

2012

Utah v. David W. Ward : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

DAVID W. WARD,

Defendant/Appellant.

**APPELLANT'S OPENING
BRIEF**

Case No. 201201165
Dist. Ct. Case No. 111500136

On Appeal from the Fourth District Court,
Wasatch County, State of Utah
The Honorable Judge Derek P. Pullan

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT IS REQUESTED

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UTAH APPELLATE COURTS

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APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal from a conviction and sentence in the Fourth Judicial District Court of the State of Utah. This appeal is authorized by Utah Code Annotated § 77-18a-1(1)(a). This Court has jurisdiction over this appeal under Utah Code Annotated § 78A-4-103(2)(e), as this appeal is from a Third Degree Felony charge of Aggravated Assault.

ISSUE PRESENTED FOR REVIEW

Did the District Court abuse its discretion when it sentenced Appellant to State Prison?

Determinative law: *State v. Moa*, 2012 UT 28 (Utah 2012); *State v. Galli*, 967 P.2d 930 (Utah 1998) *State v. Valdovinos*, 2003 UT App 432, P14 (Utah Ct. App. 2003); *State v. Houk*, 906 P.2d 907, 909 (Utah Ct. App. 1995) (per curiam); *State v. Chappoose*, 1999 UT 83, P6, 985 P.2d 915; *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990); *State v. Wright*, 893 P.2d 1113, 1120 (Utah Ct. App. 1995).

Standard of review: Abuse of Discretion: The sentencing decision of a trial court is reviewed for abuse of discretion. See *State v. Houk*, 906 P.2d 907, 909 (Utah Ct. App. 1995) (per curiam). This includes the decision to grant or deny probation, see *State v. Chappoose*, 1999 UT 83, P6, 985 P.2d 915.

STATEMENT OF THE CASE

On October 11, 2011, the Wasatch County Attorney's Office filed an information where Appellant, David Ward, was charged with aggravated assault (UCA 76-5-103(1)) (count one), damaging a communications device (UCA 76-6-108) (count two), and aggravated kidnaping (UCA 76-5-302) (count three). (R. 4-7.)¹ On October 12, 2011, the date of arraignment and appointment of counsel, a competency evaluation was ordered. (R. 8-9.) On December 14, 2011, appellant was found competent. (R. 30, 105:2.)

On January 4, 2012, the parties reached a settlement plea bargain where the State would not recommend prison and would not oppose reducing the offense level to a misdemeanor upon successful completion of probation, pursuant to Utah Code Annotated section 76-3-402(2)(a). (R. 106:2.) After hearing from the victim in the case, the court approved the plea bargain. (R. 106:2-5.) Pursuant to that negotiated settlement, Mr. Ward entered a guilty plea to count one, aggravated assault, a third degree felony, and the balance of the information was dismissed. (R. 46-47, 106:5-15.) During the plea colloquy, the Court advised Mr. Ward,

Mr. Ward, when it comes time to impose sentence, that's a decision that is mine alone. I will consider carefully the

¹ Record Index page number, hereafter, R. Numbers after a colon following the Record Index number refer to transcript page numbers.

recommendations that are made to me by the State, by your attorney. You may speak to me. You may have others speak to me; but in the end I am not bound to follow anyone's recommendation; do you understand that?

(R. 106:13.) Mr. Ward then told the Court that he understood. (R. 106:13.)

The Court also advised that a pre-sentence report would be prepared by Adult Probation and Parole, and though the recommendation of that report would be important to the Court, it is not binding on the Court. (R. 106:15.)

On February 8, 2012, a sentencing hearing was held in this case. (R. 48-49, 107.) In preparation for the hearing, the trial court reviewed a presentence report (R. 85-95), an amended presentence report (R. 96-104), and had reviewed the victim impact statement. (R. 107:2, 12.) The Court also had available in its file the psychological evaluations prepared pursuant to a prior competency hearing (R. 46-47, 69-84, 105:2, 12.)

The presentence report prepared by Adult Probation and Parole recommended that Mr. Ward be placed on probation for three years and serve a 120 day sentence. (R. 85-95.) The amended presentence report changed that recommendation, and instead suggested that three years probation and a 180 day jail sentence was more appropriate. (R. 96-104.) The sentencing matrix attached as part of the amended presentence report indicated that an intermediate sanction was appropriate, but that imprisonment was not required. (R. 103-104.)

