.org/wiki/Inclusive_or (last accessed Feb. 3, 2011) (“[A] two-place logical operator or . . . results in true whenever one or more of its operands are true.”)

Dec.). The complex legal analysis ascribed to jurors should not be greater than that employed by appellate judges. As the United States Supreme Court has explained, “Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.” Boyde v. California, 494 U.S. 370, 380-81 (1990). Yet that is precisely what the State would have this court suppose the jurors did in this case.

The State’s attempt to demonstrate the clarity of Instruction 27—an argument that took more than 4 months³ to construct and reads like a proof of a mathematical formula—is unpersuasive. The State’s argument hinges on the presence of another instruction (Instruction 14) that sets forth the elements of aggravated assault. (Resp. Br. at 21.) Because Instruction 14 required the jury to find that the defendant “intentionally caused serious bodily injury,” the State contends, the jury could not have been confused about what the term “intentionally” modified in Instruction 27. (Resp. Br. at 24; R. 186.) That argument is belied by the State’s own reasoning. The State explains, “Instruction 27 . . . was not limited to any particular crime, but was instead applicable to all three crimes at issue This does not mean, however, that all of Instruction 27 applied to all of the elements of all of the crimes. Instead Instruction 27 applied only on a clause-specific basis. . . . More importantly, Instruction 27’s definition of intentional conduct was multifaceted as well.” (Resp. Br. at 22 (emphasis added).) Having set forth that analysis, the State explains that “Instruction 27 told the jury how to interpret any element that called for either intentional conduct or an intended result.” (Id. at 23 (emphasis added).)

³ Indeed, measured from the time Mr. Hutchings raised this issue in his pro se brief on certiorari, the State had more than eight months to formulate this response.

Defendant agrees wholeheartedly with that last part. That's the problem. By the State's own reasoning, the jury's sole direction as to the difference between specific and general intent was (i) a "multi-faceted" instruction that applied (ii) to three different crimes, (iii) but not to "all of the elements of all of the crimes," and (iv) "applied only on a clause-specific basis." (Id. at 22.) The State's argument, much like the unfortunate instruction in this case, overlooks the natural and probable way the jurors were likely to understand language and the need for clarity related to the intent element of a specific intent crime. The jury instructions regarding specific intent were inadequate.

II. Mr. Hutchings Was Prejudiced by the Erroneous Jury Instructions

The faulty jury instruction was prejudicial because, had the jury been properly instructed, it is reasonably likely that the jury would not have convicted Mr. Hutchings of aggravated assault. A faulty jury instruction requires reversal if there is "a reasonable likelihood that the error affected the result." Cheves v. Williams, 1999 UT 86, ¶ 20, 993 P.2d 191. A reasonable likelihood of a better outcome exists when the court's confidence in the verdict is undermined, which happens at a point "substantially short" of where a court might conclude that a different result was "more probable than not." State v. Knight, 734 P.2d 913, 919-20 (Utah 1987). The Utah Constitution requires that "[i]n criminal cases the verdict shall be unanimous." Utah Const. art 1, § 10. Accordingly, if it is reasonably likely that even one juror voted to convict based on a misapprehension of Instruction 27, Mr. Hutchings would not have been convicted and this instruction was prejudicial. State v. Saunders, 1999 UT 59, ¶ 60, 992 P.2d 951 ("Jury unanimity means unanimity as to a specific crime and as to each element of the crime.").

It is reasonably likely that at least one juror voted to convict based on a misunderstanding of the specific intent element of the aggravated assault charge. To have convicted Mr. Hutchings at all, the jury must have believed Ms. Cuddeback's version of events.⁴ Her version was as follows: during a fight with Mr. Hutchings she began scratching at his face. In her words: "the nails must of hurt him. They were cutting him. He grabbed my wrist and threw my hand backwards." (R. 272:55.) That testimony supports a finding that Mr. Hutchings intended his conduct, but it also is entirely (and in fact more) consistent with a finding that Mr. Hutchings did not intend a result of serious bodily injury. And even if jurors believed that Mr. Hutchings intended injury, that still would be insufficient. He must have intended serious bodily injury, which is defined as "serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or . . . a substantial risk of death." Utah Code Ann. § 76-5-103(1) (2005).⁵ Because Ms. Cuddeback's injury of a broken hand barely qualifies—if at all—as a serious bodily injury, even on the State's theory the jury may not have found that Mr. Hutchings intended serious bodily injury in pushing Ms. Cuddeback's hand away from his face. Regardless of whether a broken hand could qualify under the statute, Ms. Cuddeback's testimony falls far short of compelling a finding that Mr. Hutchings intended serious bodily injury.

⁴ Mr. Hutchings testified that the injury occurred when Ms. Cuddeback punched him in a manner that broke her hand. (R. 271:120-21.) Had the jury believed that version, it would have acquitted Mr. Hutchings.

⁵ Compare "serious bodily injury" with "substantial bodily injury" in Utah Code section 76-1-504(11): "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."

Had the jury been adequately instructed, jurors would have had reasonable doubt concerning whether Mr. Hutchings formed the requisite specific intent. It is equally likely that Mr. Hutchings merely intended to push back her hand to stop her nails from “cutting him.” In arguing that no such likelihood exists, the State contends that the prosecutor’s representations to the jury were so clear that the jury knew its charge regardless of flaws in the instructions.⁶ (Resp. Br. at 30-31.) Careful review of the record demonstrates that the State has selectively recalled some moments of clarity but has overlooked less clear representations. For example, in closing arguments, the prosecutor never makes a clear distinction: “He takes her right hand as [sic] she’s been using to scratch at him, takes her right hand and throws it back, intentionally throws it back, not accidentally, but intentionally throws it back, intentionally causing the serious bodily injury where her hand is broken.” (R. 271:207 (emphasis added).) Elsewhere, he states that “[Mr. Hutchings] intentionally caused [the broken hand] because he grabbed her hand and he threw it back behind her head. She was trying to protect herself, and he grabbed her hand and threw it. He intentionally caused the serious bodily injury.” (R. 271:178 (emphasis added).)

⁶ The State also argues that the jury could have inferred intent to cause serious bodily injury from circumstantial evidence of Mr. Hutchings’ conduct at the time of the incident. (Resp. Br. at 31-33.) That argument fails. Regardless of what the jury might have inferred, the problem with Instruction 27 is that it required no inference. Further, inferring the intent to cause serious bodily injury from the intent to commit an assault would collapse two statutory elements and turn every assault into an aggravated assault (or transform aggravated assault into a general intent crime). Potter, 627 P.2d at 78 (rejecting jury instructions that may have “led the jury to believe they should automatically infer the specific intent required for [an offense] from the voluntary doing of the act.”).

In both statements, the State—like the instruction it now defends—conflated Mr. Hutchings intentional conduct with the intent to cause a particular result. Indeed, the first misstatement is especially important because it was made during rebuttal and was one of the last descriptions the jury heard before it was sent to deliberate. The prosecutor’s comments at trial were not adequate to inform the jury, as the State now suggests, that it was to employ the “exclusive ‘or’” when interpreting Instruction 27, rather than the “inclusive ‘or’.” The misleading jury instructions were prejudicial.

III. Mr. Hutchings’ Jury Instruction Challenge is Properly Before the Court

In an attempt to avoid this court’s deciding the issues presented above—and to explain why neither the State nor appellate counsel cited to the court of appeals three controlling authorities demonstrating aggravated assault was a specific intent crime⁷—the State argues that the issues set forth in this court’s writ of certiorari are not properly before the court. The State argues that the issues were not raised before the court of appeals and that any jury instruction error was invited. The State is incorrect.

To be clear, trial counsel did not object to Instruction 27. So in challenging that instruction, Mr. Hutchings has been required to show plain error and/or ineffective assistance of counsel. Accordingly, in the opening brief Mr. Hutchings set forth his claims under those two doctrines. As to plain error, Mr. Hutchings demonstrated that, under clearly established law at the time of his trial, a conviction for aggravated assault could only be predicated on the specific intent to cause serious bodily injury. (AOB at 10-11.) As to ineffective assistance of counsel, Mr. Hutchings demonstrated that trial

⁷ Even in opposing Mr. Hutchings’ petition for writ of certiorari, the State represented that the jury instructions were correct with regard to the intent required for aggravated assault. (Br. in Opp. to Pet. for Writ of Certiorari at 5-6.)

counsel was objectively deficient in failing to object to Instruction 27. (AOB at 11-12.) And as to both legal standards, Mr. Hutchings demonstrated the prejudice that flowed from the failures of his counsel and of the trial court. (AOB at 12-13.)

The State argues that the ineffective assistance of counsel claim should be rejected because it was not raised in the court of appeals. The State also argues that Mr. Hutchings' plain error argument should be rejected because Mr. Hutchings invited the error. The State is incorrect on both counts and, as discussed below, there are no impediments to this court resolving the questions presented on certiorari, something the State appeared to have recognized in opposing Mr. Hutchings' petition for writ of certiorari. (Br. in Opp. to Pet. for Writ of Certiorari at 4-6.)

