

2014

State of Utah v. James C. McCallie : Brief of the Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

JAMES C. MCCALLIE,
Defendant/Appellant.

Case Number: 20140148-CA

BRIEF OF THE APPELLANT

Appeal from a conviction for aggravated assault, a third degree felony in the Third District Court, State of Utah, the Honorable Denise P. Lindberg, Judge, presiding.

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TABLE OF CONTENTS

TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	V
NATURE OF THE PROCEEDINGS AND JURISDICTION	1
STATEMENT OF THE ISSUES & STANDARD OF REVIEW	1
CONSTITUTIONAL OR STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
POINT I	5
The trial court abused its discretion in denying Mr. McCallie's motion for mistrial and motion for new trial, given the State's comments regarding Mr. McCallie's exercise of his right to remain silent	5
POINT II	17
The trial court erred in failing to grant Mr. McCallie's motion for acquittal and directed verdict given the victim's highly intoxicated state and contradictions in the physical evidence	17
A. STANDARDS FOR INSUFFICIENT EVIDENCE	17
B. JOHN PEARCE'S TESTIMONY	18
C. TESTIMONY OF TIM AND JODY KROGH	20
D. TESTIMONY OF DETECTIVE ARNN	21
E. RECORDINGS	22
F. TESTIMONY OF JAMES MCCALLIE	23
G. OTHER DEFENSE WITNESSES	25

H. THE EFFECTS OF A .31 BAC _____	26
I. PEARCE’S EXTREMELY HIGH BAC AFFECTED HIS ABILITY TO ACCURATELY PERCEIVE THE EVENTS _____	28
J. PEARCE’S STORY DOES NOT MATCH THE EVIDENCE _____	30
K. INSUFFICIENT EVIDENCE _____	31
CONCLUSION _____	32
RULE 24 CERTIFICATE OF COMPLIANCE _____	33
CERTIFICATE OF SERVICE _____	34
ADDENDUM A (CONSTITUTIONAL PROVISIONS)	
ADDENDUM B (STATUTORY AND RULE PROVISIONS)	
ADDENDUM C (STATE AND DEFENSE EXHIBITS & JURY QUESTION)	
ADDENDUM D (MOTION FOR NEW TRIAL)	
ADDENDUM E (STATE’S RESPONSE TO MOTION FOR NEW TRIAL)	
ADDENDUM F (RULING AND ORDER ON MOTION FOR NEW TRIAL)	
ADDENDUM G (SELECTED TREATISES)	

TABLE OF AUTHORITIES

CASES

<i>Berghuis v. Thompson</i> , 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010)	11, 12
<i>Doyle v. Ohio</i> , 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)	9
<i>Griffin v. California</i> , 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)	9
<i>Merino v. Albertsons, Inc.</i> , 1999 UT 14, 975 P.2d 467	2
<i>State v. Bakalov</i> , 1999 UT 45, 979 P.2d 799	13
<i>State v. Byrd</i> , 937 P.2d 532 (Utah Ct. App. 1997)	13, 14
<i>State v. Colwell</i> , 2000 UT 8, 994 P.2d 177	1
<i>State v. Demartinis</i> , 2008 UT App 261 (unpublished)	13
<i>State v. Easter</i> , 130 Wash. 2d 228, 922 P.2d 1285 (1996)	9
<i>State v. Gallup</i> , 2011 UT App 422, 267 P.3d 289	8, 11
<i>State v. Holgate</i> , 2000 UT 74, 10 P.3d 346	18
<i>State v. Maas</i> , 1999 UT App 325, 991 P.2d 1108	10
<i>State v. Martin</i> , 2002 UT 34, 44 P.3d 805	2
<i>State v. Noren</i> , 74 P.2d 568, 570 (Utah 1985)	17
<i>State v. Palmer</i> , 860 P.2d 339 (Utah Ct. App. 1993)	8, 11
<i>State v. Reyes</i> , 861 P.2d 1055 (Utah Ct. App. 1993)	14, 16
<i>State v. Robbins</i> , 2009 UT 23, 210 P.3d 288	17
<i>State v. Saunders</i> , 98 Ohio App.3d 355, 648 N.E.2d 587 (1994)	13
<i>State v. Smith</i> , 675 P.2d 521 (Utah 1983)	17
<i>State v. Urias</i> , 609 P.2d 1326 (Utah 1980)	13
<i>State v. Wiswell</i> , 639 P.2d 146 (Utah 1981)	10
<i>Tortolito v. State</i> , 901 P.2d 387 (Wyo. 1995)	16

STATUTES & RULES

Utah Code Ann. § 77-17-3 (2008) _____	18
Utah R. Crim. P. 17(p) _____	18

TREATISES

GARY L. FISHER & NANCY A. ROGET, ENCYCLOPEDIA OF SUBSTANCE ABUSE PREVENTION, TREATMENT, AND RECOVERY (2008) _____	27
GREGORY FEIST ET AL., PSYCHOLOGY: MAKING CONNECTIONS (2009) _____	28
JOHN JUNG, ALCOHOL, OTHER DRUGS, AND BEHAVIOR: PSYCHOLOGICAL RESEARCH PERSPECTIVES (2009) _____	27
MARC GALANTER ET AL., ALCOHOL PROBLEMS IN ADOLESCENTS AND YOUNG ADULTS: EPIDEMIOLOGY, NEUROBIOLOGY, PREVENTION, AND TREATMENT (2006) _____	26
Mark S. Goldman et al., <i>Alcoholism and Memory: Broadening the Scope of Alcohol- Expectancy Research</i> , 110 PSYCHOL. BULL. 137 (1991) _____	27
RAYMOND GOLDBERG, DRUGS ACROSS THE SPECTRUM (2013) _____	27
VALERIE MENDRALLA & JANET GROSSHANDLER, DRINKING AND DRIVING, NOW WHAT? (2011) _____	27
William W. Beatty et al., <i>Visuospatial Perception, Construction and Memory in Alcoholism</i> , 57 J. STUD. ALCOHOL DRUGS 136 (1996) _____	28

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V _____	8
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NATURE OF THE PROCEEDINGS AND JURISDICTION

Appeal from a conviction for aggravated assault, a third degree felony in the Third District Court, State of Utah, the Honorable, Denise P. Lindberg, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

STATEMENT OF THE ISSUES & STANDARD OF REVIEW

1. Whether the trial court abused its discretion in failing to grant Mr. McCallie's motion for mistrial and motion for new trial when the prosecutor argued that the jury could infer guilt from Mr. McCallie's right to silence.

- a. Standard of Review: "When reviewing a [district] court's denial of a motion for a new trial, we will not reverse absent a clear abuse of discretion by the [district] court." *State v. Colwell*, 2000 UT 8, ¶ 12, 994 P.2d 177 (internal quotations omitted). "At the same time,

however, we review the legal standards applied by the [district] court in denying the motion for correctness.” *State v. Martin*, 2002 UT 34, ¶ 45, 44 P.3d 805.

b. Preservation of the Argument: Mr. McCallie made a motion for mistrial and renewed his objection in a motion for new trial. R. 223-25; 298:121.

2. Whether the trial court erroneously denied Mr. McCallie’s motion for a directed verdict given that the State’s entire case hinged on the testimony of a person whose blood alcohol limit effectively prevented him from accurately remembering events.

a. Standard of Review: “This court’s standard of review of a directed verdict is the same as that imposed upon a trial court,” in that the motion will only be granted if there is “no competent evidence that would support a verdict in the non-moving party’s favor.” *Merino v. Albertsons, Inc.*, 1999 UT 14, ¶ 3, 975 P.2d 467 (internal quotation marks omitted).

b. Preservation of the Argument: Mr. McCallie made a motion for a directed verdict on this basis. R. 298:28.

CONSTITUTIONAL OR STATUTORY PROVISIONS

The texts of the relevant Constitutional provisions and statutes are in Addendum A and B.

STATEMENT OF THE CASE

On April 5, 2013, a warrant issued for Mr. McCallie. R. 3-4. The State filed an amended information May 1, 2013. R. 19-21. The case was tried to a jury October 2 and 3, 2013 who acquitted Mr. McCallie on the major charge, discharge of a firearm, but convicted him of aggravated assault, a third degree felony. R. 138-39; 297-98. Mr. McCallie was sentenced December 16, 2013 and the judgment entered that same day. R. 214-15. Mr. McCallie filed a motion for new trial January 3, 2014 and the court denied that motion February 11, 2014. R. 223-25; 262-63. Mr. McCallie filed a notice of appeal to this court the next day, February 12, 2014. R. 264-65.

STATEMENT OF THE FACTS

This case involves an evening among individuals playing cribbage and poker as well as heavy drinking. According to the State's version of events, Mr. McCallie insulted John Pearce's aunt, and while highly intoxicated, pulled a gun on Pearce in the hallway. The gun discharged in an ensuing struggle, hitting Pearce. Mr. McCallie insisted that Pearce, who had been drinking for ten hours and had a blood alcohol level of .31, attacked him in his bedroom and that, while McCallie pulled the gun in self-defense, Pearce tripped the trigger while they were struggling over the gun on the bed.

The jury ultimately acquitted Mr. McCallie of discharging the weapon, but found that he committed an aggravated assault for brandishing the gun.

SUMMARY OF THE ARGUMENT

Mr. McCallie refused to answer questions when he was arrested and taken to the police station. The State took great pains to avoid using Mr. McCallie's silence against him during the trial, as it openly acknowledged a few times in the trial. However, during closing argument, the State argued that Mr. McCallie failed to tell his story to the police when he was questioned and that this failure was an indication of his guilt. This violated Mr. McCallie's constitutional right to remain silent because the State used his silence to infer a motive to fabricate his story.

Additionally, the State's entire case hinged on the testimony of one person, John Pearce. Pearce's blood alcohol level turned out to be .31, four times the legal limit and one in which the scientific literature deems a person almost completely incapable of remembering what occurred. In other words, no rational trial finder could believe Pearce's story. Pearce could not concretely remember virtually any detail of the crime and made several statements soon after indicating that he could not remember what had transpired. Additionally, Pearce's story was flatly contradicted by the evidence from the scene. No bullet hole matched his story, and the only apparent bullet hole in the room was behind and above where Pearce said Mr. McCallie stood. Thus, the court erred in denying Mr. McCallie's motion for a directed verdict.

ARGUMENT

POINT I

The trial court abused its discretion in denying Mr. McCallie's motion for mistrial and motion for new trial, given the State's comments regarding Mr. McCallie's exercise of his right to remain silent

Prior to trial, Mr. McCallie made a motion in limine to prevent the State from referencing a police interview where Mr. McCallie refused to answer questions and where he told police he did not understand the *Miranda* warnings. R. 297:1. The prosecutor responded, "I spoke to my detective about that very point. As we went over the interview I said, Look, you don't want to go anywhere near, that can be cast as us commenting on his right to remain silent." R. 297:1. The State continued, saying that it wanted to question the officer about Mr. McCallie's behavior—that he "was uncooperative, combative" and "smartalecky" with the police. R. 297:2. The State said,

I would like to have the Detective [Arnn] testify as to his behavior but we're not going to go into the content and I told him specifically and I'll reiterate to him, we do not want to go around *Miranda*, I'm not going to ask that. All I want to ask you about is how was he behaving.

R. 297:2. The court admonished the State that "behavioral descriptions of what he observed ... should be acceptable." R. 297:2.

When Detective Arnn testified, the State said to him, in reference to his interview of Mr. McCallie, "I'm not going into what was said specifically but I want to ask you questions about the man as you saw him ..." R. 297:130. Later,

the State, in asking whether Mr. McCallie could articulate himself or was intoxicated, said to the detective, "When you spoke with - again without going into the content - with the defendant did he have that same clarity?" R. 297:131. The State asked no further questions regarding the interview with Mr. McCallie and only elicited the officer's opinion that in his few minutes of interaction, Mr. McCallie appeared intoxicated. R. 297:131-32.

Mr. McCallie testified, and as a result of that testimony, the State elicited some of his statements, such as he asked police for a rum and Coke and a six pack of beer. R. 298:64-65. Additionally, when the officer asked Mr. McCallie about his *Miranda* rights, Mr. McCallie responded that he didn't understand "[t]he part where you're fucking jerking me off. What the fuck am I doing here to begin with? You people woke me up." R. 298:65.