At sentencing, the District Court indicated that “having considered what I know about the case so far, my inclination is to not accept the recommendation, and sentence Mr. Ward to the State Prison.” (R. 107:2-3.) Defense counsel argued that the court needed to consider the mental health issues involved in this case, that those issues have been successfully addressed, that Mr. Ward has a minimal record, and that a probation and local jail sentence would be appropriate. (R. 107:3-8, 10.) The State discussed the facts of the case and submitted the matter based on Adult Probation and Parole’s recommendation. (R. 107:8-9.) The District Court did not accept the recommendation of the parties and Adult Probation and Parole, but instead sentenced appellant to zero to five years in the Utah State Prison. (R. 48-49, 107:12-14.)

On March 2, 2012, Mr. Ward filed a timely Notice of Appeal. (R. 54)

STATEMENT OF FACTS

On October 10, 2011, Mr. Ward and his girlfriend engaged in bickering throughout the day regarding a variety of topics. (R. 88, 98.) Mr. Ward's girlfriend tried to then take a nap, but Mr. Ward kept her awake by turning up the volume of his computer speakers. (R. 88, 98.) She then took away the speakers, he threatened her, and she threatened to call the police. (R. 88, 98.)

Mr. Ward prevented his girlfriend from calling the police by taking away her telephone. (R. 88, 98.) In response, Mr. Ward's girlfriend attacked him, and grabbed him by the testicles. (R. 88, 98.) Mr. Ward responded by pushing her and slapping her face, and she then scratched his face. (R. 88, 98.) Mr. Ward's girlfriend then attempted to leave the residence, but he prevented her from doing so. (R. 88, 98.) She then attempted to crawl out of a bathroom window, but Mr. Ward stopped her by pulling her down with a choke hold on her neck, resulting in her passing out. (R. 88, 98.)

When she regained consciousness, Mr. Ward's girlfriend ran outside the residence. Feeling remorse for what had happened, Mr. Ward gave her a phone, and asked her to call the police. (R. 88-89, 98-99.) When the police arrived at the residence, Mr. Ward was no longer there, but he later returned and surrendered himself to police custody. (R. 88-89, 98-99.)

SUMMARY OF ARGUMENT

The District Court abused its discretion when it failed to fully consider the factors in aggravation and mitigation, the sentencing recommendation of Adult Probation and Parole, and the parties involved, all of who recommended a probation sentence, and instead sentenced Mr. Ward to State Prison. This brief will address this error, and Mr. Ward requests that the case be remanded, with an order that a new sentencing hearing be held where the aggravating and mitigating factors can be more fully explored.

ARGUMENT

I

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. WARD TO STATE PRISON WITHOUT PROPERLY CONSIDERING THE AGGRAVATING AND MITIGATING FACTORS

A. Introduction

As is mentioned above, the sentencing decision of a trial court, including whether to grant or deny probation, is reviewed for abuse of discretion. See *State v. Houk, supra*, 906 P.2d 907, 909; *State v. Chapoose, supra*, 1999 UT 83, P6, 985 P.2d 915; *State v. Valdovinos, supra*, 2003 UT App 432, P14. In *State v. Valdovinos, supra*, 2003 UT App 432, the court of appeal held that:

A "defendant is not entitled to probation, but rather the [trial] court is empowered to place the defendant on probation if it thinks that will best serve the ends of justice and is compatible with the public interest." *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah Ct. App. 1991). "The granting or withholding of probation involves considering intangibles of character, personality and attitude, of which the cold record gives little inkling." *Id.* at 1049 (citation omitted). Therefore, "the problem of probation must of necessity rest within the discretion of the judge who hears the case." *Id.* (quotations and citation omitted). Only if it is "clear that the actions of the judge were so inherently unfair as to constitute an abuse of discretion," will a reviewing court overturn a trial court's sentence. *Id.* at 1051 (citation omitted).

Id. at P15-P16. Typically, it is difficult to determine whether a trial court's sentence is an abuse of discretion because, as the Utah Supreme Court recently reaffirmed, sentencing judges are not required to "articulate or acknowledge the factors they consider in imposing sentences." *State v. Moa*, 2012 UT 28, P41 and fn. 65 (Utah 2012).