A. The State's Preservation Argument Fails Because the Jury Instruction Issue Was Sufficiently Raised in the Anders Brief

The ineffective assistance of counsel issue is properly before the court. To begin, the ineffective assistance of counsel issue is precisely the question presented in this court's order granting Mr. Hutchings' petition for writ of certiorari.⁸ Further, the State's argument regarding ineffective assistance of counsel is a red herring, not only because Mr. Hutchings was entitled to constitutionally effective counsel in both the trial court and on appeal, but also because trial counsel's inviting the error—which he did not—would only make the ineffective assistance argument more compelling. Regardless, any shortcomings in the manner in which issues were presented to the court of appeals arise solely from the rather unique use of an Anders brief, which became irrelevant when the court of appeals chose to address the issues on the merits.

⁸ Notably, the State has not moved the court for an order dismissing this appeal on the theory that certiorari was improvidently granted.

As it comes to this court, the case has followed the procedures set forth in State v. Clayton, 639 P.2d 168 (Utah 1981), which are modeled on the requirements announced by the United States Supreme Court in Anders v. California, 386 U.S. 738 (1967). Those cases set forth the requirements for an appellate attorney who believes that all of the issues his client seeks to raise on appeal lack merit. To ensure that the defendant's constitutional rights are protected, appellate counsel must file a brief setting forth his understanding of each issue his client seeks to raise. Clayton, 639 P.2d at 169-70. Counsel then must marshal the record in support of his belief that the client's issues lack merit. Id. at 170.

Two important safeguards guarantee that counsel has not overlooked a meritorious issue. First, his client must be given an opportunity to file a supplemental memorandum in support of the issues he seeks to raise. Id. Second, the reviewing court must review the entire record along with appellate counsel's brief and the client's supplemental memorandum. Id. Unless the reviewing court unanimously concludes that all of the issues raised by the defendant lack merit, the court orders counsel to provide full briefing on any non-frivolous issues. Id. If the Anders brief contains an argument that merits relief, the court also may grant the relief without ordering full briefing. United States v. Wallace, No. 09-4700, 2010 U.S. App. LEXIS 24725, at *6 (4th Cir. Dec. 3, 2010) (per curiam); United States v. Cornette, No. 09-4553, 2010 U.S. App. LEXIS 19284, at *4-5 (4th Cir. Sept. 15, 2010) (per curiam). Thus, an issue raised in the client's supplemental memorandum is an issue the appellate court must evaluate.

The Anders brief in this case was a hybrid. It contained one section that addressed an issue on the merits. (Add. A at 21-23.) It contained a separate section outlining then-

appellate counsel's belief that Mr. Hutchings' other issues were frivolous. (Add. A at 8-21.) The court of appeals reviewed the Anders portion of the brief, concluded that it contained only frivolous issues, and declined to address any of them. Hutchings, 2009 UT App 330, ¶ 1. The court then addressed the merits section of the brief and rejected counsel's argument. Id. ¶¶ 2-3. Then, seeing that Mr. Hutchings' supplemental memorandum had raised an issue related to the arguments in the merits section, the court of appeals addressed that issue on the merits as well. Id. ¶ 4. The issue identified as deserving consideration on the merits was raised by Mr. Hutchings as follows: "jury instruction #27 defines intentionally in a general sense but fails to define it specifically to intentionally causes serious bodily injury. The intent element of the statute is the element upon which the distinction between a more serious crime and a less serious one turns."⁹ (Add. B at 3.) In addressing that argument, the court of appeals erroneously concluded that Instruction 27 correctly stated the law because aggravated assault was a general intent crime. Hutchings, 2009 UT App 330, ¶ 4. Mr. Hutchings also raised claims of ineffective assistance of counsel, but, based upon its conclusion that Instruction 27 correctly states the law, the court of appeals specifically stated that it was unnecessary to address those claims. Id.

It is irrelevant that Mr. Hutchings' issues were not in the merits section of counsel's brief. Had the court of appeals not erred in holding that aggravated assault was

⁹ Although this statement is raised near the end of Mr. Hutchings' supplemental memorandum, it is clear that the court of appeals saw it and recognized it as non-frivolous. (Add. B at 3.) Not only does the court of appeals' opinion attribute this argument directly to Mr. Hutchings, the relevant portion of the court of appeals' opinion is directly responsive to this argument (and is not responsive to any issues raised by counsel in the Anders brief). See Hutchings, 2009 UT App ¶ 330, ¶ 4.

a general intent crime, it could have granted relief based on the arguments presented in Mr. Hutchings' supplemental memorandum. At the very least, the court of appeals had an obligation to order that those issues be briefed by counsel.¹⁰ Clayton, 639 P.2d at 170. The issues were not frivolous. In fact, the issue regarding specific intent was entirely correct. Mr. Hutchings alone correctly identified that Instruction 27 does not reflect that aggravated assault was a specific intent crime. Not only did trial counsel fail to see the issues, so did appellate counsel. The State failed to recognize the issue was meritorious when it reviewed the Anders brief and chose to address it in part. (Add. C at 4.) And as discussed, the court of appeals erred not only in failing to require appellate counsel to address the issues, but in rejecting Mr. Hutchings' position on a ground that the State now concedes is incorrect—namely, that aggravated assault is a general intent crime.

The State attempts to deny Mr. Hutchings his ability to have the issue reviewed, even though the purpose of an Anders brief is to make certain that an appellate court adequately considers the merits of all of the issues raised—regardless of appellate counsel's desire to brief them or the State's desire to respond to them.¹¹ The issues presented here were properly presented to the court of appeals and can be considered by this court under both ineffective assistance of counsel and plain error. While ineffective

¹⁰ That underscores the problems with the State's position. Because the issues were not frivolous, the least to which Mr. Hutchings was entitled was an opportunity to present meritorious arguments with the assistance of appellate counsel. Had the court of appeals taken that minimal route, Mr. Hutchings would be in precisely the same position he is in here, except that the State would not be able to challenge the manner in which the issues were raised in prior proceedings. This court should not hold that the court of appeals' failure to order additional briefing somehow operates to waive Mr. Hutchings' right to raise the very issue on which the court of appeals should have ordered additional briefing.

¹¹ The court of appeals docket for this case is attached as Addendum E.

assistance of counsel is the most straightforward route, as discussed below, plain error is an alternative route to appellate review of the defects in Instruction 27.

B. The State's Invited Error Argument Fails Because Trial Counsel Did Not Invite the Error And the State Waived Its Invited Error Argument

The erroneous jury instructions were not invited by trial counsel. Regardless, the State waived application of the invited error doctrine by representing to the court of appeals that the invited error doctrine does not apply to any jury instruction issues.

This court applies invited error when “counsel, either by statement or act, affirmatively represented to the trial court that he or she had no objection to the proceedings.” State v. Winfield, 2006 UT 4, ¶ 14, 128 P.3d 1171 (internal quotation marks omitted). Appellate courts apply the doctrine because of the preference for permitting trial courts to decide issues in the first instance and to prevent trial counsel from misleading the trial court. State v. Hamilton, 2003 UT 22, ¶ 54, 70 P.3d 111. Under invited error doctrine, the mere failure to object does not constitute invited error, which requires some affirmative conduct that leads the trial court to believe a party approves of the court’s handling of an issue. State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993); see also State v. Geukgeuzian, 2004 UT 16, ¶ 9, 86 P.3d 742 (“[A] party who fails to object to or give an instruction may have an instruction assigned as error under the manifest injustice exception” (citing Utah R. Crim. P. 19(e))).

Invited error does not preclude consideration of Mr. Hutchings’ plain error argument. First, trial counsel did not engage in any affirmative conduct sufficient to invite errors in Instruction 27. Second, the State waived its invited error argument, and, not without some irony, under its own broad reading of invited error doctrine, “invited”

the court of appeals to disregard any invited error with regard to jury instructions. The State represented to the court of appeals that it need not address invited error because “the record does not contain the proposed jury instructions from either party, and the trial transcripts do not contain the discussion between the court and counsel regarding the proposed instructions.” (Add. C at 4 n.2).

1. Trial Counsel’s Failure to Object Was Not an Affirmative Act Within the Meaning of Invited Error Jurisprudence

The act on which the State would base invited error is a single statement. After hearing objections to a number of jury instructions, the trial court asked counsel “Anything else?” (R. 271:160.) Counsel responded, “No.” (*Id.*) That is not sufficient to constitute invited error as to the specific wording of Instruction 27. It is fundamentally different from a situation where an attorney proposes jury instructions the court adopts or affirmatively indicates that he has no objection to a specific instruction. *Geukgeuzian*, 2004 UT 16, ¶ 12. Here, trial counsel failed to object, which triggers plain error analysis, but trial counsel did not lead the court into committing the error.

At its most expansive, the invited error doctrine in Utah has been premised on instances where trial counsel “affirmatively represented to the court that he or she had no objection to the jury instruction.” *Hamilton*, 2003 UT 22, ¶ 54. But even those cases involved either a greater degree of affirmative conduct or approval of a specific instruction after discussion of that instruction. For instance, in *Hamilton*, “[t]he trial court specifically required counsel to confirm on the record, that the State takes no exception to the instructions . . . nor does the Defense.” *Id.* ¶ 55 (internal quotation marks omitted) (alteration in original). Similarly, in *State v. Andersen*, 929 P.2d 1107,

1108-09 (Utah 1996), trial counsel responded that he had no objection after he was “specifically queried by the court” about a particular instruction. And in State v. Medina, 738 P.2d 1021, 1021 (Utah 1987), “defense counsel not only failed to object to the proposed instruction, but she affirmatively stated that after reading it that she had no objection.” Thus, in those cases where the court has found that saying “no objection” constituted invited error, the non-objection was linked to a specific inquiry about the issue at hand—not an inquiry as general as “Anything else?”