During the State's closing argument, the State changed course, opting to argue that Mr. McCallie's silence entitled the jury to infer his guilt. The prosecutor was in the process of arguing that Mr. McCallie's story evolved over time. R. 298:119-20. He then made the following, objectionable, statement:

The evolution of his story from the very beginning when [the police] questioned him, what does he say? Why am I here? Why are you jerking me off? Nothing happened. You woke me up. You woke me up. He didn't say it was an accident. He doesn't say this was self-defense.

R. 298:120. The defense objected that this was "a comment on my client's right to remain silent" and moved for mistrial. R. 298:121. The trial court summarily denied the motion. R. 298:121.

After trial, Mr. McCallie filed a motion for new trial based on the improper comment. R. 223-25. The motion mentioned that Mr. McCallie “refused to answer the questions of the police when he was arrested” and that “refusal was tantamount to invoking his right to remain silent under the constitutions of Utah and the United States.” R. 223. McCallie argued that “[i]n order to ... sway the jury into believing that the Defendant was fabricating a defense, [the prosecutor] stated that the Defendant did not tell the police when he was arrested that he had acted in self-protection or that the shooting was an accident.” R. 223-24. Mr. McCallie also alleged that the court failed to issue a curative instruction. R. 224.

McCallie alleged that the error was particularly harmful given serious inconsistencies in the victim’s testimony. R. 224; *see* point II, *infra*. Because the jury’s only determination involved the credibility of two people, and where the physical evidence did not comport with the victim’s story but with McCallie’s story, “the prosecutor had to impugn the Defendant and his testimony in order to convince the jury of guilt. He did that by stating that if his testimony and defenses were worthy of belief that he would have told the police when he was arrested.” R. 224. Without a corrective instruction, this left the jury with the impression that this was proper basis to infer guilt. R. 224.

The State admitted that it “argued that Defendant was given an opportunity to tell the police what had occurred on the night in question and instead of saying it was an accident or that it was in self-defense, as he claimed at trial, Defendant was confused why police were even there and told them ‘nothing

happened.” R. 252. It also asserted that Mr. McCallie had not “invoke[d] his right to remain silent at this point.” R. 252. The State then argued that Mr. McCallie’s statement to the police that “nothing happened,” coupled with later statements (that it was an accident and that it was self-defense) amounted to “proper argument” to show that Mr. McCallie was “not credible and his claim of self-defense should not be believed.” R. 253.

The court denied the motion, stating that the comment was “an appropriate comment” on Mr. McCallie’s credibility “given inconsistencies in defendant’s prior statements to the police and others.” R. 262. Additionally, the court found that Mr. McCallie’s refusal to talk to the police did not amount to an invocation of the right to remain silent, since it believed the right must be invoked unequivocally. R. 262.

The trial court erred in allowing the State to use Mr. McCallie’s silence as a basis to infer his guilt. The Fifth Amendment to the United States Constitution says, “No person shall be ... compelled in any criminal case to be a witness against himself...” U.S. Const. amend. V. This right “can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory.... [I]t protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.” *State v. Gallup*, 2011 UT App 422, ¶ 14, 267 P.3d 289 (quoting *State v. Palmer*, 860 P.2d 339, 347 (Utah Ct. App. 1993)).

The State's use of Mr. McCallie's silence as evidence of his guilt violates his right against self-incrimination and was a critical error requiring reversal. "The general rule of law is that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised." *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991). As the Supreme Court has held, "the Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965).

The State's comment that Mr. McCallie's silence indicated some sort of guilt was clearly improper. *See State v. Easter*, 130 Wash. 2d 228, 235, 922 P.2d 1285, 1289 (1996) ("the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence"). As the Supreme Court has held, "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91 (1976).

Indeed, in *Doyle*, the State sought to make the exact inference that it made in this case, which the Court found to be improper. The State argued "that the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to fit within the seams of the State's case as it was developed at pretrial

hearings.” *Id.* at 616. The State did nothing different in this case. It argued that Mr. McCallie made up the story later, otherwise he would have shared it at the time of interrogation. This is clearly prohibited.

In *State v. Wiswell*, the Utah Supreme Court reversed a conviction for a similar comment. In that case, the prosecutor argued to the jury that “I asked the officer who drove him to those places what the defendant said. He didn't tell the officer that he was an unwilling participant.” *State v. Wiswell*, 639 P.2d 146, 147 (Utah 1981). The court reversed the conviction, noting that the “prosecutor's comments during his final argument” was an attempt “by the prosecutor to put the defendant's silence before the jury after his having been advised of his right to remain silent amounts to prosecutorial misconduct.” *Id.* As this court has put it,

A prosecutor must specifically inquire about or argue using a defendant's exercise of his rights in a context that would impeach a defendant's exculpatory explanation of his conduct. The key is the framing of a question or a prosecutor's comment that demands an explanation from the defendant and raises the inference that silence equals guilt.

State v. Maas, 1999 UT App 325, ¶ 20, 991 P.2d 1108, 1112. The problem is when “the prosecution ... attempt[s] to cast the forbidden inference that [the defendant's] silence equaled guilt.” *Id.*, ¶ 25. That is exactly what occurred here. The prosecutor took Mr. McCallie's silence and used it to make an inference that he was lying, and thus, guilty—that if his story was correct, he would have told the police.

Nor was the trial court correct in stating that a defendant must affirmatively invoke the right to remain silent in order to claim it. One easily invokes one's Fifth Amendment right when he chooses to remain silent. "[I]t is difficult to see how remaining silent is not an exercise of one's right to remain silent." *Gallup*, 2011 UT App 422, ¶ 32 (Voros, J., concurring); ¶ 15 ("the *Miranda* warning itself is framed as a right to *remain* silent, implying that the right to be silent exists before a *Miranda* warning is necessary") (emphasis in original). In *Gallup*, the State argued that it could use a defendant's hanging up the phone as evidence against him. *Id.*, ¶ 17. This court found that it put the defendant in a Catch-22, to either "speak with the trooper or to remain silent" and that the court prejudicially erred in admitting the defendant's silence against him. *Id.* at ¶¶ 17-18, 25; *see also Palmer*, 860 P.2d 339.

The trial court's reliance on *Thompkins* was misplaced. In that case, the defendant remained largely silent for a few hours during an interrogation, but then later spoke with police. *Berghuis v. Thompkins*, 560 U.S. 370, 375-76, 130 S. Ct. 2250, 2263, 176 L. Ed. 2d 1098 (2010). He argued to the Court that the period of silence amounted to an invocation of the right to remain silent for purposes of *Miranda*, which would have required police to cut off the interrogation. *Id.* at 380-81. The Court disagreed, saying that police are not required to end an interrogation if a defendant only remains silent. *Id.* at 381. Had the defendant said either that he wanted to remain silent or that he did not want to talk with the police, "he would have invoked his 'right to cut off questioning.'" *Id.* at 382. Certainly, in dealing with the police, a defendant must unambiguously tell them

that he is invoking his right to silence so that they cease questioning. But if a defendant chooses to remain silent in the interrogation (and never speaks with the police), then he has, by definition, chosen to exercise the right as the police informed him.

This question is opposite to Mr. McCallie's case for several reasons. In this case, first, Mr. McCallie did not later choose to speak with the police, as the defendant did in *Thompkins*. He refused—he remained silent. As the Court put it, “[i]f Thompkins wanted to remain silent, *he could have said nothing in response to [police] questions*, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation.” *Thompkins*, 560 U.S. at 386. Thus, the Court found that by later speaking, Thompkins waived his right to remain silent. *Id.* at 385. Mr. McCallie did not later speak, and thus, his did not waive a right to remain silent.

Second, Mr. McCallie's *Miranda* violation is different. Thompkins argued that he invoked *Miranda* by silence and that subsequent statements to police were involuntarily given. Mr. McCallie invoked *Miranda* by *remaining* silent once he was subject to police questioning. He never spoke to police again. Mr. McCallie's argument is focused to that point. He chose to remain silent when faced with police questioning and that the State later used that silence against him at trial. This is a fundamentally different question than the Court addressed in *Thompkins*.

Mr. McCallie was harmed for the reasons stated in his motion and for the reasons stated in Point II, *infra*. The issue in this case is that the prosecutor used Mr. McCallie's silence as evidence of his guilt. As the Utah Supreme Court has

held, “when a person invokes his constitutional rights, the prosecution should not comment thereon, nor so use it in any way that will tend to impair or destroy that privilege.” *State v. Urias*, 609 P.2d 1326, 1328 (Utah 1980). The problem occurs when something is “implied or argued regarding any inference to be drawn” from a defendant’s silence. *State v. Demartinis*, 2008 UT App 261, *2 (unpublished); see *Urias*, 609 P.2d at 1328 (“It is significant that there is no indication that the prosecutor made any attempt to use that fact to cast any inference of guilt of the defendant, nor to persuade the jury to do so”). “The prosecutor may not in his closing arguments, ma[k]e any further mention of [the defendant’s] silence.” *State v. Bakalov*, 1999 UT 45, ¶ 67, 979 P.2d 799, 820.

As this court has stated, there are particular harms with using post-*Miranda* silence against a defendant. “[T]he prosecution may not use a defendant’s post-*Miranda* silence as substantive evidence of guilt” because its “use of post-*Miranda* silence prejudices the defendant by attempting to create an inference of guilt in the jury’s mind.” *State v. Byrd*, 937 P.2d 532, 534 (Utah Ct. App. 1997) (internal citation, quotation and corrections omitted) (citing *State v. Saunders*, 98 Ohio App.3d 355, 648 N.E.2d 587, 590 (1994) (noting effect of prosecutor’s comment was to suggest guilt of defendant, “because an innocent person would not have remained silent”).

In *Byrd*, this court found that a prosecutor’s cross-examination of a defendant improperly commented on his right to silence. *Byrd*, 937 P.2d at 537. In *Byrd*, the prosecutor solicited from an officer that the defendant remained silent

during police questioning, then asked the defendant, "You certainly did not say anything to [the police] about [your story], did you?" *Id.* at 535. This was harmful error, this court found.

To determine whether the State's improper use of defendant's silence was harmless, we consider the following factors: "(1) whether the jury would 'naturally and necessarily construe' the comment as referring to defendant's silence; (2) whether there was overwhelming evidence of defendant's guilt; (3) whether the reference was isolated; and (4) whether the trial court instructed the jury not to draw any adverse presumption from defendant's [silence]." *State v. Reyes*, 861 P.2d 1055, 1057 (Utah Ct. App. 1993)

Id. As to the first point, this court found that the questioning "clearly referred to defendant's failure, following the *Miranda* warnings, to deny involvement in the drug transaction" and amounted to a comment on his silence. *Id.* at 536. Like *Byrd*, the State's comment specifically mentioned that when questioned, Mr. McCallie did not tell the police his version of events. R. 298:120. This was clearly a comment on his silence.

As to the second point, the court emphasized that "[c]ourts have generally refused, however, to conclude that evidence was overwhelming in cases that ultimately rested on the jury's resolution of conflicting evidence, particularly where the defendant's credibility is involved." *Byrd*, 937 P.2d at 536. In *Byrd*, "[b]ecause both the State and defendant offered conflicting versions of the events surrounding the drug transaction and arrest, [and] the case came 'down to a one-on-one situation, i.e., the word of the defendant against the word of the key prosecution

witness[es]" ... we cannot say that the evidence against defendant in this case was overwhelming." *Id.*

Similarly, the case came down to the credibility of two witnesses, one of whom was highly intoxicated—to the point of incapacitation—and whose testimony was contradicted by virtually all of the physical evidence. Indeed, the jury did not believe the victim's claim about the discharge of the firearm. However, if the jury believed that it was proper to infer guilt as to the assault from Mr. McCallie's decision to remain silent—to not tell the police his story—then this improperly tipped the scales against Mr. McCallie. In other words, if the jury believed that if Mr. McCallie truly fired in self-defense and that the gun accidentally discharged, but that if this story were true, he would have told the police initially, as the State argued, then they would have rejected his claim on an improper basis.

As to the third point, the court found that even though the prosecutor made only two short references to the silence, given that the case lasted only two days, that the comments came close to the end of the case, and that the court failed to instruct the jury to disregard the comment, the evidence "weigh[ed] against the State on this factor." *Id.* at 536-37. Similarly, in this case the comment came literally minutes before the jury retired to deliberate. It was almost the last thing said to them. Because this case also only lasted two days, and because the comment came so close to deliberations, like *Byrd*, it was particularly egregious.