It is a different matter, however, when a trial court does articulate their reason behind their sentencing action. In that case, an appellate court will "analyze whether the district court appropriately weighed certain factors when the district court provides detailed explanations for the sentence it imposes. *Id.* In the present case, the trial court articulated detailed explanations for its sentence, including its analysis of aggravating and mitigating factors. (R. 107:13-14.) As such, this court is allowed to and should analyze whether the trial court properly evaluated and weight those factors. *Id.* Upon making this evaluation, this court should find that the trial court's action was inherently unfair, and constituted an abuse of discretion. *State v. Valdovinos, supra*, 2003 UT App 432, P15.

B. The Trial Court Analysis of Aggravating and Mitigating Factors

In this case, the trial court indicated that it found three factors in aggravation, specifically that:

1. Mr. Ward had a prior conviction in 2006 for unlawful detention and a prior conviction in 2008 for simple assault.
2. Mr. Ward was selfish on the date in question.
3. Mr. Ward has training in martial arts.

(R. 107:12-13.) The only mitigating factor that the trial court considered was that “Mr. Ward had mental health issues . . . that are now more treated than they were on the day in question.” The court then downplayed that factor, indicating that probation would not be able to ensure he would take his medicine.

C. The Trial Court’s Analysis of Aggravating Factors was in Error

1. Mr. Ward’s Criminal History

In finding Mr. Ward’s prior criminal history a factor in aggravation, the trial court completely ignored the fact that the 2006 and 2008 convictions were the only adult convictions that Mr. Ward had incurred. (R. 99.) Further these convictions were for misdemeanors, and it appears from the record that

Mr. Ward did not serve a jail sentence for either, but only paid fines. (R. 99.) Further, it is significant that Mr. Ward had a period of crime free life for three and a half years prior to the current offense. (R. 99.) In short, Mr. Ward's prior criminal history, was more mitigating than aggravating, and the trial court's focus on the nature of the charges instead of the lack of severity was misguided.

2. Mr. Ward's Selfishness

The second aggravating factor discussed by the trial court was that Mr. Ward was selfish on the date in question. (R. 107:12-13.) The selfishness the court referred to was the fact that Mr. Ward would not let his girlfriend sleep, he kept engaging her in bickering, he wouldn't "let it go" and this selfishness resulted in the assaultive behavior. (R. 107:12-13.) In designating selfishness as an aggravating factor, the trial court ignores the fact that the bickering on the date in question has been alleged to have been mutual. (R. 98-99.) Further, the trial court acknowledges that the victim in this matter may have been the primary aggressor, but that his response to her conduct was disproportionate. (R. 107:13.) As such, it appears that both parties to this fight were acting immaturely and with selfishness, and that that character trait should not be held against Mr. Ward as a factor in aggravation.

Mr. Ward's "selfishness" and behavior leading up to the physical contact is also explainable by his diagnosed mental health condition. As was argued by counsel at sentencing, Mr. Ward was suffering from "bipolar and with post traumatic stress disorder." (R. 107:3.) This mental illness, that at the time was going untreated, explains the behavior that the court erroneously considers aggravating.

3. Mr. Ward's Martial Art Training

In the presentence report, Mr. Ward reported to Adult Probation and Parole that his leisure and recreation activities included being involved in martial arts and fishing. (R. 97.) He also reported that he had spent several years training in Brazilian Jiu-Jitsu. (R. 100.) Because of this training, the court felt that Mr. Ward's conduct was intentional because he knew that he could hurt her. (R. 107:13.) The trial court did acknowledge, however, that even though the victim thought Mr. Ward was going to kill her, his actions spoke otherwise. (R. 107:13.)

Mr. Ward's martial art training should not have been considered an aggravating factor as he clearly did not employ that training in a manner intended to hurt the victim. When Mr. Ward was attacked by his girlfriend, he only used sufficient force to get her off of him. (R. 98-99.) The only time the victim in this matter was assaulted in an aggravated manner was when

Mr. Ward was pulling her down from the window, which did not necessarily employ the use of martial arts training. Indeed, it is possible that the discipline Mr. Ward had learned from his martial arts hobby actually gave him restraint, despite his mental illness.