Further, those cases represent the high-water mark of the invited error doctrine. Otherwise, legitimate issues will be artificially insulated from plain error review simply because the trial court periodically asks counsel if it would like to raise any issues. If the invited error doctrine were to apply here, there would be no meaningful distinction between failures to object and affirmative non-objections. This court should clarify that trial counsel must affirmatively state she has no objection to a specific instruction, not that she does not wish to raise additional issues generally.

Regardless, because the confusing instructions here involve an element of the crime of aggravated assault, the error qualifies as a “manifest injustice” under this court’s interpretation of Rule 19(c) of the Utah Rules of Criminal Procedure. State v. Jones, 823 P.2d 1059 (Utah 1991) (Even though defendant failed to object to the lack of an elements instruction when the instructions were given, trial court’s complete failure to give an elements instruction was clear error and required reversal of his conviction and remand for a new trial.). Plain error review is available.

2. The State Waived Its Invited Error Argument by Telling the Court of Appeals That Invited Error Is Inapplicable

By representing to the court of appeals that the invited error doctrine does not apply, the State waived its right to raise invited error. A party must raise and adequately brief its claims of invited error. State v. Casey, 2003 UT 55, ¶ 39 n.10, 82 P.3d 1106. And when a party fails to raise issues before the court of appeals, those issues may not be “raised on certiorari unless the issue arose for the first time out of the court of appeals’ decision.” DeBry v. Noble, 889 P.2d 428, 443-44 (Utah 1995).

Here, the State concedes that it failed to raise the issue of invited error before the court of appeals. (Resp. Br. at 26.) That is an understatement. Beyond simply failing to raise the issue of invited error, the State affirmatively represented to the court of appeals that the record did not support an invited error argument with regard to jury instructions. (Add. C at 4 n.2). The State told the court of appeals that the record was insufficient to support invited error. (Id.) The State explained that, though it had considered raising a claim of invited error, “[i]n this case . . . the record does not contain the proposed jury instructions from either party, and the trial transcripts do not contain the discussion between the court and counsel regarding the proposed instructions.”¹² (Id.) The State chose instead to allow the court to conduct its review under a plain error standard, representing to the court of appeals that there was no error because “the instruction at issue here was correct” and that “[t]he State accordingly does not ask this Court to

¹² The State has abruptly shifted course. The record cite it relies on for invited error here is the second volume of the trial transcript. (Resp. Br. at 26 (citing R. 271:160).) That transcript was cited repeatedly in the Anders brief Mr. Hutchings’ counsel filed (including citations in the section of the Anders brief to which the State responded.). (Add. A at 6, 13, 14, 22.) The State makes no effort to explain how the record that it found inadequate before the court of appeals suddenly supports its claim of invited error.

determine whether Defendant approved this instruction prior to its submission.” (Id.) Because trial counsel’s approval of instructions by responding “no” to “anything else?” concerned all instructions, not a specific instruction, the State’s concession in the court of appeals applies with regard to Instruction 27.

Ironically, what this demonstrates is that the State not only waived its claim of invited error, it actually invited the court of appeals to reach the merits of Mr. Hutchings’ jury instruction issues under plain error standard.¹³ The court of appeals’ opinion is based, in part, on the State’s invitation: “Although Hutchings failed to object to these instructions in the trial court, he requests that we review them under the plain error doctrine. The State does not contest our review of these issues.” Hutchings, 2009 UT App 330, ¶ 2 n.1. In such circumstances, the State may not now raise invited error.

Finally, Mr. Hutchings notes the self-defeating nature of the State’s arguments that Mr. Hutchings’ claim is not properly before the court. Any invited error bolsters Mr. Hutchings’ argument concerning ineffective assistance of counsel. Geukgeuzian, 2004 UT 16, ¶ 13. The State sometimes recognizes that where an error is invited, “a defendant can obtain review only by alleging ineffective assistance of counsel in inviting the error.” (Resp. Br. at 25.) But, as discussed, the State argues that this defendant is not

¹³ The State argues that its invited error concession is no longer applicable because it was limited to the slightly different jury instruction claim raised by Mr. Hutchings’ appellate counsel in the Anders brief. (Resp. Br. at 26, 27 n.10.) That is incorrect. To the extent the concession was based on the State’s inability to find record evidence of invited error related to any jury instructions, the concession extended to all jury instructions. Further, as discussed, the issue was properly raised in Mr. Hutchings’ memorandum in support of his Anders issues. In its Anders response, the State represented that it had reviewed the record and concurred in then-appellate counsel’s finding that Mr. Hutchings’ arguments were frivolous. (Add. C at 4.) Thus, having reviewed and analyzed Mr. Hutchings’ arguments and record cites, the State should have raised its invited error argument.

entitled to review on that ground either because, in the State's view, appellate counsel was constitutionally ineffective in failing to raise the ineffective assistance of trial counsel in the court of appeals. (Id. at 28.) Yet even through that lens, this court still may address the issues concerning Instruction 27.

As the United States Supreme Court has explained, where appellate counsel fulfills Anders obligations, an ineffective assistance of appellate counsel claim survives if "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." Smith v. Robbins, 528 U.S. 259, 285-86 (2000). And as the Utah Supreme Court has explained, "If we were to require defendant to present the claim of ineffective assistance of trial or appellate counsel in a [new] proceeding . . . , we are not aware of any evidence or argument which might be made that is not now before us. We therefore conclude that in these peculiar, narrow circumstances, we should now address defendant's claim and not require him to raise it later in a [new] proceeding" State v. Humphries, 818 P.2d 1027, 1029 (Utah 1991). The issues are properly before this court, even on the State's view, because appellate counsel was constitutionally ineffective.

Conclusion

Mr. Hutchings' conviction for aggravated assault should be vacated. The jury was instructed that it could find Mr. Hutchings guilty of aggravated assault by finding that he had only a general intent to push Ms. Cuddeback's hand away from his face. That is how the court of appeals read the instructions, but it affirmed on the ground that aggravated assault was a general intent crime, something the State now concedes was incorrect. This court should reject the State's contention that the jury understood what the court of

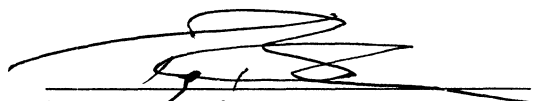
appeals did not, namely that the jury instructions plainly state that aggravated assault requires a specific intent.

Because the instructions misstated the State's burden, trial counsel was constitutionally ineffective in failing to object to the instructions. And to the extent appellate counsel failed to raise that issue—an issue Mr. Hutchings raised—then appellate counsel was constitutionally ineffective.

The jury's confusion caused by the instructions was prejudicial. Ms. Cuddeback testified that Mr. Hutchings pushed her arm away from him when she dug her fingernails into his face. That is consistent with Mr. Hutchings' having only a general intent to push her arm back and not the specific intent to cause serious bodily injury, especially where the only injury caused was a broken hand. This court should vacate Mr. Hutchings' conviction on the aggravated assault charge.

DATED this 14th day of February, 2011.

SNELL & WILMER L.L.P.



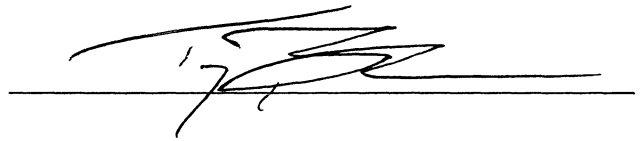
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February, 2011, two true and correct copies of the foregoing were served via U.S. Mail, postage-prepaid, upon the following:

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A handwritten signature in black ink, appearing to be "R. Tenney", is written over a horizontal line.

Index to Addenda

- Addendum A: Anders Brief of Appellant, Utah Court of Appeals No. 20080681 (June 18, 2009) (original addenda omitted)
- Addendum B: Mr. Hutchings' Supplemental Responses to the Anders Brief (originally filed as Addendum B to Anders Brief of Appellant, Utah Court of Appeals No. 20080681 (June 18, 2009))
- Addendum C: Response Brief of Appellee, Utah Court of Appeals, No. 20080681 (July 29, 2009)
- Addendum D: State v. Hutchings, 2009 UT App 330 (Memorandum Decision)
- Addendum E: Docket Report, State v. Hutchings, Utah Court of Appeals No. 20080681

Tab A

ORIGINAL

NOTICE

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
LARRY LEWIS HUTCHINGS, : Case No. 20080681-CA
Defendant/Appellant. : Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Assault, a Second Degree Felony, in violation of Utah Code Ann. § 76-5-103, and Criminal Mischief, a Class B Misdemeanor, in violation of Utah Code Ann. 76-6-106, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dennis M. Fuchs, presiding. The defendant is currently incarcerated in connection with the case on appeal.

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FILED
UTAH APPELLATE COURTS
JUN 18 2009

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
LARRY LEWIS HUTCHINGS, : Case No. 20080681-CA
Defendant/Appellant. \ :

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Annotated §§ 77-18a-1(1)(a) (2006 as amended) and 78-4-103(2)(e) (2008 as amended).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Did defense counsel and the prosecution have an improper relationship or did they conspire to deprive Mr. Hutchings of his due process rights? Questions of law are reviewed for correctness. *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992). The issue was preserved in Mr. Hutchings' pro se "Memorandum in Support of Motion to Amend Appellants Brief," *see* Addendum A. The issue is not otherwise contained in the record.