The court's failure to issue a curative instruction was also problematic. In one case, this court again found harm with the State's solicitation of evidence of a defendant's silence at trial, and noted the particular problem with not curatively instructing the jury. "Although the elicited comment was isolated and was not referred to in closing argument, the trial court did not immediately admonish the jury to disregard it," the court found. *Reyes*, 861 P.2d at 1057.

As this court emphasized in *Gallup*, Mr. McCallie was placed in a Catch-22. Had Mr. McCallie decided to talk to the police, then any statements he made could have been used against him. If he decided not to talk to the police, as is his right under the Constitution, then the State still could, and in fact, did, use his silence against him. Mr. McCallie should have the protection of the Constitution which prevents the State from using his silence adversely at trial. See *Tortolito v. State*, 901 P.2d 387, 390 (Wyo. 1995) ("a citizen who stands mute in the face of accusatory interrogation about the crime during a law enforcement investigation and inquiry is without constitutional protection against law enforcement personnel who treat silence as probative evidence of guilt"). Thus, the court erred in failing to grant the motion for mistrial.

POINT II

The trial court erred in failing to grant Mr. McCallie's motion for acquittal and directed verdict given the victim's highly intoxicated state and contradictions in the physical evidence

After the State rested, the defense made a motion for directed verdict based on insufficiency of the evidence. R. 298:28. In particular, the defense claimed that the Pearce “was so under the influence that no reasonable jury could believe his testimony.” R. 298:28. The court denied the motion, reasoning that “the State has made its prima facie case” and that questions as to Pearce’s intoxication went to the weight of his testimony. R. 298:28. The State, however, failed to make out its prima facie case because the evidence, which depended entirely on Pearce’s testimony, was based on a non-existent memory from extreme intoxication, and was so contradictory to the physical evidence, as to be utterly non-persuasive.

A. STANDARDS FOR INSUFFICIENT EVIDENCE

“A conviction not based on substantial reliable evidence cannot stand.” *State v. Robbins*, 2009 UT 23, ¶ 14, 210 P.3d 288. Further, “a defendant need not adduce any evidence in his defense unless the prosecution first adduces believable evidence of all the elements of the crime charged.” *State v. Smith*, 675 P.2d 521, 524 (Utah 1983). A “motion to dismiss for insufficient evidence at the conclusion of the State’s case in chief requires the trial court to determine whether the defendant must proceed with . . . his defense.” *State v. Noren*, 74 P.2d 568, 570 (Utah 1985) (citations omitted). “In order to submit a question to the jury, it is necessary that

the prosecution present some evidence, of every element needed to make out a cause of action.” *Id.* (citation omitted). “When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged.” Utah Code Ann. § 77-17-3 (2008)); *see* Utah R. Crim. P. 17(p).

This court will hold that there was insufficient evidence if “after viewing the evidence and all inferences drawn therefrom in a light most favorable to the jury’s verdict, the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted.” *State v. Holgate*, 2000 UT 74, ¶ 18, 10 P.3d 346 (quoting *State v. Dunn*, 850 P.2d 1201, 1212 (Utah 1993)).

B. JOHN PEARCE’S TESTIMONY

Pearce was the only person other than Mr. McCallie present during the crime. According to Pearce, he showed up to visit his aunt and uncle, Tim and Jody Krogh, around 9 am, bringing a half-gallon of whiskey. R. 297:16-17. The three played cribbage and drank for several hours until sometime late afternoon when Mr. McCallie, who rented a bedroom in the house, showed up with a 12 or 18 pack of beer. R. 297:18-19, 23. Mr. McCallie sat at the table with them and drank some beer and whiskey and chit chatted, but did not play. R. 297:18-19.

At some moment, Mr. McCallie called Pearce’s aunt a “cunt” and said it stood for “can’t understand normal thinking.” R. 297:19-20. They started arguing. Tim asked Mr. McCallie to apologize and Mr. McCallie refused. R. 297:20. The

game finished and Tim and Jody went to bed—around 8 or 9 pm. R. 297:21. Mr. McCallie and Pearce continued to play poker and drink whiskey for several hours. R. 297:21-22, 43.

The two began to argue again about the earlier insult and Pearce told Mr. McCallie that he disrespected his family. According to Pearce, Mr. McCallie said to “go fuck myself” and refused to apologize. R. 297:22. Pearce’s uncle Tim then came out of his bedroom and told the two to quiet down. R. 297:22. By the time they had the argument, Pearce had been drinking “[r]oughly maybe 10 hours or better.” R. 297:33.

Mr. McCallie then told Pearce to come into his bedroom for a shot of brandy. As the two walked toward the bedroom, talking about golfing, Mr. McCallie turned around, just at the foot of the bed, pointed a gun at Pearce and said, “How about I just fuckin’ kill you?” R. 297:22-23, 35-36, 40. Pearce watched him pull back the hammer and point the gun at his face, about six inches away. R. 297:24.

Pearce testified he “grabbed his wrist and the barrel of the gun and tried to pull it away from me ...” R. 297:24. During that struggle the gun came “down into my side and then the gun went off.” R. 297:24. The whole struggle took “[l]ess than a second” and the gun went off in “the blink of an eye”—it “was all instantaneous.” R. 297:27. Pearce said the gun burned his hand as it went off. R. 297:31.

The bullet went through Pearce's side through the front and out the back and should have been somewhere in the room. R. 297:27-29, 40. The two struggled and Pearce spun Mr. McCallie to the bed, "put my knee on his arm" and screamed for help. R. 297:29. Pearce said that when the police showed up, he told Mr. McCallie that he would tell them it was an accident if Mr. McCallie let go of the gun, which he did. R. 297:30.

C. TESTIMONY OF TIM AND JODY KROGH

Tim Krogh testified that Pearce had been there all day drinking whiskey and that he played cards with him for some of the day. R. 297:73-75. He heard McCallie insult his wife, but he stayed with them for an hour or so, while the two calmed down and McCallie played the guitar. R. 297:83-84. He heard Mr. McCallie and Pearce arguing around 10 pm and that he told them to be quiet and that Pearce needed to not come by anymore and that McCallie would have to find a new place to live the next morning. R. 297:67-68. Tim went back again, but said the two were only being loud and boisterous, not arguing. R. 297:77-78. He heard the gunshot and ran to McCallie's bedroom, seeing Pearce with his left knee on McCallie's left hand which held the gun, and Pearce's right hand on the gun's barrel. R. 297:68-70, 80. Pearce's left hand held Mr. McCallie's other wrist. R. 297:69-70. Pearce said he had been shot. R. 297:70. In the ten seconds Tim saw the scene, he said it looked like a one-sided struggle with Pearce on top of

McCallie. R. 297:71-72. Jody showed up and Tim pushed her back and called 911. R. 297:71.

Jody Krogh testified that the men were being loud that evening and they woke her up. R. 297:87-88. When she confronted them about it, Mr. McCallie called her names, which made Pearce upset. R. 297:88-89. She heard Tim asking them to leave, and later heard the gunshot. R. 297:90-91. She saw the two struggling briefly. R. 297:90.

D. TESTIMONY OF DETECTIVE ARNN

Detective Arnn visited Pearce in the hospital within an hour of the shooting. R. 297:107, 117. He took a short statement from him, which he had no difficulty understanding. R. 297:110-11. Pearce did not seem to slur his words. R. 297:112. Arnn returned to the scene and secured the gun and ammunition. R. 297:117-21.

Arnn looked for a projectile, but could not find one. R. 297:126-27. They found a "spot on the wall" in the bedroom that "was fairly high" that could have been a bullet hole. R. 297:127. "There appeared to be a hole in the drywall which appeared consistent with may have been caused by a projectile." R. 297:128. Arnn used a Saws-All to dig into the wall, but only found several two by fours and no projectile in the wood. R. 297:128, 140-41. Arnn saw an indentation on the wood which was "consistent enough" with a bullet hole that prompted him to dig. R. 297:143-44. Arnn admitted that it was "very possible" that the "bullet hit that wood and fell down, fell down or disintegrated or moved to some other location

..." but that he failed to follow through on that possibility. R. 297:146. He testified that the hole on the ceiling "seemed like my most likely spot for that bullet hole" and that having searched the entire room, they could not find any other place where a bullet could have been. R. 297:147. Arnn marked the spot on the wall where the hole was, which was above the bed, where McCallie and Pearce struggled. R. 297:134-35; Def. Ex. 11. He admitted it "didn't feel that it was that important" to find the bullet in order to confirm Pearce's story. R. 297:148.

Arnn interviewed Mr. McCallie and smelled the odor of alcohol on him and believed him to be intoxicated. R. 297:131-32. He did not do any sort of field sobriety test or ever test McCallie's blood. R. 297:139-40. But McCallie had an injury to his face that was bleeding. R. 297:139, State's Ex. 6.

E. RECORDINGS

The State also played several jail recordings from Mr. McCallie. In one recording with Tim, McCallie said he thought he shot Tim and that he needed Pearce "to say this was an accident." R. 298:119. In a phone call to his mother, McCallie said that Pearce would say the shooting was an accident. R. 298:119. Then in a later phone call to a Christy, Tim's daughter, McCallie asked her to "get a little pushy" with Pearce, that "it'll be well worth [Pearce's] while" if he cooperated and that he would "take care of him." R. 298:119. In a later call, McCallie said that "I'm going a different direction with the story now, it's self-defense now since John doesn't want to play ball." R. 298:119.

F. TESTIMONY OF JAMES McCALLIE

Mr. McCallie testified that he had been driving a semi-truck that day and, presenting his logs, showed that he arrived in Salt Lake City between 8:30 and 9:00 pm that day. R. 298:33-34. He said he stopped off at 7-11, picked up an 18-pack of beer and then went to the bank. R. 298:34-35. McCallie provided a receipt showing he pulled cash from an ATM for his rent at 10 pm. R. 298:33-35.

He got home and found Pearce there. R. 297:36. The two were "becoming friends" and so McCallie put his truck bag in his bedroom and began working on his logs. R. 298:37-38. Pearce started talking with McCallie about guns for 30-45 minutes, by which time, McCallie had consumed two beers. R. 298:38. He got up to walk to his bedroom and show Pearce the gun. R. 298:38-39. He pulled the gun out of his dresser, set it on the bed then picked it up, unloaded it, walked out of the bedroom and showed it to Pearce. R. 298:38-39. He then took the gun back to the bedroom and began to load it when Pearce came back in. R. 298:39. Mr. McCallie believed Pearce wanted to steal the gun, so McCallie asked him to leave, then reloaded it and put it under his pillow to try to hide it from Pearce. R. 298:39-40.

He came back out and played guitar with Pearce, who kept asking him to drink whiskey. R. 298:40. McCallie put the bottle to his lips to placate Pearce, but did not drink, since he only drank hard alcohol on his birthday. R. 298:40. McCallie then took two beers into the shower with him, drank one of them and had two other unopened beers on his nightstand. R. 298:41-42. He got dressed

and Pearce came back the bedroom asking him to come out and do more shots. R. 298:42.

McCallie went back out and they played music and were a "little bit loud" when Jody came out and was upset about being woken up. R. 298:43. McCallie called her names and said he'd be moving out. R. 298:43. Pearce demanded that McCallie apologize, but he refused. R. 298:43-44. McCallie went to the bedroom, and Pearce came in, stood on McCallie's feet with his fists clenched, demanding that McCallie apologize. R. 298:45. McCallie reached behind him and grabbed the gun with his left hand from under his pillow because he felt threatened. R. 298:45-46. He told Pearce to leave the room.

That's when he grabbed the gun and he pinned my finger against the frame of the gun. Well, when I pulled back on it, he fell over the top of me and he had his finger in the trigger guard and in essence, when he fell over the top of me, he pushed the trigger and fired the weapon himself.

R. 298:46. McCallie denied ever threatening to kill Pearce. R. 298:47. He only to Pearce he wanted him "out of my room." R. 298:47. McCallie said he held the gun's hammer back to prevent Pearce from firing or getting control of the weapon and using it on him. R. 298:48-49.

McCallie testified that he put clothes on and went outside, where the police took him to the ground and crushed his face into the pavement, cutting it. R. 298:52-53.