D. The Trial Court Ignored Several Mitigating Factors

As mentioned above, the only mitigating factor found by the trial court was his mental health issues that had gone untreated at the time of the incident, but were successfully receiving treatment at the time of sentencing. (R. 107:13.) In making this finding, the trial court ignored several other mitigating factors.

First, the record indicates that Mr. Ward acted under strong provocation as the victim was actually the primary aggressor under one version of the events. (R. 98-99.) Second, Mr. Ward's attitude suggested an amenability to supervision as he was now being treated for his mental health issues, and indeed, probation felt he was a good candidate for probation's services. (R. 96-104.) Third, as mentioned above, Mr. Ward had only experienced misdemeanor convictions from two prior incidents, one in 2006 and the other in 2008, and he had an extended period of arrest-free street time of three and a half years. (R. 99.)

Regarding the mental health issues that were so quickly dismissed by the trial court, Mr. Ward had suffered a difficult life leading up to the instant offense, that should have been given more consideration. (R. 100.) In making its probation recommendation, Adult Probation and Parole outlined that Mr. Ward's mother died when he was two years-old, and that his father was sent to prison when he was three years-old. (R. 100.) He spent his informative years in foster care, and other difficult situations, was physically and sexually abused by those entrusted with his care. (R. 100.) These circumstances led to the post traumatic stress disorder diagnosis that Mr. Ward suffered from, which played a direct role in his response to the attack and abuse he perceived from his girlfriend's actions. (R. 98-99.)

Despite the mental health explanation to the assaultive conduct on the date of this incident, Mr. Ward has taken full responsibility for his actions, and apologized openly in court for his behavior. (R. 107:11.) Mr. Ward also acknowledge that he was grateful that he was arrested, and that this incident has led him to taking advantage of diagnosis, treatment, therapy, and medication, and has provided him the skills necessary to ensure such an incident would never happen again. (R. 107:11.) He further acknowledged the severity of his actions, and that he needed to stay on his medication in order to prevent any future problems.

Despite these acknowledgments of Mr. Ward, the trial court indicated that it did not believe that the probation department could monitor his medication compliance. (R. 107:10, 13-14.) This concern was addressed by Mr. Ward and his counsel, who advised the court that probation Mr. Ward could provide compliance reports to probation and submit to blood tests to confirm his Lithium levels. (R. 107:10.)

E. The Trial Court Abused its Discretion in Failing to Consider All of The Factors in Mitigation

In *State v. Galli*, 967 P.2d 930 (Utah 1998), the Utah Supreme Court held that a trial court's sentence should be reversed if it is excessive and ignores factors in mitigation. *Id.* at p. 938. In *Galli*, as in this case, the trial court made detailed findings regarding the factors it considered in determining the sentence it imposed. *Id.* After reviewing the factors discussed by the trial court, the Utah Supreme Court found that the sentence was excessive, that certain mitigating factors had not been properly considered, and reversed the case for resentencing. *Id.*, see also *State v. Moa*, *supra*, 2012 UT 28 at P43. Factors overlooked by the *Galli* trial court included the fact that the crime did not lead to serious bodily injury or death, the defendant accepted

responsibility for his actions, that he had very little criminal history, and that he had demonstrated an ability to rehabilitate himself. *Id.*

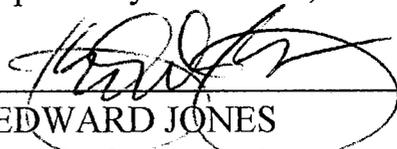
As in *Galli*, the trial court in the present case has likewise overlooked significant mitigating factors including those found in *Galli*. Here, the victim did not suffer serious bodily injury or death, Mr. Ward accepted responsibility for his actions, he has very little criminal history, and he has demonstrated an ability to rehabilitate himself through counseling and proper medication. The trial court was in error for not considering fully these factors, and this matter should be reversed for resentencing.

CONCLUSION

For the reasons set forth above, appellant, Mr. Ward, respectfully requests this court find that the trial court abused its discretion in sentencing Mr. Ward to State Prison, and reverse this matter for resentencing consistent with the mitigating factors discussed above.