2. Was the evidence insufficient to support a conviction? "We will not overturn a jury verdict unless the evidence presented at trial is "so insufficient that reasonable minds could not have reached the verdict." *J.W. v. State*, 2001 UT App 208

(citations omitted). Similarly, did the court err in not granting Mr. Hutchings' motion to dismiss? "[A] motion for a directed verdict made at the close of the state's case may be denied if the trial court finds that the state has established a 'prima facie case against the defendant by producing 'believable evidence of all the elements of the crime charged.'" *State v. Emmett*, 839 P.2d 781, 784 (Utah 1992) (citation omitted). The evidence is to be viewed in the light most favorable to the state. *See Mahmood v. Ross*, 1999 UT 104, ¶ 16, 990 P.2d 933. The issue was preserved at trial. R 271:75-80.

3. Did "vindictive prosecution" occur when the State amended the Information to alleged more serious crimes than the ones listed in the original information? Questions of law are reviewed for correctness. *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992). The issue was preserved in Mr. Hutchings' pro se "Memorandum in Support of Motion to Amend Appellants Brief," *see* Addendum A. Mr. Hutchings response to counsel's characterization of this related issue is attached in Addendum B.

4. Did the trial court err in denying Mr. Hutchings' Motion for a New Trial on the basis that prior trial counsel failed to investigate and raise the circumstances of his back injury to the jury? "[I]t is well settled that, as a general matter, the trial court has broad discretion to grant or deny a motion for a new trial. Under this standard of review, we will reverse only if there is no reasonable basis for the decision." *State v. Redding*, 172 P.3d 319, 2007 UT App 350 (citations omitted). The issue was preserved in Mr. Hutchings' Motion for a New Trial. R. 269.

5. Did prior trial counsel perform ineffectively when he failed to object to an improper jury instruction. "This court reviews a trial court's failure to give accurate elements in a jury instruction under a correctness standard." *State v. Stevenson*, 884 P.2d 1287, 1290 (Utah App. 1994). "This court has consistently held that '[f]ailure to give an elements instruction for a crime satisfies the manifest injustice standard under rule 19(c) and constitutes reversible error as a matter of law.'" *American Fork v. Carr*, 970 P.2d 717, 720 (Utah App. 1998) (alteration in original) (citation omitted). "Further, because [t]he general rule is that an accurate instruction upon the basic elements of an offense is essential, failure to provide such an instruction is reversible error that can never be considered harmless." *State v. Stringham*, 957 P.2d 602, 608 (Utah App. 1998) (alteration in original) (quotations and citations omitted); *see also State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991) ("[T]he failure to give [an elements] instruction can never be harmless error.").

Prior defense counsel did not object to the jury instruction. "When objections are not made at trial and properly preserved, appellate review is under a 'plain error' standard. Plain errors are those that 'should have been obvious to the trial court and that affect the substantial rights of the accused.'" *State v. Morgan*, 813 P.2d 1207, 1210-11 (Utah App. 1991) (citing *State v. Eldredge*, 773 P.2d 29, 35 (Utah), *cert. denied*, 493 U.S. 814 (1989)); *cf. State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992) (Challenges to jury instructions ordinarily present a question of law, reviewed on appeal without deference to

the trial court). For unpreserved issues, the matter may be reviewed under the doctrines of plain error, manifest injustice, or ineffective assistance of counsel. *State v. Morgan*, 813 P.2d 1207, 1210-11 (Utah App. 1991); *State v. Casey*, 2003 UT 55 at ¶ 40, 82 P.3d 1106 ("'[M]anifest injustice' has been defined as being 'synonymous with the 'plain error' standard.'"); *see also Casey*, 2003 UT 55 at ¶ 41 (The manifest injustice or the plain error standard requires the appellant to show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.").

"To establish ineffective assistance of counsel, 'a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'" *Mvers v. State*, 2004 UT 31, ¶ 20, 94 P.3d 211.

In addition, "When an ineffective assistance of counsel claim 'is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law.'" *State v. Isiah Bo'Cage Vos*, 2007 Ut App 215, ¶9 (Utah App 2007) (citations omitted).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The texts of the following relevant constitutional and statutory provisions are contained in this brief or Addendum C:

1. Utah Code Ann. § 76-5-103

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

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

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

Id. (emphasis added).

2. Utah Code Ann. § 76-1-601(11) ("serious bodily injury" includes "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member").

STATEMENT OF THE CASE

On April 13, 2006, the State filed an Information charging Mr. Hutchings with one count of Burglary, a Second Degree Felony; one count of Assault (Domestic Violence), a Class A Misdemeanor; and one count of Criminal Mischief, a Class B Misdemeanor. R. 1-3.

After Mr. Hutching's Preliminary Hearing on June 13, 2006, the State filed an Amended Information charging Mr. Hutchings with one count of Aggravated Burglary, a

First Degree Felony; one count of Aggravated Assault, a Second Degree Felony; and one count of Criminal Mischief, a Class B Misdemeanor. R. 4-5.

Following the trial, the jury found Mr. Hutchings guilty of Criminal Mischief and Aggravated Assault. R. 212-213. Mr. Hutchings was found not guilty of Aggravated Burglary. R. 214

On October 22, 2007, the trial court sentenced Mr. Hutchings “to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison” on Count II, Aggravated Assault, a 2nd degree felony. R. 229. Mr. Hutchings was “given credit for time serve[d]” on Count III, Criminal Mischief. R. 230. The trial court ordered that Mr. Hutching’s sentence to “run consecutively to time now serving at Utah State Prison.” R. 230

STATEMENT OF THE FACTS

On April 6, 2006, Larry Hutchings went to 120 E. Utopia Avenue, #2, a place where he resided. R 271:106. His girlfriend, Deborah Cuddeback, would not open the door. R 271: 113. Mr. Hutchings kicked in the door to retrieve some of his personal belongings whereupon he was attacked by Ms. Cuddeback. R 271: 113-14. According to the State, however, Mr. Hutchings was the aggressor who grabbed the victim and assaulted her. During the altercation, Ms. Cuddeback scratched and bruised Mr. Hutchings about the neck and face. R 271: 115-17, 120. Ms. Cuddeback’s hand was broken; she had discomfort in her neck and other parts of her body. R 271:42, 47.

Not finding proof of all the elements of Aggravated Burglary, the jury found Mr. Hutchings not guilty of “intentionally or knowingly ... enter[ing] or remain[ing] unlawfully in the dwelling [of] Deborah Cuddeback ... [w]ith the intent to commit an assault on any person; and ... [t]hat in attempting, committing, or fleeing from a burglary, the defendant caused bodily injury to Deborah Cuddeback, who was not a participant in the crime.” R 181 (the elements of Aggravated Burglary are contained in Instruction 7). His acquittal on that charge, though, was offset by his convictions for Aggravated Assault and Criminal Mischief, from which he appeals.

SUMMARY OF THE ARGUMENT

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clayton*, 639 P.2d 168 (Utah 1981), appellate counsel for Mr. Hutchings hereby files a hybrid “Anders” brief. Point I and its subsections are raised pursuant to *Anders*. Point II is raised separately by appellate counsel without any reference to *Anders*.

No evidence exists in the record in terms of any improper attempts between the prosecution and defense counsel to conspire against Mr. Hutchings. The record speaks for itself as to the actions or inactions taken by defense counsel during trial and on appeal.

Sufficient evidence existed in the record to establish “serious bodily injury.” Mr. Hutchings disagrees with that assessment and appears to argue that the lack of distinction between “serious bodily injury” and “substantial bodily injury” entitles him to the benefit of a lesser charge.

Mr. Hutchings argues that the mental state of “intentionally” was not proven at trial. Counsel expounds on that issue and notes that because the jury was allowed to base its Aggravated Assault conviction on the lesser mental state of “knowingly,” the conviction must be reversed due to the improper elements instruction. Assuming, *arguendo*, that sufficient evidence existed for the “intentionally” or “knowingly” mental state, given the possibility that the jury used an inapplicable mental state in accordance with the flawed instruction, defense counsel performed ineffectively in allowing such an instruction to be given to the jury. The trial court also erred in allowed such an instruction since it was contrary to the plain language of the Aggravated Assault statute.

ARGUMENT

POINT I. ISSUES PRESENTED ON APPEAL MAY BE BRIEFED IN ACCORDANCE WITH THE *ANDERS* AUTHORITY

In Point I, Mr. Hutchings’ issues are summarized below. His own *pro se* position is attached in Addendum A and Addendum B.

A. DID DEFENSE COUNSEL AND THE PROSECUTION HAVE AN IMPROPER RELATIONSHIP OR DID THEY CONSPIRE TO DEPRIVE MR. HUTCHINGS OF HIS DUE PROCESS RIGHTS?

According to Mr. Hutchings, one of his arguments appears to suggest that his trial counsel and/or his appellate counsel are not appropriately representing him:

The defendant’s attorneys Jason Poppleton and Lisa Remal[,] as members of the Salt Lake Legal Defenders Association [and] also [as] a state agency[,] have a close and continuous relations[hip] with the prosecuting office and the court itself through discrete, ami[a]ble relationships with the judge, through the court family. In defendant’s case it appears that his defense counsel was careful not to

compromise or weaken the[ir] relationship by any seemingly antagonistic action in defense of the defendant. A definite at[titude] of “Go and get along” will be shown as to [be] defense counsel’s approach in defendant’s defense. The same appears to be the approach of appellant counsel, Ron Fujino, in this appeal.