In regards to the phone calls, Mr. McCallie testified that he called Tim and pretended not to know so that he could hear his side of the story. R. 298:56. In

fact, Pearce told McCallie's mother that the shooting was an accident. R. 298:58-59. Christy told McCallie that Pearce wanted to be compensated and McCallie agreed that he would help take care of him. R. 298:59, 66. But when Pearce said he would no longer say it was an accident, McCallie had to say what happened, which was that the gun was pulled in self-defense. R. 298:60.

G. OTHER DEFENSE WITNESSES

Dr. Robert Rothfeder testified for the defense. He reviewed Pearce's medical records and found his blood alcohol level was at .31, four times the presumptive level and that the attending physician described him as "heavily intoxicated" when he arrived at the hospital. R. 298:6-7, 9. He testified that a person with this BAC who did not regularly drink would be "non-functional" and could not walk or talk. R. 298:8. A regular drinker would still be "significantly impaired" such that he would have great difficulty thinking, understanding, remembering, walking a straight line, or reasoning. R. 298:8. He believed a person with that level of intoxication could possibly pull a handgun trigger consciously, but that it would be questionable whether they could aim or operate it. R. 298:18.

McCallie's mother, Carol Ibarra, testified that Pearce told her he "was very sorry for what happened" and said "it was an accident ..." R. 298:77. Pearce said he wanted McCallie to give him "severance pay for the three days I was off work." R. 298:77. He also said he did not want to press charges. R. 298:79.

Marjorie Maughan, a friend of Ibarra's, also testified that she heard Pearce tell Ibarra that the shooting was an accident. R. 298:80-81.

H. THE EFFECTS OF A .31 BAC

As Dr. Rothfeder testified, the effects of a .31 BAC are staggering for witness comprehension. R. 298:6-18. They would have difficulty remembering or doing anything that would be necessary to accurately recollect something that happened, given their inability to reason, think, understand or remember. R. 298:8.

"Alcohol impairs the ability to form new memories."¹ The "impact of alcohol on memory formation [i]s a dose-related continuum with minor impairments at one end and very large impairments at the other, with all impairments representing the same fundamental deficit in the ability to store new information in memory for longer than a few seconds."² As doses increase beyond .15, "the resulting memory impairments can become much more profound, sometimes culminating in blackouts, a complete inability to remember critical elements of events, or even entire events, that transpired while intoxicated."³

According to one text, a BAC of .30 results in a "stuporous state." The person would have the "inability to respond to stimuli" and would be "not likely to

¹ MARC GALANTER ET AL., ALCOHOL PROBLEMS IN ADOLESCENTS AND YOUNG ADULTS: EPIDEMIOLOGY, NEUROBIOLOGY, PREVENTION, AND TREATMENT 164 (2006).

² *Id.*

³ *Id.*

remember events the next day.”⁴ A BAC not much higher, .35, would result in a person being completely anesthetized. *Id.* “Stupor and unconsciousness are present for many individuals who have BAC levels of .21 to .30. Marked central nervous system depression occurs at levels about .30, including decreased respiration and heart rate sometimes resulting in death.”⁵ As one text described the symptomology, a .31 is nearly fatal:

Level 4: From .15 to .30 BAC, the person is in a high-risk state. All physical and mental functions are impaired considerably. The person is unable to walk without help. Breathing is labored, body temperature may go down, and reflexes are depressed. There may be a loss of bladder control. *The person does not know what he or she is doing or saying and is unable to remember events.* Loss of consciousness may occur.

Level 5: Above a .30 BAC, a person is unconscious or in a coma. The part of the brain that controls breathing and heartbeat is dangerously affected. The person is close to death and could die without medical attention.⁶

Pearce admitted that he has consumed whiskey nearly every day for thirty-four years. R. 298:86-87. In fact, one of the most serious complications of long-term alcohol use, according to all the research, is a significantly impaired memory.⁷ Those who use alcohol frequently have “poorer spatial working

⁴ RAYMOND GOLDBERG, *DRUGS ACROSS THE SPECTRUM* 126 (2013).

⁵ GARY L. FISHER & NANCY A. ROGET, *ENCYCLOPEDIA OF SUBSTANCE ABUSE PREVENTION, TREATMENT, AND RECOVERY* 57–58 (2008).

⁶ VALERIE MENDRALLA & JANET GROSSHANDLER, *DRINKING AND DRIVING, NOW WHAT?* 18 (2011) (emphasis added).

⁷ GOLDBERG, *supra* note 4, at 126; JOHN JUNG, *ALCOHOL, OTHER DRUGS, AND BEHAVIOR: PSYCHOLOGICAL RESEARCH PERSPECTIVES* 203–04 (2009); Mark S. Goldman et al., *Alcoholism and Memory: Broadening the Scope of Alcohol-Expectancy Research*, 110 *PSYCHOL. BULL.* 137 (1991); William W. Beatty et al., *Visuospatial*

memory” and including an inability to form short-term memories or “remembering recent events and learning new information.”⁸ Drinking over a long period “shrinks the brain,” killing tissue which leads “to widespread deficits in cognition and behavior” including to deficits in working and long-term memory.⁹ “Some people appear conscious and even function when they drink, but later, they have no memory of what transpired. This condition, referred to as an alcohol-induced blackout, may be an early indication of alcoholism.”¹⁰

I. PEARCE’S EXTREMELY HIGH BAC AFFECTED HIS ABILITY TO ACCURATELY PERCEIVE THE EVENTS

While Pearce testified confidently, the evidence reflects that he could not accurately perceive—if at all remember—the events given his high level of intoxication. Pearce could not remember what clothes McCallie wore. R. 297:35. Critically, he could not remember the exact date the shooting took place. He remembered finding out in the hospital that it was April Fool’s Day, “not a good day to get shot,” he said. R. 297:41-42. However, the shooting took place on the early morning hours of March 31, a day earlier than Pearce’s recollection. R. 297:42. Therefore, it took Pearce almost 24 hours before he seemed to come out of the alcoholic stupor.

Perception, Construction and Memory in Alcoholism, 57 J. STUD. ALCOHOL DRUGS 136 (1996).

⁸ JUNG, *supra* note 7, at 203–04.

⁹ GREGORY FEIST ET AL., *PSYCHOLOGY: MAKING CONNECTIONS* 266 (2009).

¹⁰ GOLDBERG, *supra* note 4, at 126–27.

Pearce could not recollect any of the times and admitted he was only “guessing” about specifics. R. 297:50. He believed McCallie arrived around 3 pm or sometime mid-afternoon. R. 297:18-19, 23. However, McCallie provided documentation, both from his trucking company, as well as store receipts, that show he did not arrive until after 10 pm, seven hours later. R. 298:33-35, Def. Ex. 14. According to Pearce, he had been drinking for 10 hours before the shot went off. R. 297:33, 40. If Pearce arrived at 9 or 10 am, then the shot would have been around 7 or 8 pm. Notably, police did not receive the 911 call until 5:17 am, nine hours after one of Pearce’s recollections and five hours after the other. R. 297:151.

Pearce did not perceive the weapon. He did not recall ever seeing a gun prior to the actual moment it was pointed at him. R. 297:49. He did not see Mr. McCallie reach down to get it. R. 297:42. Nor did Pearce see McCallie go to his dresser or to the bed or pull the gun out of his waistband. R. 297:42.

Pearce admitted on cross-examination that “everything [was] calm and everything [was] ok” before they walked into the bedroom, in contravention to his statements that the two were arguing. R. 297:44. Indeed, he told police officers on April 1st, just one day after the shooting, that McCallie did not make any statements before pointing the gun at him, in contradiction to his trial testimony. R. 297:44-45. Pearce also told a detective that McCallie said, “I’m going to kill your ass” and “I’m just going to kill you,” different statements than his testimony. R. 297:117.

Perhaps most importantly, Pearce told police day after the shooting that “it was all kind of a blur” and that “my memory isn’t 100 percent on everything.” R. 297:47. He also said, “You know, I can’t remember exactly.” R. 297:48. Pearce testified that at the time he “was still—kinda things were still trying to sort thing out, everything that had happened.” R. 297:45.

Pearce admitted that he did not remember making some statements to the police nor could he remember all of their questions, claiming that a day later he was “still pretty shaken up.” R. 297:45-46. “I don’t recall every question I was asked that day,” he said. R. 297:49. He said things became clearer later because “once I had ... calmed down ... I was able to re-gather my thoughts and think about exactly what had happened ...” R. 297:46.

In reality, it wasn’t that Pearce was under shock. According to the literature, he would have had no or little ability to form a memory at all. What this reflects is that Pearce likely created these memories subsequently, when he was no longer so highly intoxicated.

J. PEARCE’S STORY DOES NOT MATCH THE EVIDENCE

Perhaps the most persuasive evidence of the inaccuracy of Pearce’s memory is its failure to comport with the evidence at the scene. According to Pearce, McCallie stood at the bed and that when he tried to push the gun down toward the ground, it fired, which would have been directed out of the room in a downward trajectory. Not only did police not find a bullet in that location or

direction (or anywhere else in the house for that matter), but the only possible location—a hole in the ceiling well inside the bedroom—was consistent with McCallie’s version of events. While the police did not find a bullet, the detective admitted that the spot in the ceiling was the “most likely spot for that bullet hole” and that it was “very possible” that the bullet fell down the wallboard. R. 297:146-47. Pearce’s story, then, does not make sense. If the hole in the ceiling was made by the bullet, then it would have to travel downward through Pearce, turn around and go backwards into the room and up to the ceiling, a physical impossibility.

Pearce’s claim that McCallie held the gun in his right hand was contradicted by Tim’s statement that McCallie had the gun in his left hand. R. 297:60, 68-70, 80. It also contradicts McCallie’s left-handedness. R. 297:60, 78.

Additionally, Pearce’s story fails to account, at its most basic level, for where the gun came from. Pearce could not recall where the gun came from—it just suddenly appeared. *See* point II H. *supra*. But McCallie wore sweatpants, as depicted in a police photograph. State’s Ex. 6. It would be difficult for Mr. McCallie to carry that firearm in those pants without Pearce noticing it. Indeed, what makes more sense is McCallie’s version that the gun was under the bed’s pillow and was pulled out in a moment of struggle.

K. INSUFFICIENT EVIDENCE

The State needed to show sufficient evidence that Mr. McCallie committed a 1) threat, 2) accompanied by a show of immediate force or violence, 3) to do

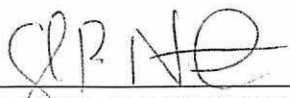
bodily injury to another, 4) with a dangerous weapon, 5) and not in self-defense. Utah Code Ann. §§ 76-5-102, 76-5-103.

While Pearce's testimony, if fully credited, amounts to sufficient evidence of an assault, his extreme intoxication reveals that no reasonable jury could believe his testimony and hence, the evidence was insufficient for that reason. The State did not have any independent evidence of guilt other than the testimony of a person whom the literature states had a blood alcohol level that would almost entirely impair his memory. Pearce's statements to police soon after reflect his inability to remember what occurred and the evidence at the scene flatly contradicts his story. Thus, the evidence was insufficient to convict Mr. McCallie of aggravated assault.

CONCLUSION

For these reasons, Mr. McCallie requests that this court reverse his aggravated assault conviction, given the prosecutor's comment on his invocation of his right to silence and the insufficiency of the evidence against him.

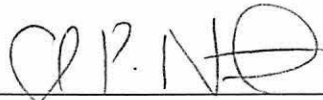
RESPECTFULLY SUBMITTED this 31 day of December, 2014.



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RULE 24 CERTIFICATE OF COMPLIANCE

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac 2011 in Baskerville 13 point, and contains 8292 words, excluding the table of contents, table of authorities, and addenda.



SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

CERTIFICATE OF SERVICE

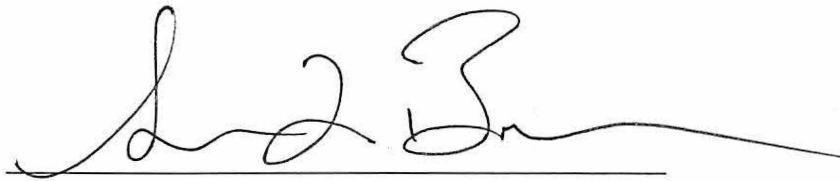
I hereby certify that on this 2nd day of January, 2015, I have caused to be ☐ mailed ☒ hand-delivered eight copies of the foregoing to:

Utah Court of Appeals
450 South State
P.O. Box 140230
Salt Lake City UT 84114-0230

I certify that on this 2nd day of January, 2015, two copies of the foregoing brief were ☐ mailed ☒ hand-delivered to:

Utah Attorney General
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854

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



A handwritten signature in black ink, appearing to read "David B. [unclear]", is written over a horizontal line.