DATED: July 23, 2012

Respectfully submitted,



J. EDWARD JONES
Attorney for Defendant - Appellant

BRIEF FORMAT CERTIFICATION OF COMPLIANCE

Pursuant to Rules 24(f)(1)(C) , and 27(b), Utah Rules of Appellate Procedure, I certify that this brief is 14 point Times New Roman font, and contains 3,575 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B), based on the word-count feature of my word-processing program, Corel WordPerfect 12.

DATED: July 23, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Edward Jones", is written over a horizontal line.

J. EDWARD JONES
Attorney for Defendant - Appellant

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ADDENDUM A

IN THE FOURTH JUDICIAL DISTRICT COURT-HEBER
OF WASATCH COUNTY, STATE OF UTAH

COPY

STATE OF UTAH,)
)
Plaintiff,)
)
vs.)
)
DAVID W. WARD,)
)
Defendant.)

Case No. 111500136 FS

Sentencing Hearing
Electronically Recorded on
February 8, 2012

BEFORE: THE HONORABLE DEREK P. PULLAN
Fourth District Court Judge

APPEARANCES

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P R O C E E D I N G S

(Electronically recorded on February 8, 2012)

THE COURT: Call the matter of State of Utah vs. David W. Ward.

MR. WILLIAMS: Judge, I got a pre-sentence report and then I got another one that recommends 180 days. Did you get that one?

THE COURT: I did.

MR. WILLIAMS: Okay.

THE COURT: I got the -- and that's the one I've read.

MR. WILLIAMS: Okay. I like the first one better.

THE COURT: (Inaudible) GPS monitor, yeah. This matter comes before the Court for sentencing. Have you received a copy of the pre-sentence report with the recommendation?

MR. WILLIAMS: We have, Judge, and we've looked at that. Judge, and we'd just mostly like to address with respect to the report the recommendation a little bit.

THE COURT: Have you also received the victim impact statement?

MR. WILLIAMS: Yeah, we have.

THE COURT: Both from the mother and the victim, herself?

MR. WILLIAMS: Yes, Judge.

THE COURT: Counsel, I will tell you that having considered what I know about the case so far, my inclination

1 is to not accept the recommendation, and sentence Mr. Ward
2 to the State Prison. So this is a case you need to argue.
3 The aggravating factors, at least what I know so far, are
4 significant. So if you would speak to the recommendation.

5 MR. WILLIAMS: Judge, I -- I understand maybe, I guess,
6 based on what happened that day and what the allegations are
7 about what happened that day as to how you would be considering
8 prison, but I think this is a case that in my mind is not a
9 prison case.

10 This is an unfortunate case that started with two
11 people with mental health issues, that should never have been
12 together. It was a firework waiting to go off from the start.
13 Judge, I think what we have here is a situation -- there's no
14 question, and the pre-sentence report doesn't even really
15 suggest -- go into this at all, but we had two mental health
16 evaluations that both diagnosed the defendant with bipolar and
17 with post traumatic stress disorder.

18 I think on that day he was barely within control.
19 This was a at least two sided situation with both people being
20 combatants. I think that it's -- from Mr. Ward's position it
21 started out with her being the aggressor, and him just kind of
22 being mentally ill and kind of not necessarily losing it, but
23 getting to a point where he lost control a little bit.

24 He understands he hurts her. He feels bad for hurting
25 her. He knows he never should have hurt her. He also knows

1 that he has that potential to hurt people. He's much stronger.
2 He has that ability to be a danger; but Judge, I think what
3 takes this out of the realm of prison in my mind is the fact
4 that he had these very, very serious mental health issues. I
5 mean, if you read the competency evaluations, he's extremely
6 mentally ill, and he was functioning in society without any
7 medication or treatment whatsoever.

8 He has now been in jail for 120 days, and he has
9 been regularly meeting with Jenny Pinter from Heber Valley
10 Counseling. They've got him on medications. They've worked
11 really hard to get -- to get those in the right place, because
12 they've upped and lowered the dosages. They've got it really
13 good.

14 He's kept a log of how he's been feeling, to help him
15 with his medications and getting them on target, which isn't an
16 easy thing with bipolar. The problems that people with bipolar
17 experience are very difficult to treat, and it takes time.
18 Being in this situation he's been in in jail has probably
19 been helpful because he's had to focus to keep the log of the
20 medications that are making me -- having me -- making me feel
21 this way and that way, and they've been able to adjust it.