See State of Utah v. Larry Lewis Hutchings, “Memorandum in Support of Motion to Amend Appellant’s Brief,” page 2, dated January 21, 2009 (hereinafter Hutchings’ Issues) (attached as Addendum A).

In contrast to Mr. Hutchings’ claims, however, no evidence exists in the record regarding any improper relationship between the prosecution and defense counsel. The record speaks for itself as to the actions or inactions taken by defense counsel during trial and on appeal. Other than the arguments made herein,¹ there is no record basis for such an argument on appeal. *Cf.* Utah R. App. P. 11(e)(2) (“Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.”); *see also Carter v. Galetka*, 44 P.3d 626, 2001 UT 96 (“Counsel cannot be found ineffective for failing to raise an ineffectiveness of counsel issue against himself or herself.”).

¹ In addition to the arguments briefed on appeal, Mr. Hutchings previously requested and this Court denied his Rule 23B motion to remand the case for an ineffective of assistance of counsel determination. Utah R. App. P. 23B.

B. DID THE PROSECUTION FAIL TO MEET ITS BURDEN OF PROOF IN NOT PRESENTING SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION?

While it may be understandable that Mr. Hutchings disagrees with the jury's verdict or its perception of the persuasiveness of the trial evidence, the standard of review *on appeal* means that the trial evidence may not be simply reargued to this Court as if it were another jury:

This court has stated that in order to prevail on a sufficiency challenge to a jury verdict, "the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." We will not overturn a jury verdict unless the evidence presented at trial is "so insufficient that reasonable minds could not have reached the verdict."

The burden on a defendant challenging the sufficiency of the evidence is heavy. Defendant must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack. This court 'must sustain the trial court's judgment unless it is against the clear weight of the evidence [presented at trial], or if [we] otherwise reach[] a definite and firm conviction that a mistake has been made.' The conviction, however, 'must be supported by a quantum of evidence concerning each element of the crime as charged from which the [factfinder] may base its conclusion of guilt beyond a reasonable doubt.'

J.W. v. State, 2001 UT App 208 (citations omitted).

1. A Quantum Of Evidence Existed For Serious Bodily Injury

According to Mr. Hutchings, "the prosecution has never at any time produced evidence of a serious bodily injury having been caused to another by anyone[,] let alone the defendant." Hutchings' Issues, page 9. The aggravated assault jury instruction and

the corresponding statute both require proof of "serious bodily injury." R 186 (Jury Instruction 14 is attached as Addendum D); Utah Code Ann. § 76-5-103(1)(a); Utah Code Ann. § 76-5-103(1)(b) (subsection (b) of the aggravated assault statute is inapplicable because it was not part of the instruction given to the jury).²

"A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he ... intentionally causes serious bodily injury to another." Utah Code Ann. § 76-5-103. Under Utah Code Ann. § 76-1-601(11), "serious bodily injury" includes "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member." *Id.* As reflected by the following excerpted portions of the trial transcripts, for the element of serious bodily injury a quantum of evidence existed from which the jury may base its conclusion of guilt beyond a reasonable doubt. Ms. Cuddeback expressly testified about sustaining protracted loss or impairment of the function of her hand:

Ms Cuddeback: That's as far as I can bend my hand still.

.....

² Mr. Hutchings also appears to argue that because subparagraph (b) requires "force likely to produce death or serious bodily injury," he was improperly convicted. Utah Code Ann. § 76-5-103(1)(b) (*emphasis added*). Assuming the correctness of his statement that there was no force likely to produce death in this case, there still was force *likely to produce* serious bodily injury – force a step below the jury finding that he *actually caused* serious bodily injury to another. Utah Code Ann. § 76-5-103(1)(a). Again, the issue is a non-issue because the subparagraph (b) language was not presented to the jury in the instruction. R 186.

Ms. Parkinson: What type of work do you do? I know you don't want to say where you work, but what type of work do you do?

Ms. Cuddeback: Housekeeping.

Ms. Parkinson: So do you use your hand a lot then?

Ms. Cuddeback: I do.

Ms. Parkinson: Has it been difficult to use your hand?

Ms. Cuddeback: Very.

Ms. Parkinson: How so?

Ms. Cuddeback: I clean millions of toilets. And I use a rag, and it has all these metal works on the back. And you have to wipe in here and there. And I hit it on the thing all the time. And just pushing the bathroom cart that we push from place to place, you have to squeeze it and push the thing along. It gets very sore after a while.

Ms. Parkinson: Are you right handed?

Ms. Cuddeback: I am very much right handed.

Ms. Parkinson: Has this injury effected the way you write?

Ms. Cuddeback: Oh, yeah, big time.

Ms. Parkinson: Your Honor, if we could have the witness step down and show the jury her injuries?

The Court: Any objection?

Mr. Poppleton: No objection.

The Court: If there is no objection from the defense, that's fine.

Ms. Parkinson: If you could just show the jury how you can move your hand, or if you can't move your hand and where your knuckle is.

Ms. Cuddeback: I can only bend it right here.

Ms. Parkinson: So could you show us the other hand where the knuckle should be aligned? And let's see your other hand. So can you actually close your fist?

Ms. Cuddeback: I could, but just this far.

See R. 272:61; R. 272:65-67. In addition to Ms. Cuddeback's testimony, Dr. Steven Mimnaugh's testimony provided more evidence of serious bodily injury:

Mr. Burmester: Even without the further specialist, you mention a certain amount of time that the bone would have to be immobilized. Assuming it all welded back miraculously perfect, how long would that take?

Dr. Mimnaugh: It would probably take – six weeks would be a good guess of constant immobilization. There are implications to the immobilization because then the muscles get weak and tendons can shorten and joints can get stiff. And so then there's – usually will have the patients do a course of hand therapy to make sure that the hand goes back to its normal function.

Mr. Burmester: While it's immobilized or after?

Dr. Mimnaugh: After. After. So you are sure the bone is really set up.

Mr. Burmester: So the setup time takes how long?

Dr. Mimnaugh: About six weeks.

Mr. Burmester: And then assuming that is successful, a time of physical therapy for how long would you guess?

Dr. Mimnaugh: Probably four weeks.

R. 271:53-54. Sufficient evidence was presented for proving “serious bodily injury.”

2. The Evidence Presented At Trial Satisfied The Intent Requirement of “Knowingly”

According to Mr. Hutchings, “the prosecution failed to ever present any evidence [of] intent, [specifically] as to the specific element[,] intentionally.” Hutchings’ Issues, page 9. However, as discussed below, the more glaring problem was that the jury was improperly allowed to base its conviction on the lesser mental state of “knowingly.” See *infra* Point II; R 198 (in jury instruction 27, the mental states of “intentionally” AND “knowingly” were both presented to the jury); R 271: 178 (during closing argument, the prosecution addressed the “knowingly” element of aggravated assault).

Assuming, *arguendo*, that the “intentionally” or “knowingly” mental state may have been satisfied by the evidence presented at trial, there is no way for this Court to know which mental state the jury relied on during its deliberations. Since the jury may have based its conviction on the “knowingly” mental state, see R 186 (jury instruction 14) and R 198 (jury instruction 27), the trial court improperly allowed them to consider a mental state below the greater mental state of “intentionally” in reaching its verdict.

The jury was not properly informed about the difference between “knowingly” and “intentionally.” Such a result constitutes prejudicial error and requires reversal. *State v. Haston*, 846 P.2d 1276, 1277 (Utah 1993) (per curiam) (“Since the jury was allowed to consider the depraved indifference alternative, as well as those states of mind described in subsections (a) and (b) of section 76-5-203(1), defendant is entitled to a new trial.”); see

Francis v. Franklin, 471 U.S. 307, 322 (1985) (“Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.”); see *infra* Point II.

C. DID “VINDICTIVE PROSECUTION” OCCUR WHEN THE STATE AMENDED THE INFORMATION TO ALLEGED MORE SERIOUS CRIMES THAN THE ONES LISTED IN THE ORIGINAL INFORMATION?

According to Mr. Hutchings, the prosecution’s decision to amend the charges listed in the Information amounted to vindictive prosecution. After the preliminary hearing, the State asserted its position:

And your Honor, the State would rest at this point. The State has informed defense Counsel that the offer is withdrawn once the preliminary hearing went forward.

The State also told defense Counsel that we would be amending the Information to an aggravated burglary, Count I, instead of burglary now as a second-degree felony; and the second count would be an aggravated assault, as a second-degree, causing serious bodily injury. Defense Counsel was aware of that.

R. 31:30. The court allowed the amendment and bound-over the charges. R. 31:31.

“The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.” Utah R. Crim P. 4(d). Mr. Hutchings correctly views

the State's amendment as improper because a "different offense is charged." *Id.*

However, the second part of Rule 4 hinders his argument.

Tillman v. Cook, 855 P.2d 211 (Utah, 1993), provides guidance. Defendant Tillman also argued that his substantial rights were prejudiced by an amendment to the information. Rejecting his argument, the supreme court explained the "[h]e was bound over after the information was amended; therefore, the circuit court found probable cause in the evidence to support it. Moreover, the information was amended on August 18, 1982, and the trial did not begin until January 4, 1983. Thus, Tillman's attorneys had more than three months after the amendment to prepare a defense to the additional aggravating circumstances alleged. *Id.* at 215-16.