Tab A

ADDENDUM A

Constitutional Provisions

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH CONSTITUTION

ARTICLE I, SECTION 7. [DUE PROCESS OF LAW.]

No person shall be deprived of life, liberty or property, without due process of law.

ARTICLE I, SECTION 12. [RIGHTS OF ACCUSED PERSONS.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.

Tab B

ADDENDUM B

Statutory and Rule Provisions

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.

76-5-103. Aggravated assault.

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

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

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

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

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

77-17-3. Discharge for insufficient evidence.

When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged.

Utah R. Crim. P. 17. The trial.

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

- (1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;
- (2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and
- (3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

- (1) misdemeanor cases when defendant is in custody;
- (2) felony cases when defendant is in custody;
- (3) felony cases when defendant is on bail or recognizance; and
- (4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impaneled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(3) The prosecution shall offer evidence in support of the charge;

(4) When the prosecution has rested, the defense may present its case;

(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and

(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(j) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(k) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty

not to form or express an opinion thereon until the case is finally submitted to them.

(l) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(m) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(n) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(o) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

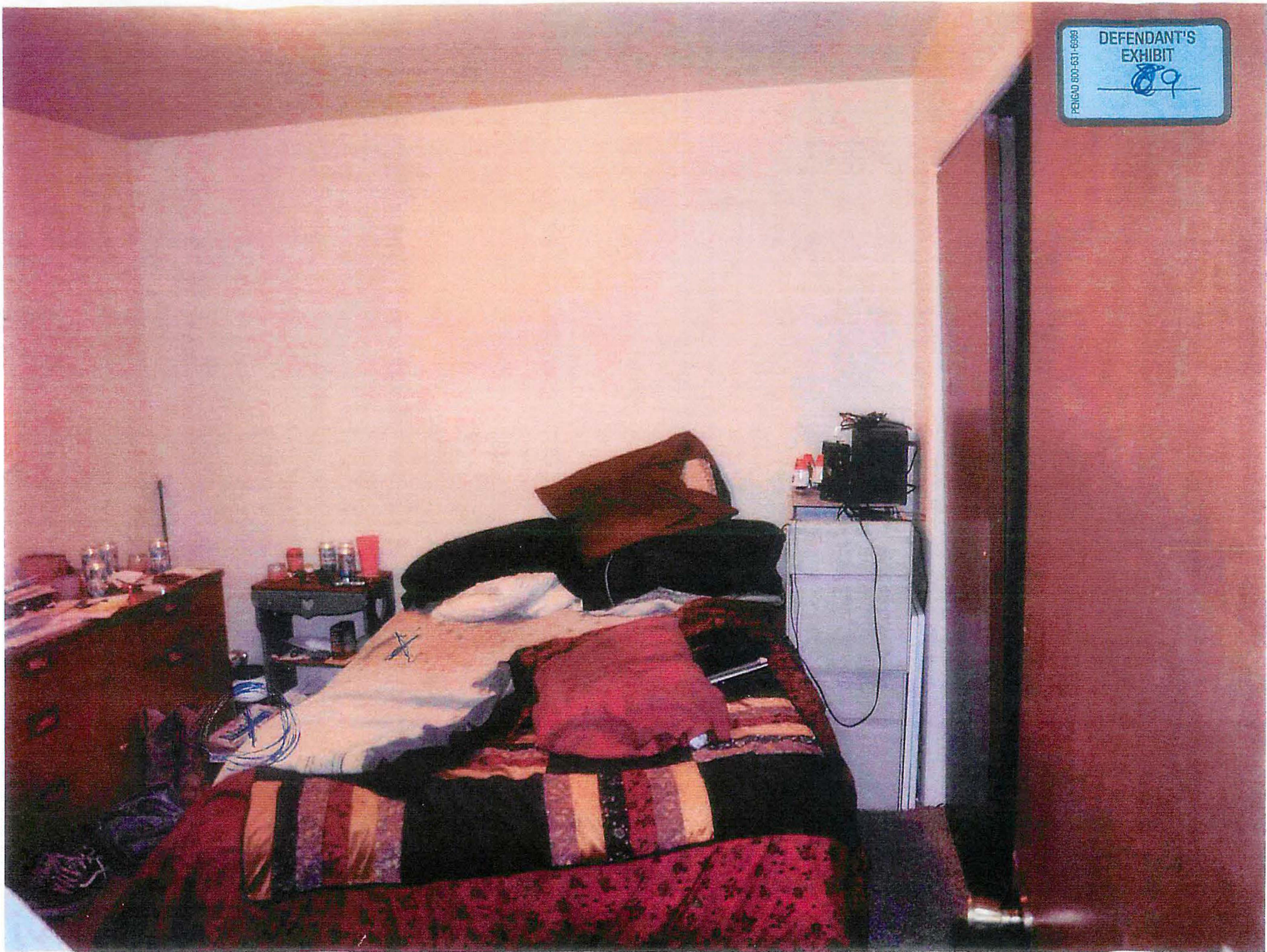
(p) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

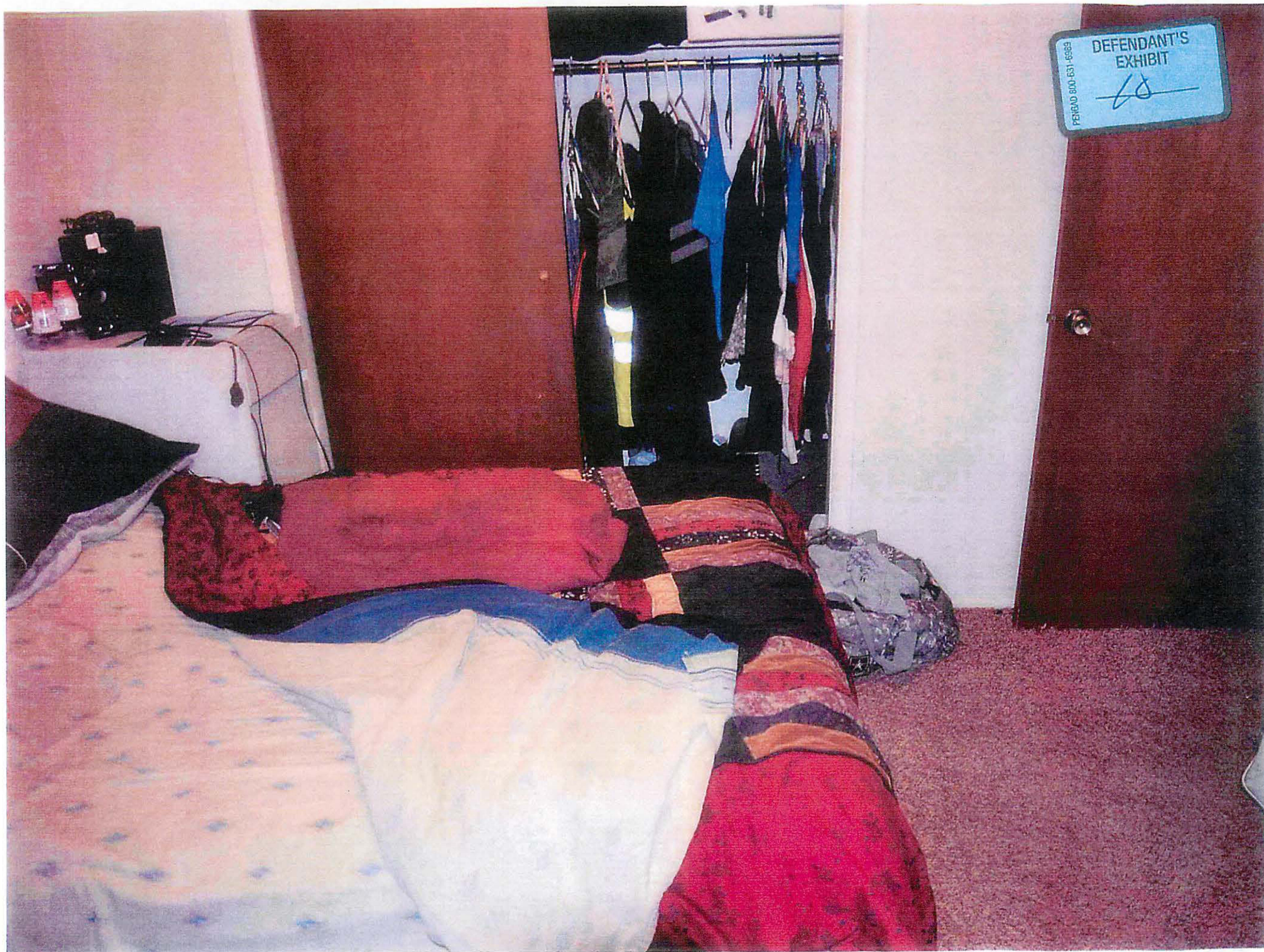
Tab C

ADDENDUM C
State and Defense Exhibits
Jury Question



DEFENDANT'S
EXHIBIT
89
PENICAD 800-631-6999



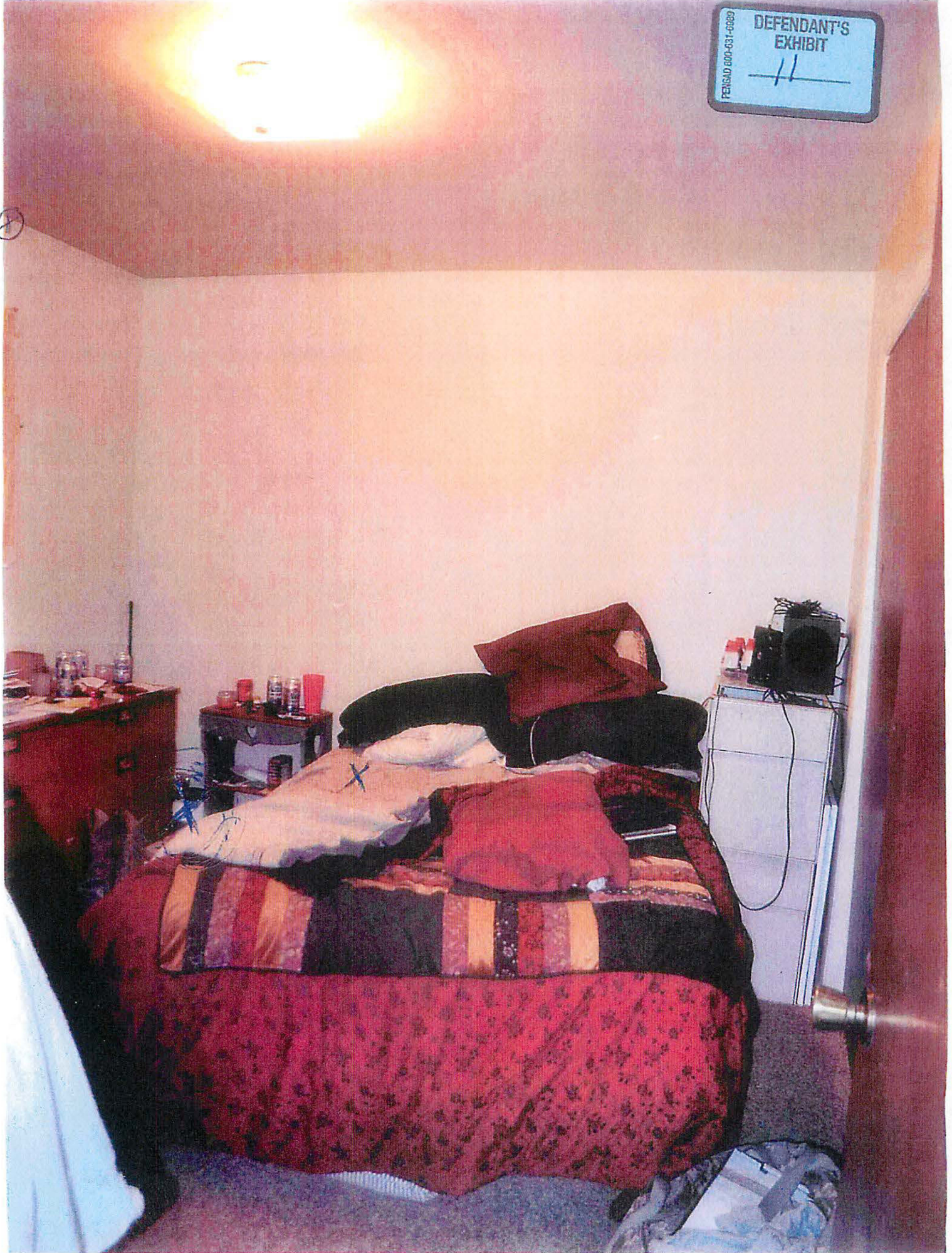


DEFENDANT'S
EXHIBIT
48
PENAND 800-631-6669

PCMSAD 800-631-6009

DEFENDANT'S
EXHIBIT

11





Intermountain Healthcare

Lab Results



Murray, UT

CBC

Test Status	WBC	RBC	HGB	Hct	MCV		
Last Ref. Range:	3.6-10.6	4.50-5.90	13.5-17.5	41.0-53.0	80.0-100.0		32.0-36.0
Units:	KuL	MuL	g/dL	%	fL	pg	g/dL
03/31/13.05:59	Final	9.7	4.85	16.9	48.5	100.0	34.8 H