22 He's also had regular therapy sessions with Ms. Pinter
23 that have been very helpful. He feels like he's ready to get
24 out and go into society. The victim in this case, they don't
25 have children together. They don't have any -- there's no

1 reason why he would ever need to contact her again. There --
2 this isn't a situation where there's likely to be any problem
3 with that victim again.

4 He's also learned some things about triggers and some
5 problems. It's not just his bipolar that caused the problem on
6 that day. He has post traumatic stress disorder from violence
7 that was perpetrated on him as a child. According to his
8 version of events, the victim in this case grabbed him by the
9 testicles, and that's when -- and was hurting him, and that's
10 when it triggered something in his head that he did get out of
11 control; but I believe those things can be addressed through
12 medication, Judge.

13 The recommendation is 180 days. He's been in 120 days.
14 His criminal history is not long. It's got some violence on
15 it, and I think that that's a result of trying to survive in
16 society without medications for somebody who needs that. We
17 just saw that with the last case, where you explained that a
18 diabetic can't function without insulin. Neither can someone
19 with bipolar survive without their medication. It is a recipe
20 for disaster for him to be out in the world without proper
21 medication and treatment.

22 He actually has loved his time with Ms. Pinter. It's
23 been one of the greatest things he's ever gone through, in
24 having somebody to talk to and help him out in that way. So,
25 Judge, our recommendation would be to follow the recommendation

1 of AP&P, except for we don't understand why he would need a
2 substance abuse evaluation. The report really didn't go into
3 that.

4 He doesn't -- his problem isn't substance abuse, and
5 he wasn't under the influence of anything at the time that
6 this happened. It said he used methamphetamines in 2007 or
7 something. I don't know that he necessarily needs that.

8 He's had two mental health -- well, I don't know if
9 he's had the mental health evaluation necessarily that AP&P
10 would want him to have, but he's had something along those
11 lines, and he's well on his way to getting the kind of
12 treatment that he needs.

13 I think one of the terms of probation would be being
14 compliant with his medication and treatment recommendations
15 of his therapist, and that he remain in therapy. Judge, I'll
16 submit it on that, but just state that I think if all I had
17 read was the pre-sentence report that doesn't even address in
18 the least his mental health situations, other than to say,
19 "The defendant reports having emotional problems which cause
20 moderate interference with his day-to-day life." That doesn't
21 address the actual situation of the two doctors that report
22 bipolar disorder and post traumatic stress disorder with severe
23 symptoms.

24 MR. WARD: Could I speak to that?

25 MR. WILLIAMS: You'll get a chance.

1 MR. WARD: It was just on that sentence.

2 MR. WILLIAMS: Oh, go ahead.

3 MR. WARD: On that sentence, that was asked to me, I
4 believe, on the PSI, and that was after medication. It has
5 actually gotten a lot better. If you recall, last time I was
6 having severe anxiety with the Depacote. They've removed that
7 and have placed me on Lithium, and I've actually -- haven't
8 felt like this since I was younger, almost 16, and I feel like
9 my old self again, very confident, very under my own control.
10 That's something that has been helpful actually.

11 THE COURT: I'll hear from you further in just a
12 second.

13 MR. WILLIAMS: I was just going to state, Judge,
14 according to Dr. Giles, it's bipolar most recent episode
15 mixed severe with mood congruent psychotic features and
16 post traumatic stress disorder. So this isn't a moderate
17 interference with his life. This is severe with psychotic
18 features.

19 Judge, I think that it's worth looking at this with an
20 eye of somebody who maybe isn't in the same position as someone
21 else who might come in with some violence and some -- and some
22 -- a direction that wasn't looking good at all, because I think
23 that mental health is a mitigating factor that needs to be
24 seriously considered, especially where it's a mental health
25 issue that can be treated, and is being treated, and I think

1 being treated very well at this time. I'll submit it on that.

2 THE COURT: Thank you. Mr. King.

3 MR. KING: Your Honor, I see this case a little differ-
4 ently than defense Counsel. Defense Counsel says that this is
5 a situation where we have two mentally ill people and that's
6 why it came out the way it did. That is not consistent with
7 the defendant's past. This -- as I was saying, this was not
8 the victim's fault.