Similarly, in Mr. Hutchings' case, he was bound over after the information was amended, with probable cause found by the circuit court. Since Mr. Hutchings' trial then did not commence until September 4, 2007 – approximately 15 months after the preliminary hearing, his notice of the amendment and the opportunity to defend the aggravated assault charges were at least as great as the 3 month time period afforded Tillman to defend in his death penalty case. *See also State v. Kirgan*, 712 P.2d 240 (1985) (citation omitted) ("A variance between an information and the proof will be considered immaterial in a case in which it appears that the defendant's right to notice and fair opportunity to defend have not been infringed and the record is such as to protect the defendant against another prosecution for the same offense.").

Due to governing authority, which allowed the State to amend the Information after the preliminary hearing, the lack of improper action by the State nullifies the vindictive prosecution argument.

D. DID TRIAL COUNSEL PERFORM INEFFECTIVELY WHEN IT FAILED TO INVESTIGATE THE DEFENDANT'S BACK INJURY?

According to Mr. Hutchings, his trial counsel was ineffective in failing to investigate his back injury and to present evidence of his injury to the attention of the jury. The parties disagreed on the nature of the struggle which formed the basis for the aggravated assault charge. Mr. Hutchings' position is that had the jury known about his back injury, his account would have been believed over the victim's account because his back injury prevented him from acting (or assaulting) anyone in the manner alleged. In his Motion for a New Trial, the issue was addressed by prior defense counsel:

What I [defense counsel] can say, in fairness to Larry [Hutchings] is this, obviously he went to the hospital. I'm sure there was some conversation about why he went to the hospital and obviously he would have relayed the information that he had a back injury. So in fairness to Larry, that conversation probably took place but whether or not he told us it was as a result of the date in question, April 6th of 2006, I don't have any recollection of that and I don't believe that to be the case. I would say with certainty that Mr. Hutchings never did ask us to talk to his doctor, he never asked us to get medical records from doctor. That I can say with certainty.

R. 269:11-12.

During the Motion for a New Trial, Mr. Hutchings also informed the judge that at trial, he did not discuss his back injury in front of the jury:

[Defense counsel]: In your testimony did you reference the injuries that you had sustained?

Mr. Hutchings: Other than the facial injuries at the time, no sir, I didn't.

[Defense counsel]: And why not?

Mr. Hutchings: I just – it slipped my memory at that point.

R. 269:6.

After the evidence was presented during the Motion for a New Trial, the trial court ruled on the back injury issue as follows:

I've [the court] listened to the evidence that's been presented here. Again, I was the one that presided over the trial so I'm familiar with the trial and the evidence that was presented at trial and I've read the memorandums. I'm going to deny the defendant's motion.

I'm sorry, Mr. Hutchings, but I'm denying your motion. I don't think you've met either prong of the Strickland case and requirements. I don't think that you've shown that your counsel's performance was objectively deficient. I've heard testimony from counsel that they might have been aware of your back injury but at no time were they aware that you were seeking to have your doctor questioned by them nor your medical records to be examined and possibly introduced at the time of trial. In fact, I've heard your own testimony that during the course of the trial you spoke about this being basically self-defense against the alleged victim but even in your testimony you never brought up the fact of the back injury and you never mentioned it in the course of the trial while on the stand or to your counsels during the course of the trial and you were obviously aware of your back injury. You did claim that you had received certain injuries, I remember that during the trial from the alleged victim and that did come out to the jury and they still believed that you were the aggressor and I think that there was enough evidence for them to be able to do that.

I don't even think with that I have to get to the second prong but I'm surely not convinced after having heard all the evidence that even if that came out in trial, it would have made any difference in the jury's verdict in regards to this matter. You had given testimony that you were injured, maybe not specifically in regards to

your back but to other injuries and I'm not sure that this would have convinced the jury to find any differently than they did find. So for those reasons I'm denying your motion.

R. 269:16-17.

"[I]t is well settled that, as a general matter, the trial court has broad discretion to grant or deny a motion for a new trial. Under this standard of review, we will reverse only if there is no reasonable basis for the decision." *State v. Redding*, 172 P.3d 319, 2007 UT App 350 (citations omitted). Given the discretion afforded the trial court for determining whether to accept or reject Mr. Hutchings testimony over his counsel's testimony, "no reasonable basis" exists in the record for a reversal on this issue. The lower court acted within its discretion in finding that at "no time were they [counsel] aware that you were seeking to have your doctor questioned by them nor your medical records to be examined and possibly introduced at the time of trial." R. 269: 16-17. The allegations do not meet the requirements of an ineffective assistance of counsel claim. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

E. IN THE EVENT THIS COURT FINDS REVERSIBLE ERROR, DOES THE DOUBLE JEOPARDY CLAUSE PREVENT A RE-TRIAL OR RE-SENTENCING?

According to Mr. Hutchings, the Double Jeopardy clause prevents this Court from remanding his case for re-trial or re-sentencing on a lesser included charge not included in the jury instructions. The issue is premature at this point of the briefing schedule, but the following principles are noted.

[T]he double jeopardy guarantee contained in [the state and federal constitution] protects a defendant from (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

The double jeopardy guarantee does not protect a defendant from a retrial for an offense when his conviction for that same offense has been reversed on appeal as a result of trial error. A caveat to this general rule is that when the conviction of a lesser offense implies an acquittal of a greater offense, double jeopardy bars retrial of the greater offense if the conviction for the lesser offense is reversed on appeal.

State v. Low, 192 P.3d 867, 2008 UT 58 ¶¶ 51-52 (citations omitted). Depending on how the appeal is resolved, the above authority may or may not be applied to the circumstances of this case.

F. *ANDERS* CERTIFICATION

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clayton*, 639 P.2d 168 (Utah 1981), appellate counsel seeks permission from this Court to withdraw from the appeal. Counsel hand-delivered a copy of the draft for the brief to Mr. Hutchings for his review. In response, Mr. Hutchings penned a response to the draft. Mr. Hutchings' initial arguments on appeal, as well as his response to the draft of the brief are attached in Addendum A and Addendum B. On two occasions, counsel discussed the substantive arguments of the drafted brief with Mr. Hutchings.

Although the brief represents a hybrid presentation of the respective positions of both appellate counsel and Mr. Hutchings, should Mr. Hutchings prevail in his appeal, trial counsel would be appointed to represent him during the lower court proceedings. Should Mr. Hutchings not prevail in his appeal, Mr. Hutchings' right to appellate counsel

would not extend beyond his direct appeal (i.e. not for a petition for certiorari, nor for subsequent habeas corpus proceedings). *Ross v. Moffitt*, 417 U.S. 600 (1974).

POINT II. THE TRIAL COURT ERRED IN ITS ELEMENT INSTRUCTION ON AGGRAVATED ASSAULT TO THE JURY

The jury instruction on Aggravated Assault, Instruction 14, improperly set forth the mental state as *either* intentionally or knowingly. The elements portion of the jury instruction read:

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

R 186 (Jury Instruction 14 is attached as Addendum D).

By allowing the jury to convict Mr. Hutchings under the lesser mental state of "knowingly," as opposed to the more culpable mental state of "intentionally," the instruction disregarded the elements from the applicable aggravated assault statute. *See State v. Harmon*, 712 P.2d 291 n.2 (Utah 1986) (per curiam) (citations omitted) ("failure to instruct on the elements of the crime is reversible error."). The aggravated assault statute reads in pertinent part:

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

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

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

Utah Code Ann. § 76-5-103(1) (emphasis added).

The State's theory of aggravated assault, which was reflected in jury instruction 14, focused only on subsection 76-5-103(1)(a). See Addendum D. The intentional mental state is clearly and unequivocally required under subsection 103(1)(a).

The inapplicable section, Utah Code Ann. § 76-5-103(1)(b), was not part of jury instruction 14. See Addendum D. Admittedly, subsection (1)(b) does not require the intentional mental state, but since subsection (1)(b) was not part of the jury's deliberations, the lesser mental states of knowingly or recklessly were inapplicable for Mr. Hutchings' trial. See *State v. McElhaney*, 579 P.2d 328 (Utah 1978) (footnote omitted) ("Under 76-5-103(1)(a) the prosecution must prove the defendant intentionally caused serious bodily injury to another, but under 76-5-103(1)(b) no culpable mental state is specified and thus under 76-2-102 "intent, knowledge, or recklessness shall suffice to establish criminal responsibility").

In the case at bar, trial counsel rendered ineffective assistance when he failed to fully and appropriately object to instruction 14. Granted, counsel partially requested the insertion of the word, "intentional," into the accompanying assault instruction, R 271:152, but such a request did not correct the otherwise improperly inserted "knowingly" mental

state for the aggravated assault jury instruction. *State v. Haston*, 846 P.2d 1276, 1277

(Utah 1993) (per curiam) ("Since the jury was allowed to consider the depraved indifference alternative, as well as those states of mind described in subsections (a) and (b) of section 76-5-203(1), defendant is entitled to a new trial."); see *Francis v. Franklin*, 471 U.S. 307, 322 (1985) ("Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict."). Prior counsel's inactions constituted deficient performance and it was unreasonable for counsel to act in a manner contrary to the language in the Aggravated Assault statute. Absent the error, the outcome would have been different.