CBC (cont)

Test Status	RDW SD	RDW	PLTS	MPV	Nucleated RBCs, Automated	
Last Ref. Range:	35.1-43.9	11.3-15.6	150-400	6.6-12.4		
Units:	fL	%	KuL	fL	/100 WBCs	
03/31/13.05:59	55.4 H	15.2	397	9.6	0.0	

03/31/2013.05:59 - Ordering/Requesting Facility: Intermountain Medical Center, Murray, UT; Performing Location(unless otherwise noted): Intermountain Medical Center, Murray, UT

Serum Drug Screen

Test Status	Ethanol	Acetamin	Comment:	Salicylate	Comment:
Last Ref. Range:	<13	10-30		0.0-30.0	
Units:	mg/dL	ug/mL		mg/dL	
03/31/13.05:59	Final	310 H	<10 L	* See Note	<1.0

* Comments

03/31/13.05:59 Ethanol:

For medical purposes only. Not for legal use.
Results verified by dilution & repeat analysis

03/31/13.05:59 Comment:: (NOTE)

INTERPRETATION OF ACETANINOPHEN:

Toxic level: >=140 ug/mL 4 hours after ingestion or >50 ug/mL 12 hours after ingestion.

03/31/13.05:59 Comment:: (NOTE)

INTERPRETATION OF SALICYLATES:

Analgesia and Antipyresis: 2-10 mg/dL

Anti-inflammatory: 15-30 mg/dL

03/31/2013.05:59 - Ordering/Requesting Facility: Intermountain Medical Center, Murray, UT; Performing Location(unless otherwise noted): Intermountain Medical Center, Murray, UT

To aid your preparation for trial, the victim(s) and victim identifying information have been redacted from the enclosed documents. This sensitive information may not be disseminated to the defendant or others (URCrP, Rule 16(e)).

CBC, Differential

Test Status	Differential Type	Neut, Auto	Lymph %	Mono, Auto	Eos, Auto	Baso, Auto	Immature Granulocytes
Last Ref. Range:		36.0-66.0	24.0-44.0	0.0-12.0	0.0-5.0	0.0-5.0	0.0-0.4
Units:		%	%	%	%	%	%
03/31/13.05:59	Final	Automated	35.8 L	46.6 H	9.9	6.4 H	0.9

CBC, Differential (cont)

Test Status	Neut, Abs	Lymphs, Abs	Mono, Abs	Eos, Abs	Baso, Abs	Immature Granulocyte, Absolute
Last Ref. Range:	1.6-6.8	1.2-3.4	0.2-0.9	0.0-0.5	0.0-0.3	0.0-0.03
Units:	KuL	KuL	KuL	KuL	KuL	KuL
03/31/13.05:59	3.5	4.5 H	1.0 H	0.6 H	0.1	0.04 H

03/31/2013.05:59 - Ordering/Requesting Facility: Intermountain Medical Center, Murray, UT; Performing Location(unless otherwise noted): Intermountain Medical Center, Murray, UT

Point of Care, Blood Testing

Test Status	Na	Prothrombin Time	K	INR	Cl	CO2	Glucose
Last Ref. Range:	137-146	11.9-14.4	3.5-5.0		98-109	19-30	65-99
Units:	mmol/L	sec	mmol/L		mmol/L	mmol/L	mg/dL
03/31/13.05:57	Final		3.3 L		110 H	20	126 H
03/31/13.05:56	Final	13.3		* 1.1			

Point of Care, Blood Testing (cont)

Test Status	BUN	Creatinine	GFR, Estimated	Average GFR for age	Comment:	Calcium, Ionized (Whole Blood)	Hematocrit, POC	Hgb, Calc
Last Ref. Range:	5-21	0.71-1.18	>60	>60		1.03-1.25	41.0-52.0	13.5-17.5
Units:	mg/dL	mg/dL	mL/min/1.73 sq m	mL/min/1.73 sq m		mmol/L	%	g/dL
03/31/13.05:57	9	1.20 H	* 67	93	* See Note	1.10	53.0	18.0 H
03/31/13.05:56								

* Comments

03/31/13.05:57 GFR, Estimated: If patient is African American, multiply estimated GFR by 1.16

03/31/13.05:57 Comment:: (NOTE)

INTERPRETATION OF ESTIMATED GFR:

Please note new equation for estimated GFR.

Estimated using CKD-EPI equation

(www.nkdep.nih.gov)

Chronic Kidney Disease less than 60 mL/min/1.73 sq m Kidney failure less than 15 mL/min/1.73 sq m

03/31/13.05:56 INR: Typical warfarin therapeutic ranges: Moderate 2.0-3.0, High 2.5-3.5

03/31/2013.05:57 - Ordering/Requesting Facility: Intermountain Medical Center, Murray, UT; Performing Location(unless otherwise noted): Intermountain Medical Center, Murray, UT

DRIVER'S DAILY LOG

ORIGINAL - File each day at home terminal

(ONE CALENDAR DAY - 24 HOURS
Use Time Standard At Home Terminal)

3/30/13
(MONTH) (DAY) (YEAR)

677
(TOTAL MILEAGE TODAY)

677
(TOTAL MILES DRIVING TODAY)

Alfa Express Inc.

(NAME OF CARRIER OR CARRIERS)

635 East Apple Tree Drive, Sandy, UT 84070

(MAIN OFFICE ADDRESS)

I certify these entries are true and correct:

Chris McCallie

(DRIVER'S SIGNATURE IN FULL)

Edison Jim

(NAME OF CO-DRIVER)

641422/285493-282675
VEHICLE NUMBERS - (SHOW EACH UNIT)

On-Duty Cycle
May Be Restarted
After At Least 34
Consecutive
Hours Off-Duty

Hours Worked
Last 7 Days

1. RESTART
2. 10.75
3. 9.00
4. 12.25

5. _____
6. _____
7. _____

Yesterday
Total Hours

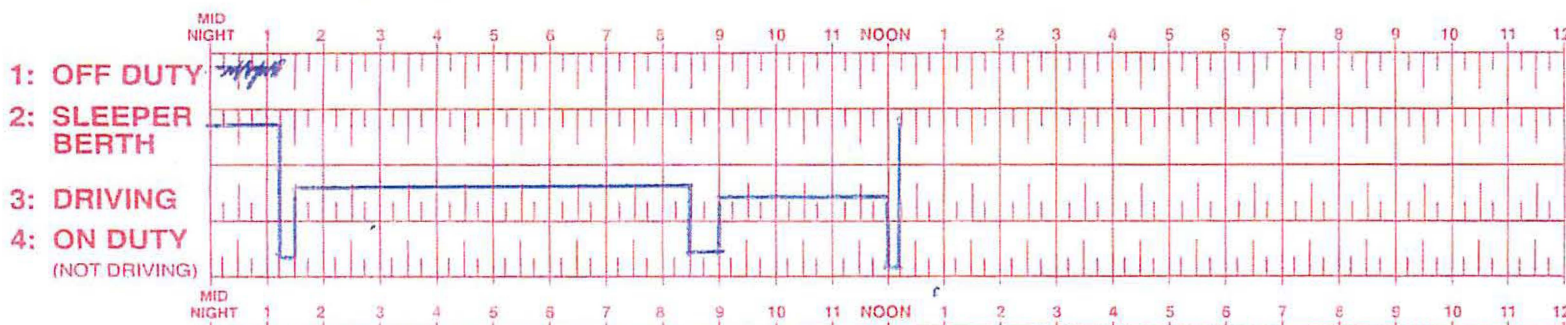
32

70 Hours Less
Total Hours
Equals Hours
Available
Today

38

Hours Worked
Today

If Hours
Worked Today
Exceeds
Hours
Available, You
Are In
Violation.
Your Reason
Is To Be
Entered In
"Remarks".



REMARKS

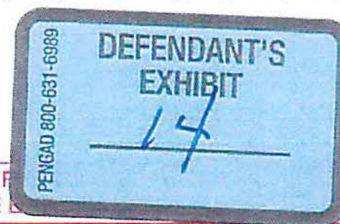
walcott IA.
ORGP+Hook/PTI

ELMCREEK NE.
FUEL

SIDNEY NO.
PT/sleeper

B.O.L.# Or
SHIPPER & COMMODITY 127-20688/028-75003

SHIPPING DOCUMENT, MANIFEST NUMBER, OR NAME OF A SHIPPER AND COMMODITY. INFORMATION REQUIRED
AND ENTER NAME OF PLACE YOU REPORTED AND WHERE RELEASED FROM WORK AND WHEN AND WHERE



CHECK THE TIME
ARRIVED.

DRIVER'S VEHICLE INSPECTION REPORT

AS REQUIRED BY THE D.O.T. FEDERAL MOTOR CARRIER SAFETY REGULATIONS, I SUBMIT THE FOLLOWING:

DATE: 3/30/13 TRACTOR/TRUCK NO.: 641422

TRAILER(S) NO.(S): 285493/282675

EXPLAIN DEFECT OR DEFICIENCIES

CHECK APPROPRIATE BOX

- ☒ I detect no defect or deficiency in this motor vehicle as would be likely to affect the safety of its operation or result in its mechanical breakdown.
- ☐ I detect the following defects or deficiencies in this motor vehicle as would be likely to affect the safety of its operation or result in its mechanical breakdown. (Explain defects or deficiencies to the left +):

DRIVERS' SIGNATURE

Chris McCallie

- ☐ Above defects corrected. ☐ Above defects need not be corrected for safe operation of the vehicle.

MECHANIC'S SIGNATURE

DRIVER'S SIGNATURE



STORE 901
5085 Buffalo Creek Rd
Elm Creek, NE 68836
308-856-4330
03/30/2013

SALE

Transaction #: 5170871

Qty Name	Price	Total
1 Ltr Coke	1.99	1.99
1 Deposit Soda Single	0.00	0.00
Subtotal		1.99
Sales Tax		0.00
Total		1.99

Received:

Debit Card
XXXXXXXXXXXX6790
APPROVED
Auth #: 648239

SWIPED



090105170871

Pos:5 Clerk:151 03/30/2013 10:01:09
#ORIGINAL RECEIPT

THANK YOU
FOR SHOPPING
TA TRAVELCENTER #077
WALCOTT, IA 52773

004 Dakota Store: 0077
Register # 11. Receipt#:69898

CUSTOMER COPY

Sat Mar 30 2013 00:57:15

1 LITER CODE RED DEW \$2.09TX
012000003622
BOTTLE DEPOSITS \$0.05TX
099998779272

Sale Total \$2.14
Tax Total \$0.15
Total \$2.29
DEBIT \$2.29

TOTAL AMOUNT = \$2.29
ACCOUNT#: XXXXXXXXXXXX6790

AUTHORIZATION # 679368
REF # 011328

DATE: 03-30-13 TIME: 00:57:30

DEBIT CARD INVOICE

PLEASE COME AGAIN!