9 The defendant had past violence. The type of violence
10 I think is specifically insightful. In 2006 this was interrup-
11 tion with a communication device and unlawful detention. In
12 2008 it was again a violent assault crime. The defendant's
13 past is that when he gets in relationships with women he
14 becomes controlling and violent.

15 In the defendant's-- I mean, in the victim's statement
16 I want to point out that -- this would probably be the one,
17 two, three, four -- the sixth paragraph on the first page where
18 she describes past threats, when she would try to leave the
19 relationship he would hold her down in an martial arts move,
20 and force her to apologize and promise not to leave him.

21 In the second paragraph on the second page, it talks
22 about previous him bragging about knowing how to rip people's
23 arms off, knowing how to break people's necks, and hoping for
24 the opportunity to do that at some point in his life.

25 I would ask the Court to also focus on the fourth

1 paragraph of the second page where she talks about how she was
2 dying. That he was choking her to the point where her eyes
3 felt like they were going to explode in her head, and she felt
4 like she was dying.

5 In addition, in the mother's statement it refers to
6 him threatening to slash her tires if she ever tries to leave
7 him. These threats are consistent with his past criminal
8 behavior. This is a man who apparently cannot take being
9 left, cannot take the possibility of getting in trouble for
10 his behaviors. Again, we have a past interruption with commun-
11 ication device that is consistent with his behavior on this
12 occasion. Unlawful detention in the past.

13 This is a man who this is not an isolated incident.
14 This is the course of his behavior consistent throughout his
15 life. In this case it led to the near death of a person that
16 he claimed to have loved. With that, your Honor, I don't
17 disagree with the Court's previous suggestion that this might
18 be a prison case, and with that I would submit it on the
19 recommendations.

20 THE COURT: Thank you. Is there anyone that wanted to
21 speak with me today in representing the victim?

22 MR. KING: Your Honor, the victim informed our victim's
23 advocate that she was afraid to be -- to make a statement with
24 the defendant here.

25 THE COURT: Thank you.

1 MR. WILLIAMS: Judge, could I just clarify one thing?

2 THE COURT: Briefly. Go ahead.

3 MR. WILLIAMS: I did bring up the fact that these were
4 two mentally -- people with mental health issues. The victim
5 has informed Mr. Ward on multiple occasions that she also has
6 bipolar disorder, and she also has a history of criminal -- a
7 criminal history of violence as well.

8 They both -- this is -- this was a bad situation;
9 two people with bipolar, untreated, living together. I only
10 -- I don't report that to take any of the severity of what
11 happened off of Mr. Ward, other than to just say this was a
12 bad situation from the start. Even without her being that,
13 having him out in the world, as I've stated, without any kind
14 of medication or treatment is probably not ever going to be a
15 good situation.

16 THE COURT: Well, the problem, Counsel, is I have no
17 guarantee that he's going to be medication compliant when he's
18 out. That's a -- that's a serious -- and I agree with you,
19 Mr. Ward, unmedicated, is dangerous.

20 MR. WILLIAMS: Judge, I'm sure he can provide reports
21 to the Court.

22 MR. WARD: Your Honor, they actually draw blood once a
23 month, I mean, to make sure that my Lithium levels don't get
24 too high. So I can provide those to the Court.

25 THE COURT: Mr. Ward, you have the right to speak at

1 your sentencing. Is there anything more that you would want me
2 to know today?

3 MR. WARD: I just want to say that I'm terribly sorry
4 for what happened that day, and for hurting Ms. Davis. You
5 know, I look at coming here kind of as a blessing, because I
6 was on a very rickety road, and I didn't know if I was going to
7 survive very much longer on that path.

8 I've had a lot of talks with Marvin, the guards here,
9 with therapists, been doing the GOGI skills and all of the life
10 skills, and have graduated from both of those, and have learned
11 some valuable things, and have learned to let go of a lot of
12 things in my past that were really troubling me and hurting
13 me and causing me to have a lot of resentment and anger that
14 didn't belong in the present time.

15 I just want to say, you know, I understand the severity
16 of this case, and I understand how bad it is when I'm off medi-
17 cation and that I can never go without it. I'm very grateful
18 for the fact that I was able to get on medication when I came
19 here.