Moreover, the trial court committed plain error in allowing the jury instruction on Aggravated Assault to be in clear violation of the plain language of the corresponding statute. Compare Addendum D with Utah Code Ann. § 76-5-103(1)(a). Allowing the jury to consider a lesser mental state as a basis for a conviction is plain error. The error should have been obvious to the trial court because of the statutory language. And the error was harmful because this Court is unable to determine if the jury improperly relied on the lesser mental state during its deliberations. A new trial is required.

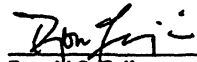
POSITION ON ORAL ARGUMENT

Oral argument is not requested.

CONCLUSION

Defendant/Appellant, Larry Lewis Hutchings, respectfully requests that this Court reverse his conviction and remand his case for a new trial.

SUBMITTED this 18 day of June, 2009.



Ronald S. Fujino
Attorney for Mr. Hutchings

CERTIFICATE OF DELIVERY

I hereby certify that I have caused the original and seven copies of the foregoing to be hand-delivered to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 18th day of June, 2009.



James C. Cole

Tab B

ON PAGE 15 OF MR. FUJINO'S BRIEF TO THIS COURT HE STATES THAT SUBSECTION 6 TO SECTION 76-5-103 CHALL' CODE IS INAPPLICABLE BECAUSE IT WAS NOT GIVEN TO THE JURY THAT IS NOT AND HAS NEVER BEEN MY CHALLENGE, MY CHALLENGE IS TO THE SPECIFIC ELEMENTS THAT DISTINGUISH BETWEEN A MORE SERIOUS CRIME FROM A LESS SERIOUS ONE.

AND TO DETERMINE UPON WHAT ELEMENTS THE DISTINCTION TURNS ALL THREE STATUTE'S OF LAW MUST BE REVIEWED, TO NOTE THE DETERMINATION OF THE LEGISLATIVE INTENT IN DEFINING WHAT ELEMENTS THE DISTINCTION TURNS AND THIS DISTINCTION MUST BE REVIEWED BECAUSE THE INTEREST IN DUE PROCESS IS IMPLICATED.

THE UNITED STATES SUPREME COURT, HELD IN RE WINSHIP "THE WINSHIP REQUIREMENTS APPLIES TO ELEMENTS THAT DISTINGUISH A MORE SERIOUS CRIME FROM A LESS SERIOUS ONE. THUS A STATE MAY NOT DISTINGUISH BETWEEN SIMILAR OFFENSES THAT HAVE DIFFERENT MAXIMUM PENALTIES WITHOUT REQUIRING THE PROSECUTION TO PROVE BEYOND A REASONABLE DOUBT THE FACTS UPON WHICH THE DISTINCTION TURNS BECAUSE THE INTEREST IN DUE PROCESS IS IMPLICATED" SEE APPENDIX U. N.J., 530 U.S. 466, 488-92 (2000) (CITE OMITTED).

I BELIEVE WE CAN ALL AGREE THAT PART OF THE DISTINCTION BETWEEN THE LESS SERIOUS AND MORE SERIOUS CRIMES OF AGGRAVATED ASSAULT THIRD DEGREE AND AGGRAVATED ASSAULT SECOND DEGREE IS THE ELEMENT OF INTENTIONALITY. BUT THE ONLY DISTINCTION BETWEEN AGGRAVATED ASSAULT THIRD DEGREE AND ASSAULT CLASS "A" MISDEMEANOR IS SERIOUS BODILY INJURY AND SUBSTANTIAL BODILY INJURY. BUT THE DEFINITION PROVIDED FOR IN SECTION 76-1-608 (1) "SERIOUS BODILY INJURY" INCLUDES BODILY INJURY CREATES OR CAUSES SERIOUS PERMANENT DISFIGUREMENT, PROTRACTED LOSS OR IMPAIRMENT OF THE FUNCTION OF ANY BODILY MEMBER.

THE LANGUAGE PROTRACTED LOSS OR IMPAIRMENT OF THE FUNCTION

①

Of any bodily member. This could include any injury which may require immobilizing for a period of time. A sprain of some severity may require immobilizing for some weeks would this not be a substantial bodily injury and also a serious bodily injury by the definitions set forth for both the more serious crime aggravated assault and the less serious crime of assault. And do not both these similar offenses carry different maximum penalties on what does the distinction turn?

A review of the record preliminary hearing (At 303) the prosecutor placed the distinction on the language "causing serious bodily injury. And again on the record preliminary hearing (At 31) the prosecutor "it would be causing bodily injury (your Honor, and that's such it is 76-6-203" the Judge "that will be allowed".

Clearly the prosecutor and the court placed the distinction on the language of serious bodily injury vs substantial bodily injury and as the definition provided in Section 76-1-60(1) can not by definition be distinguished the more serious crime from the less serious crime both carrying different maximum penalties and thusly deny's the defendant the right to due process.

is a less serious crime includes the language - uses a weapon or other means of force likely to produce death or serious bodily injury vs the language - intentionally causes serious bodily injury to another as the more serious crime. How can the more serious crime not have the same level of risk of life, included in its element and be a more serious crime by definition?

Further as the distinction between the more serious crime vs the less serious crime is undignifiable and on what it turns implied due process it is by nature ambiguous it must

(2)

(9)

decided in favor of the defendant.

Finally, under the argument on jury instructions #27 defines "intentionally in a general sense but fails to define it specifically to intentionally causes serious bodily injury. The intent element of the statute is the element upon which the distinction between a more serious crime and a less serious one turns. Therefore requires that an act and mental state of intent to cause the injury to the alleged victim with the specific intentional act of injuring. See the wording requirements and Appellate v. N.J., the United States Supreme Court holding presented in previous argument in regards to "A state may not distinguish between similar offenses that have different maximum penalties without requiring the prosecution to prove beyond a reasonable doubt the facts upon which the distinction turns because the interest in due process is implicated."

Tab C

Case No. 20080681 –CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/ Appellee,

vs.

Larry Lewis Hutchings,
Defendant/ Appellant.

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Brief of Appellee

Appeal from convictions for aggravated assault and criminal mischief,
in the Third Judicial District Court of Utah, Salt Lake County, the
Honorable Dennis M. Fuchs presiding.

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Oral Argument Not Requested

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Utah Code Ann. § 76-5-103 (West 2004)**

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Case No. 20080681 – CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Larry Lewis Hutchings,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for aggravated assault, a second degree felony, and criminal mischief, a class B misdemeanor. This Court has jurisdiction under Utah Code Annotated § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUES

Issue: Defendant raises five issues in his brief. Four of the issues are addressed by defense counsel in an *Anders* brief. The State concurs in the analysis set forth therein.

Through counsel, Defendant also argues that the trial court erred when it submitted a jury instruction that allowed the jury to consider whether Defendant knowingly assaulted his victim.

Standard of Review. Defendant acknowledges that he did not object to this issue below. As such, this Court should only reverse if it determines that there was manifest error. *State v. Hamilton*, 2003 UT 22, ¶¶ 53-54, 70 P.3d 111; *State v. Bolson*, 2007 UT App 268, ¶ 11, 167 P.3d 539.¹

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Annotated § 76-5-102 (West 2004) and Utah Code Annotated § 76-5-103 (West 2004) are attached as Addenda to this brief.

STATEMENT OF THE CASE

On April 13, 2006, Defendant was charged with one count of burglary, one count of assault, and one count of criminal mischief. R. 1-3. On August 14, 2006, the State filed an amended information charging Defendant with one count of aggravated burglary, one count of aggravated assault, and one count of criminal mischief. R. 4-5.

Defendant was tried from September 4-5, 2007. R. 166-71. Following deliberations, the jury convicted Defendant of aggravated assault and criminal mischief, but acquitted him of aggravated burglary. R. 212-15.

¹ Defendant incorrectly suggests that the standard for reviewing an unpreserved challenge to a jury instruction is plain error. As noted above, such claims are reviewed for manifest error. As a functional matter, however, Utah courts have analyzed the two standards using the same test. *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996).

SUMMARY OF ARGUMENT

Defendant raises five issues in his brief. The first four issues are addressed by defense counsel in an *Anders* brief. The State concurs in defense counsel's analysis, and accordingly asks this Court to reject those arguments as frivolous.

With respect to the fifth issue, Defendant argues that the jury received an incorrect instruction on the elements of aggravated assault. Although Defendant claims that the jury should not have considered whether his conduct was knowing, the aggravated assault statute specifically requires the State to prove that an assault occurred, and settled law allows the State to prove assault through knowing conduct. Defendant's argument should therefore be rejected.

ARGUMENT

I.

UNLESS DIRECTED TO DO SO BY THIS COURT, THE STATE OFFERS NO RESPONSE TO THE *ANDERS* ISSUES

With respect to issues I.A-I.E, defense counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 783 (1967). Aplt. Br. 8-21. "Because of the special nature of the *Anders* brief, the attorney general [is not] expected to file a responsive brief." *State v. Clayton*, 639 P.2d 168, 170 (Utah 1981).

The State has reviewed the record and concurs in the analysis offered by defense counsel. As set forth therein, these arguments are frivolous and should be rejected.

II.