Call 1-800-632-9240

Items 2



PILOT STORE 901
5085 Buffalo Creek Rd
Elm Creek NE 68836
308-856-4330
03/30/2013

QSR Counter
TO GO

SALE

Transaction #: 9093738

Qty Name	Price	Total
1 12" Chk Terivaki	7.00	7.00
Subtotal		7.00
Sales Tax		0.39

Received:

MyRewards Points 1.78
Visa 5.61
XXXXXXXXXXXX6790
Approved
Auth #: 095910

SWIPED

Gen Merch Rate 0.39
Total 7.39
MyRewards Card# XXXXXXXXXXXX0722
POINTS:

Current Balance: 0
Earned This Visit: 0
Redeemed This Visit: 178

RESTAURANT REWARDS:
Current Balance: \$0.00
Earned This Visit: \$0.00
Redeemed This Visit: \$0.00

SHOWERS:
Current Balance: 3.00
Earned This Visit: 0.00
Redeemed This Visit: 0.00

COFFEE CLUB:
Current Purchases: 1/9

COMBO CLUB:
Current Purchases: 2/9

CONTEST ENTRIES:
NCAA Sweepstakes: 27

Pos:9 Clerk:199 03/30/2013 09:59:43

SHELL
HIGHWAY 385 AND I-80
SIDNEY NE 68112

57 444 618806
S180892

03/30/13 09:59 PM CARD#_6790
6275 Highland Dr, Salt Lake UT
ATM UT4938

Sequence# 3686

Withdraw from Chk Acct_4835	\$200.00
-----------------------------	----------

Available Balance	\$1,275.82
Present Balance	\$1,275.82

PEACH	1	2.49
ORANGE	1	1.99

Sub-Total	4.36
-----------	------

Tax	0.00
-----	------

TOTAL	4.38
-------	------

DEBIT \$ 4.36

XXXXXX,XXXXX6790

INVOICE: 171066

Deficit

ALTH # 671703

THANKS, COME AGAIN

REG# 0003 CSH# 000 GR# 01 TEAM# 3921

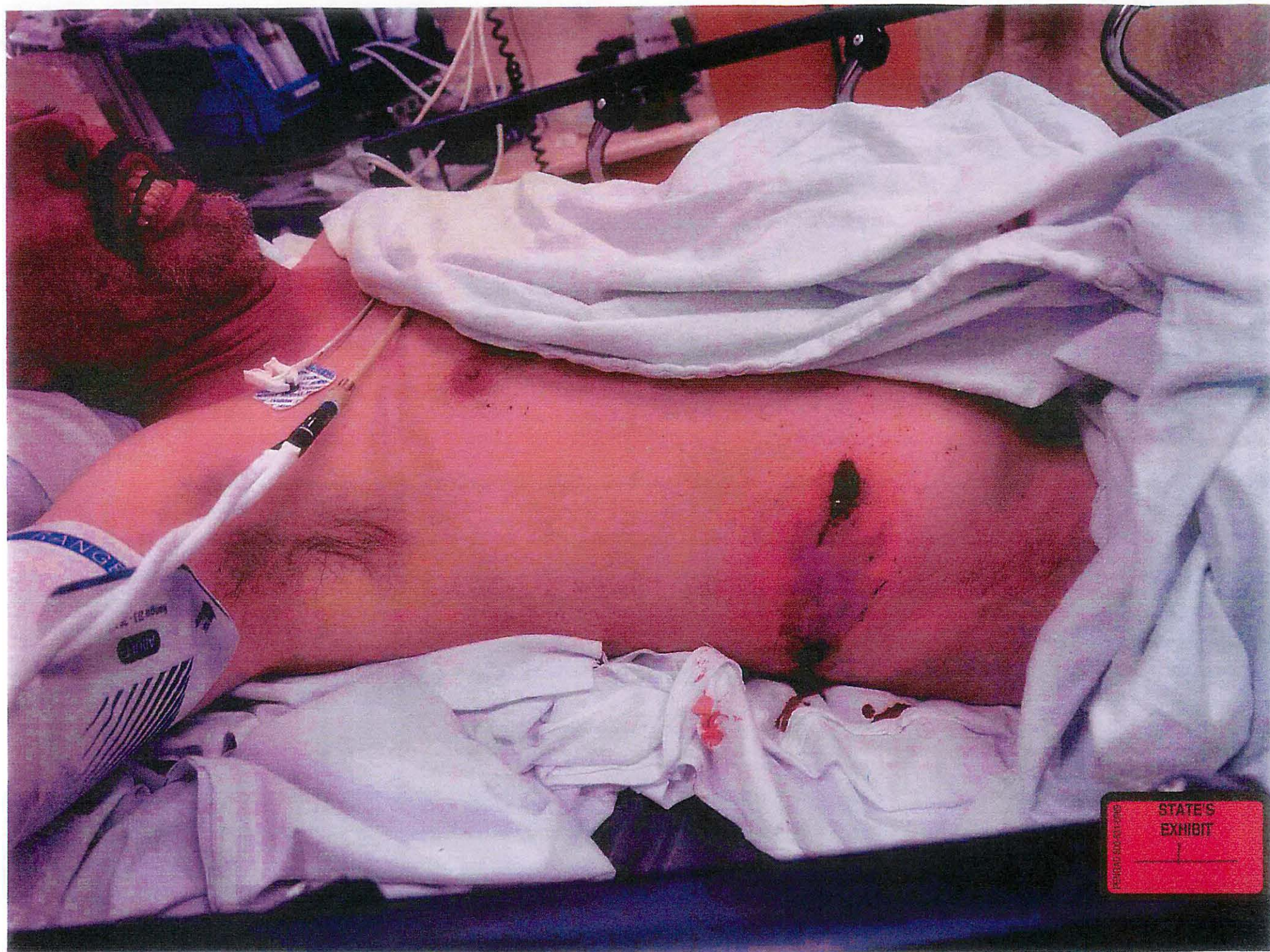
03/30/13 13:09:12

SI# 4551

BANK FROM HOME, THE OFFICE, OR THE ROAD,
CHASE.COM MAKES BANKING EASIER!
VIEW ACCOUNT STATEMENTS & CHECK IMAGES
PAY BILLS. SET ATM PREFERENCES. ACTIVATE
PERSONALIZED ALERTS-AT YOUR CONVENIENCE.

ENROLL TODAY!

JPMorgan Chase Bank, N.A. Member FDIC





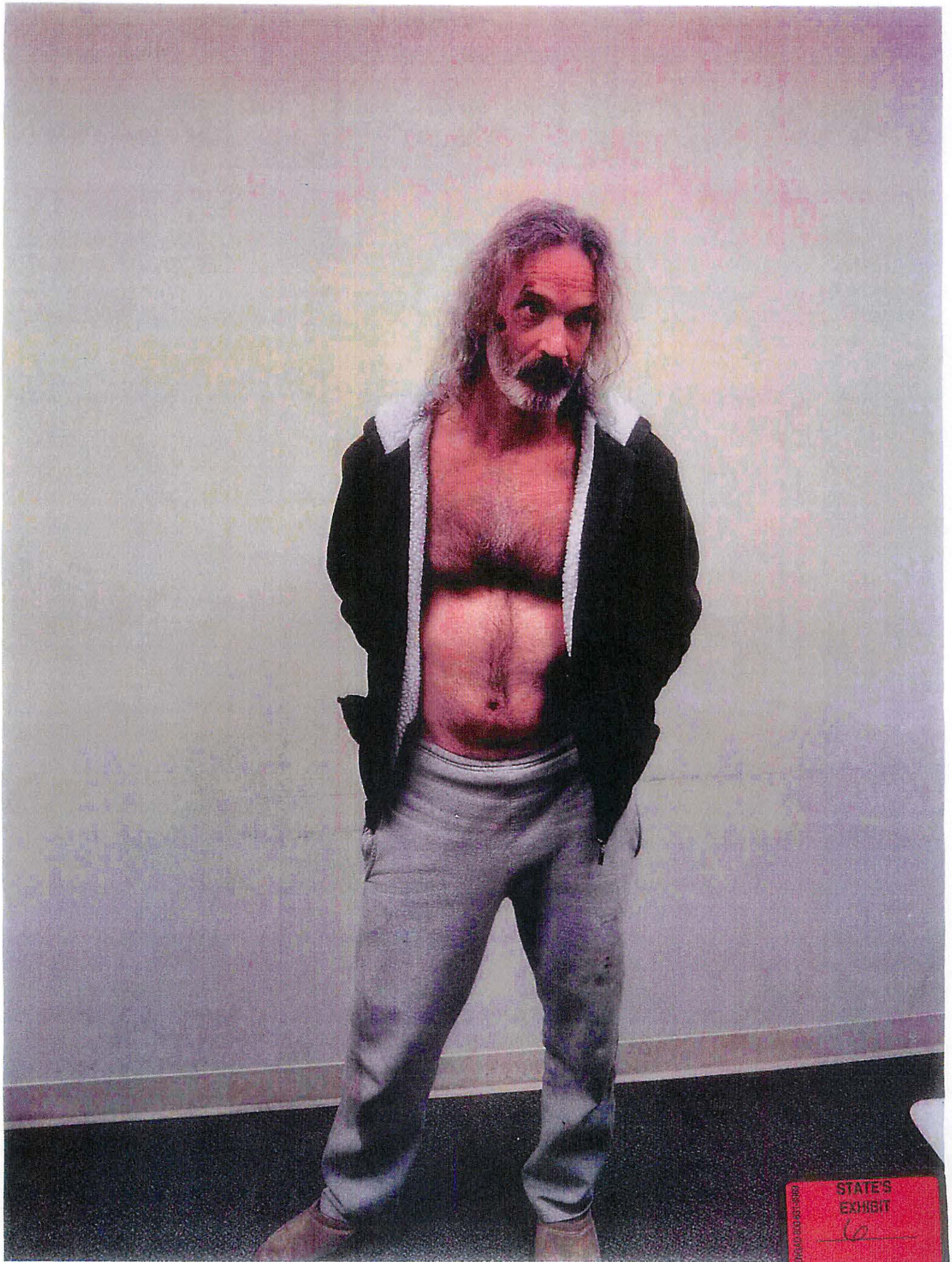
STATE'S
EXHIBIT
2



STATE'S
EXHIBIT
4



STATE'S
EXHIBIT
5



STATE'S
EXHIBIT
6



STATE'S
EXHIBIT

7

State v. James McCallie 131903319 Oct. 3, 2013

Questions from jury:

#1 Does it matter
which person ^{physically} pulled the
trigger.

#2 Does it matter if
it was on purpose
or on accident as pertaining
to No #23 #3

As to your first question, the jury must determine if the evidence is sufficient to convince you, beyond reasonable doubt, that it was the defendant - Mr. McCallie - who discharged the weapon.

As to your second question, ^{if} the jury ~~must~~ ^{that it was} determines ~~whether~~ the defendant who discharged the weapon, it must then determine whether the action in question was done with the intent to intimidate or harass John Pearce, as stated under element #4 to Instruction 23. Please refer to instruction #27 for the definition of intent.

Tab D

ADDENDUM D
Motion for New Trial

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

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

STATE OF UTAH, Plaintiff, vs. JAMES CHRISTOPHER MCCALLIE Defendant.	MOTION FOR NEW TRIAL PURSUANT TO RULE 24 OF UTAH RULES OF CRIMINAL PROCEDURE Case No. 131903319 JUDGE DENISE LINDBERG
---	--

Comes the Defendant by counsel, Scott Wilson, and moves the Court to order a new trial for the following reasons:

1. The prosecutor commented on the Defendant's right to remain silent when he was arrested for the offenses in this information. The Defendant refused to answer the questions of the police when he was arrested. That refusal was tantamount to invoking his right to remain silent under the constitutions of Utah and the United States. In spite of the Defendant's basic and obvious right to remain silent, the prosecutor commented on his failure to provide the police with the reasons for the shooting. During the closing argument the prosecutor told the jury that the Defendant had tried to get the alleged victim to say that the shooting was an accident. He went on to say that when the alleged victim refused to endorse that the shooting was an accident, that the Defendant then went to the self-protection defense. In order to bolster that contention and sway the jury into believing that the Defendant was fabricating a defense, he stated that the Defendant did not tell the police when he was

arrested that he had acted in self-protection or that the shooting was an accident. Defense counsel immediately objected and moved for a mistrial. The objection and motion for a mistrial were denied. The Defendant's right to a fair trial was denied by the prosecutor's argument to the jury. The Defendant's right to a fair trial was further prejudiced by the failure of the Court to provide a corrective instruction to the jury. Therefore, the jury was led to believe that the prosecutor's argument was legitimate and that they could rely upon it in making their decision.