20 That's about where I want to leave it. My -- I hope
21 that -- I hope that she's okay. I hope that everything is all
22 right with her, and that this doesn't, you know, bug her in her
23 future. I hope that I can do the restitution and everything
24 necessary to make amends for that.

25 THE COURT: Thank you. Is there a restitution amount?

1 MR. KING: Your Honor, she has relocated in relation
2 to this. We'd ask that the Court leave restitution open for
3 90 days for us to determine if she's going to make a claim on
4 that.

5 THE COURT: This matter comes before the Court for
6 sentencing. Mr. Ward has entered a guilty plea to aggravated
7 assault, a third-degree felony. By way of aggravating factors
8 he has prior convictions for behavior similar to that exhibited
9 here; unlawful detention of another individual in 2006, simple
10 assault in 2008, culminating in the most serious offense, that
11 pending before me 2011 for aggravated assault.

12 The victim impact letter is disturbing, as she
13 describes the events of that day. Mr. Ward exhibited a level
14 of selfishness that is remarkable. In fact, she told you that
15 that night.

16 MR. WARD: Because I had smoked a cigar without her.

17 THE COURT: That's not what I'm talking about.

18 MR. WARD: That's what she told me.

19 THE COURT: That you smoked all the cigarettes, that's
20 not what I'm talking about. That argument that night exhibits
21 a level of selfishness that's remarkable. You don't let her
22 sleep. You keep after her, after her. She's just trying to
23 get out of your way, and you won't let it go, and it all ends
24 up in this horrible assaultive behavior by you.

25 MR. WARD: I had -- had talked --

1 THE COURT: Now is not the time for you to talk.

2 MR. WARD: Okay.

3 THE COURT: Any -- her statement makes clear that
4 whatever acts she took against you were in defense of herself.
5 I understand you disagree with that, but you've pled guilty.
6 Your response -- whatever she did to you, your response was
7 far in excess of what was required to stop it.

8 The other aggravating factor that's very concerning
9 to me is that Mr. Ward has training in the martial arts. You
10 know that you can hurt people. So in every way it appears to
11 me that your act was intentional on this day, and Ms. Davis
12 believed that you were going to kill her. Your actions speak
13 otherwise.

14 You've indicated today, "I hope she's okay." She's
15 not okay. She will remember this for the rest of her life.
16 She is fearful to even enter a public courtroom today to be
17 in your presence, as she should be. Mr. Davis -- or Mr. Ward
18 choked the victim to unconsciousness, and ultimately she fled
19 the home and contacted the police.

20 MR. WARD: I gave the phone to her so that she could.
21 I wasn't trying to hurt her.

22 THE COURT: The only mitigating factor in the case is
23 the mental health issues that have been raised today that are
24 now more treated than they were on the day in question. The
25 other concern that I have about placing the defendant on a

1 probation situation is the inability of that department to
2 monitor medication compliance. When Mr. Ward is not medicated,
3 you're a dangerous person; and even medicated today, you don't
4 seem to me to take full responsibility for what you did that
5 day.

6 Having weighed those factors, it's the judgment and
7 sentence of the Court that the defendant serve zero to five
8 years in the Utah State prison, that he pay a fine of \$950,
9 that he pay restitution which will remain open for a period of
10 90 days from today's date. Court's in recess.

11 COURT BAILIFF: All rise.

12 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Haws, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her court reporter's license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

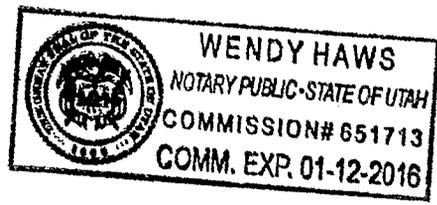
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 5th day of May 2012.

My commission expires:
January 12, 2016

Wendy Haws
Wendy Haws, CCT
NOTARY PUBLIC
Residing in Utah County



Beverly Lowe
Signed: Beverly Lowe, CCR/CCT

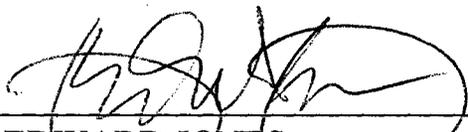
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CERTIFICATE OF SERVICE

I hereby I certify that on July 23, 2012, a true and correct copy of the foregoing Appellant's Opening Brief and Addendum A was mailed by first class mail to the following:

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