THE TRIAL COURT DID NOT COMMIT MANIFEST ERROR WHEN IT SUBMITTED JURY INSTRUCTION 14

In Point II of his brief, Defendant argues that Instruction # 14 misstated the law by “allowing the jury to convict Mr. Hutchings under the lesser mental state of ‘knowingly,’ as opposed to the more culpable mental state of ‘intentionally.’” Aplt. Br. 21. According to Defendant, the only mental state that is at issue in an aggravated assault charge is the “intentional” mental state. Aplt. Br. 21-23. Defendant acknowledges that he did not object to this instruction below, but asks this Court to review it for plain error. Aplt. 3. Contrary to Defendant’s claim, however, the instruction at issue was correct.²

² This Court ordinarily refuses to review unpreserved challenges to jury instructions where the defendant approved the instruction prior to its submission to the jury. See, e.g., *State v. Hamilton*, 2003 UT 22, ¶¶ 54-55, 70 P.3d 111. In this case, however, the record does not contain the proposed jury instructions from either party, and the trial transcripts do not contain the discussion between the court and counsel regarding the proposed instructions.

But, as explained below, the instruction at issue here was correct. The State accordingly does not ask this Court to determine whether Defendant approved this instruction prior to its submission.

Instruction # 14 defined the elements of aggravated assault as follows:

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

R. 186. Contrary to Defendant’s claim, this was a correct statement of the elements.

Defendant was charged with second degree aggravated assault. R. 4-5. Under Utah Code Annotated § 76-5-103(1)(a) (West 2004), second degree aggravated assault has two elements.

First, the State must prove that the defendant “commit[ted] assault as defined in Section 76-5-102.” Utah Code Ann. § 76-5-103(1)(a). When proving this, there is no statutorily prescribed mens rea. See Utah Code Ann. § 76-5-102 (West 2004). As such, the State is allowed to prove that the assault occurred through either intentional, knowing, or reckless conduct, Utah Code Ann. § 76-2-102 (West 2004), and Utah courts have thus repeatedly held that a person can be convicted of assault based on knowing conduct. See, e.g., *State v. Atkin*, 2006 UT App 155, ¶ 9, 135 P.3d 894; *State v. Jones*, 878 P.2d 1175, 1177-78 (Utah App. 1994).

Second, once the State has proven that an assault occurred “as defined in Section 76-5-102,” it then must prove that the assault was aggravated. By contrast to the assault element, the aggravated assault statute does contain a mens rea requirement for the aggravator. Specifically, the State must prove that the defendant “intentionally cause[d] serious bodily injury to another.” Utah Code Ann. § 76-5-103(1)(a).

Aggravated assault therefore involves two separate mens rea requirements. First, the State proves that an underlying assault occurred through either intentional, knowing, or reckless conduct; and second, the State must also prove that the defendant intentionally caused serious bodily injury. Utah Code Ann. § 76-5-103(1)(a).

The instruction at issue here therefore correctly allowed the jury to determine whether Defendant’s conduct was knowing. Under Instruction # 14(2)-(3), the State was allowed to prove that Defendant committed an underlying assault through either intentional or knowing conduct. *See* R. 186. And under Instruction # 14(4), the State was required to prove the aggravator by intentional conduct. *See* R. 186.

The State recognized these separate requirements at trial. During the State’s closing argument, for example, the State argued that Defendant had “intentionally or knowingly committed an assault on Deborah Cuddeback.” R. 271: 178. The State

then separately argued that Defendant had “intentionally caused serious bodily injury.” R. 271: 178.

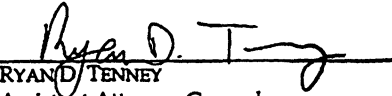
Given this, there was no error, let alone manifest error in Instruction # 14.³

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted July 29, 2009.

MARK L. SHURTLEFF
Utah Attorney General


RYAN D. TENNEY
Assistant Attorney General
Counsel for Appellee

³ In his Supplemental Response to the *Anders* brief, Defendant also argues that there is no “definable” distinction between the serious bodily injury and substantial bodily injury requirements set forth in Utah Code Annotated § 76-1-504(10)-(11) (West 2004). Aplt. Br. Addendum B at 1-2. This claim does not appear to have been addressed in defense counsel’s *Anders* brief. Regardless, it, too, is frivolous.

Under Utah Code Annotated § 76-1-504(10), a serious bodily injury involves a “permanent disfigurement” or “protracted loss or impairment of the function of any bodily member or organ.” By contrast, Utah Code Annotated § 76-1-504(11) states that a substantial bodily injury only involves an injury “not amounting to serious bodily injury,” that causes “temporary disfigurement” or “temporary loss or impairment of the function of any bodily member or organ.” Thus, by statute, the two requirements are differentiated by the duration of the impairment. Defendant’s argument should therefore be rejected.

CERTIFICATE OF SERVICE

I certify that on July 29, 2009, two copies of the foregoing brief were ☒ mailed

☐ hand-delivered to:

Ronald Fujino
4764 South 900 East, Suite 2
Salt Lake City, UT 84117

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

Melissa Meyer

Addenda

Addenda

C

West's Utah Code Annotated Currentness

Title 76. Utah Criminal Code

Chapter 5. Offenses Against the Person (Refs & Annot)

Part 1. Assault and Related Offenses

§ 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.**CREDIT(S)**

Laws 1974, c. 32, § 38; Laws 1989, c. 51, § 1; Laws 1991, c. 75, § 3; Laws 1995, c. 291, § 4, eff. May 1, 1995; Laws 1996, c. 140, § 1, eff. April 29, 1996; Laws 2000, c. 170, § 2, eff. May 1, 2000; Laws 2003, c. 109, § 1, eff. May 5, 2003.

Current through 2009 General Session and 2009 First Special Session

►

West's Utah Code Annotated Currentness

Title 76. Utah Criminal Code

Chapter 5. Offenses Against the Person (Revis & Amend)

Part 1. Assault and Related Offenses

→ § 76-5-103. Aggravated assault

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

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

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

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

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

CREDIT(S)

Laws 1973, c. 196, § 76-5-103; Laws 1974, c. 32, § 10; Laws 1989, c. 170, § 2; Laws 1995, c. 291, § 5, eff. May 1, 1995.

Current through 2009 General Session and 2009 First Special Session

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END OF DOCUMENT

Tab D

IN THE UTAH COURT OF APPEALS

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

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

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

Before Judges Bench, Thorne, and McHugh.

McHUGH, Judge:

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

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

The jury instruction on aggravated assault provided,

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

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

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

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

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

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

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

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

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

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

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

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

Carolyn B. McHugh, Judge

I CONCUR:

Russell W. Bench, Judge

I CONCUR IN THE RESULT:

William A. Thorne Jr., Judge

Tab E

Appellate Docket Search

Docket Information Case - 20080681

Utah Court of Appeals

Title: State v. Hutchings

Docket No: 20080681 Docket Date: 08/08/2008
Agency: THIRD DISTRICT, SALT LAKE Case: 061902496
Status: Closed

Date	Action	Disposition Date
08/08/2008	Notice of Appeal Filed	
08/08/2008	Courtesy Copy	
08/08/2008	Courtesy Copy	
08/08/2008	Transcript Request Received	
08/22/2008	Docketing Statement Filed	
08/25/2008	Ack. of Request for Transcript	
08/25/2008	Ack. of Request for Transcript	
08/25/2008	Ack. of Request for Transcript	
08/26/2008	Appearance of Counsel	
09/02/2008	Notice of Transcript Filed TC	
09/03/2008	Call for Record Pursuant to R.	
09/04/2008	Record Index Filed	
09/04/2008	Record Filed	
09/05/2008	Set Briefing Schedule	
09/10/2008	Notice of Transcript Filed TC	
09/10/2008	Notice of Transcript Filed TC	
09/10/2008	Notice of Transcript Filed TC	
09/16/2008	Perfect Record/Record Index Le	
09/18/2008	Supplemental Record Index File	
09/18/2008	Supplemental Record Filed	
10/02/2008	Misc. Letter	
10/17/2008	Extension of Time for Appellan Stipulatio	10/20/2008
11/18/2008	Extension of Time for Appellan Granted	11/19/2008
11/19/2008	Extension Granted	
12/18/2008	Extension of Time for Appellan Granted	12/22/2008
12/22/2008	Extension Granted	
01/20/2009	4th Ext. Req.-Appellant Brief Denied	01/26/2008
01/26/2009	Extension Denied	
02/05/2009	Forwarded Filing to Attorney	
02/17/2009	Motion to Remand - Rule 23B Denied	03/18/2009
03/04/2009	Misc. Letter	
03/09/2009	Response to Motion	
03/18/2009	Motion-Remand Denied	
03/18/2009	Re-set Briefing Schedule	
03/27/2009	Misc. Letter	
04/16/2009	Extension of Time for Appellan Stipulatio	04/16/2009
05/18/2009	Extension of Time for Appellan	
06/18/2009	Appellant's Brief Filed	
06/18/2009	Brief on Disc filed	
06/24/2009	Appearance of Counsel	
06/24/2009	Misc. Letter	
07/21/2009	Extension of Time for Appellee Stipulatio	07/21/2009
07/29/2009	Appellee's Brief Filed	
07/29/2009	Brief on Disc filed	
08/14/2009	Misc. Letter	
08/28/2009	Extension of Time for Reply Br Stipulatio	08/27/2009
09/11/2009	Clerk's Note	

09/24/2009 AC Issue - 2nd Level
10/20/2009 Submitted for Memorandum Decis
11/13/2009 Memorandum Decision
12/02/2009 Courtesy Copy
01/13/2010 Notice - Writ of Cert Filed
02/18/2010 Notice-Cert Granted in S.C.
02/22/2010 Record Sent to Sup. Ct.
02/22/2010 Remittitur/Transfer

[New Search](#)