2. The Defendant was found not guilty of the most serious charge of Discharge of a Firearm, a felony 2. He was found guilty of Aggravated Assault, a felony 3, after the jury deliberated for a considerable amount of time. The jury sent two questions to the Court. Although the Court correctly answered the questions, they showed that the jury was confused and in doubt about what they were to consider in their deliberations. The prosecutor's argument to the jury that the Defendant's defenses were a fabrication because he failed to tell the police about them and the failure to correct that argument violated the Defendant's right to a fair trial. Those errors pushed the jury in the direction of finding the Defendant guilty of the aggravated assault. The prosecutor's case hinged on the jury believing the alleged victim over the testimony of the Defendant. They were the only witnesses to the shooting. The physical evidence of where a bullet hole was found was inconsistent with the testimony of the alleged victim, but consistent with the testimony of the Defendant. Therefore, the prosecutor had to impugn the Defendant and his testimony in order to convince the jury of guilt. He did that by stating that if his testimony and defenses were worthy of belief that he would have told the police when he was arrested. The jury was left with that belief when there was no corrective instruction. The jury simply followed that argument to a verdict of guilty on one of the two offenses before them.

RESPECTFULLY submitted this 30th day of December, 2013.

/S/ SCOTT A. WILSON
SCOTT A. WILSON
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing Motion to Clint Heiner at the office of the District Attorney, 111 East Broadway, Suite 400, Salt Lake City, Utah, 84111 this 30th day of December, 2013.



Tab E

ADDENDUM E

State's Response to Motion for New Trial

SIM GILL
District Attorney for Salt Lake County
CLINT HEINER, Bar No. 11905
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

ORIGINAL
DISTRICT COURT
14 JUL 17 PM 12:40
CLINT HEINER
DEPUTY CLERK

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

THE STATE OF UTAH,

Plaintiff,

-vs-

JAMES CHRISTOPHER MCCALLIE,

Defendant.

)
) STATE'S RESPONSE TO DEFENDANT'S
) MOTION FOR NEW TRIAL PURSUANT
) TO RULE 24 OF UTAH RULES OF
) CRIMINAL PROCEDURE

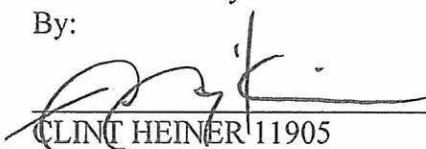
)
)
) Case No. 131903319

Hon. DENISE LINDBERG

Clint Heiner, Deputy District Attorney, and Attorney for the State, hereby requests that
Defendant's Motion For New Trial be denied.

DATED this ____ day of _____, 2013.

SIM GILL
District Attorney for Salt Lake County
By:


CLINT HEINER 11905
Deputy District Attorney

I- Facts

During the State's closing argument, the State argued that Defendant's theory about what had occurred on the night in question had changed and Defendant's testimony at trial was not credible. At trial, Defendant testified that shooting John (Victim) was in self-defense. To point out to the jury that Defendant's claim of self-defense was not credible the State pointed out that Defendant's story changed multiple times.

The State argued, in one jail call Defendant did not even know who he shot and did not remember anything. In another jail call Defendant told his mother to convince John to state that this was an accident. Then after Defendant was not successful in getting John to say it was an accident, Defendant decided to claim self-defense because John was "not playing ball." Finally, the state argued that Defendant was given an opportunity to tell the police what had occurred on the night in question and instead of saying it was an accident or that it was in self-defense, as he claimed at trial, Defendant was confused why police were even there and told them "nothing happened" (Defendant did not invoke his right to remain silent at this point). When the state made this argument Defendant objected, requested a mistrial, and at a minimum that a corrective instruction be given to the jury. All three requests were denied. Defendant was convicted of Aggravated Assault.

Defendant now requests a new trial. In his motion, Defendant argues that the State's statement in closing argument was a comment about Defendant's right to remain silent which was improper and denied Defendant a fair trial. Defendant also

contends that the Court should have provided a corrective instruction to the jury to advise the jury that the State's argument was improper.

II- Law

Utah Rules of Criminal Procedure Rule 24, Motion for new trial states:

- (a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party (emphasis added).

If a constitutional error is substantial and prejudicial to the extent that there is a reasonable probability that it affected the reliability of the trial outcome, then a new trial is required. *State v. Maas*, 991 P.2d 1108 (Utah App.,1999). The Due Process Clause of the Fourteenth Amendment prohibits use of a defendant's post- *Miranda* silence for impeachment purposes. *State v. Baker*, 963 P.2d 801 (Utah.App.,1998).

III- Argument


Here, the State agrees that Defendant has a right to remain silent; however, he didn't. Defendant made a statement to the police that "nothing happened" and then he made different statements to different people, (i.e. he did remember anything and it was an accident), and then at trial made a totally different statement (i.e. that it was self-defense). This is proper argument and was properly argued to show that Defendant is not credible and his claim of self-defense should not be believed. Because the argument was proper, no corrective instruction was required.

IV- Conclusion

Because the State's argument was proper no corrective instruction was required; therefore, Defendant's motion for new trial should be denied.

RESPECTFULLY SUBMITTED this 16th day of January, 201~~3~~⁴.

SIM GILL
District Attorney



CLINT HEINER
Deputy District Attorney

Tab F

ADDENDUM F

Ruling and Order on Motion for New Trial


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

STATE OF UTAH,	:	MINUTE ENTRY RULING & ORDER
Plaintiff(s),	:	CASE NO. 131903319
vs.	:	Judge Denise P. Lindberg
JAMES CHRISTOPHER MCCALLIE,	:	Date: 10 th February 2014
Defendant(s),	:	


Motion for new trial is DENIED. The Court first notes that the transcript provided by defense counsel is only a partial transcript of the State's rebuttal argument. As such, it's difficult to evaluate the full context of the claimed wrongdoing by the prosecutor. But, even with this limited record, the Court concludes that the prosecutor's comment on rebuttal was an appropriate comment on the credibility of defendant's testimony, given the inconsistencies in defendant's prior statements to the police and others.

The Court disagrees with defense counsel's argument that defendant's alleged "refusal" to answer questions was "tantamount to invoking his right to remain silent." The right to remain silent must be invoked unequivocally. See Berghuis v. Thompson, 560 U.S. 370 (2010). The evidence in this case was that defendant was not cooperative, but did make statements to the police on the date of the incident.

So ORDERED this 10th day of February, 2013



Judge Denise P. Lindberg



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 131903319 by the method and on the date specified.

MAIL: JAMES CHRISTOPHER MCCALLIE 1938 NUNLEY CIRCLE HOLLADAY, UT 84121

MAIL: CLINT T HEINER 111 E BROADWAY STE 400 SALT LAKE CITY UT 84111

MAIL: SCOTT A WILSON 424 E 500 S STE 300 SALT LAKE CITY UT 84111

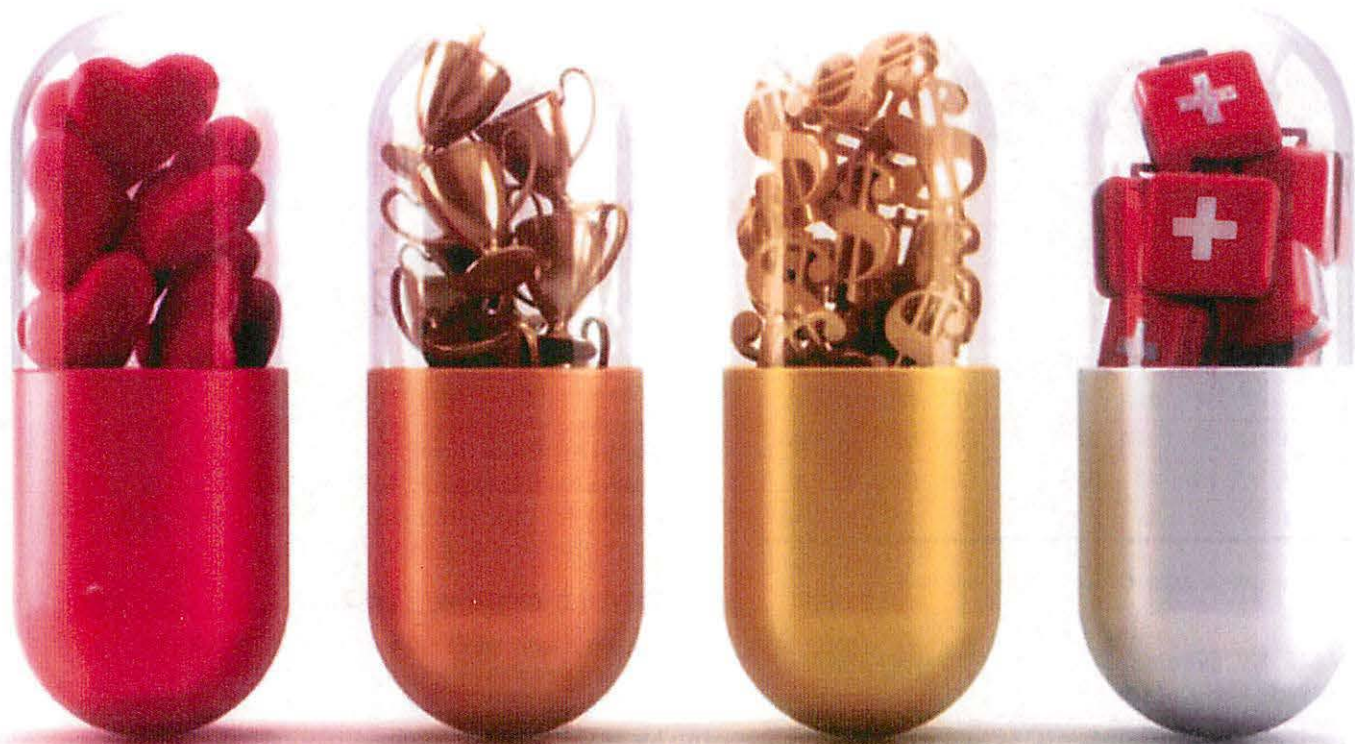
Date: 02/11/2014

/s/ AMY BAUGHMAN

Deputy Court Clerk

Tab G

ADDENDUM G
Selected Treatises



Raymond Goldberg

DRUGS ACROSS THE SPECTRUM

7th EDITION

TABLE 6.1 Approximate Blood Alcohol Concentrations

Drinks (per hour)	Body Weight (pounds)							
	100	120	140	160	180	200	220	240
1	.04	.03	.03	.02	.02	.02	.02	.02
2	.08	.06	.05	.05	.04	.04	.03	.03
3	.11	.09	.08	.07	.06	.06	.05	.05
4	.15	.12	.11	.09	.08	.08	.07	.06
5	.19	.16	.13	.12	.11	.09	.09	.08
6	.23	.19	.16	.14	.13	.11	.10	.09
7	.26	.22	.19	.16	.15	.13	.12	.11
8	.30	.25	.21	.19	.17	.15	.14	.13
9	.34	.28	.24	.21	.19	.17	.15	.14
10	.38	.31	.27	.23	.21	.19	.17	.16

Source: Distilled Spirits Council of the United States.

TABLE 6.2 Effects of Alcohol at Varying Blood Alcohol Concentrations

BAC	Effects
0.05%	Less alert; less inhibited; slightly impaired judgment; slight euphoria
0.10%	Slower reaction time; impaired muscle control; reduced visual and auditory acuity; legal intoxication in most states
0.15%	Distorted perception and judgment; impaired mental and physical functions; less responsible behavior
0.20%	Markedly affected psychomotor ability; difficulty staying awake
0.25%	Inability to stand without help; grossly affected ability to comprehend
0.30%	Stuporous state; inability to respond to stimuli; not likely to remember events the next day
0.35%	Completely anesthetized; 1% will die at this BAC
0.40%	State of unconsciousness or coma; half will fatally overdose without medical intervention
0.50%	Deep coma or complete unconsciousness if not already dead

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Effects of Alcohol

Alcohol accounts for 10% of all deaths in the United States each year, and the life expectancy of an alcoholic is reduced by 15 years. It affects every organ in the body. Two important factors that determine how

alcohol affects the body are frequency of use and quantity consumed. The type of alcohol consumed does not matter. In a study of male and female adolescents, beer, wine, and distilled spirits produced equally damaging physical impairment.⁸³ In this section, we will examine the acute and chronic effects of alcohol on the brain, liver, gastrointestinal tract, cardiovascular system, and immune system, as well as the relationship between alcohol and cancer. Figure 6.3 illustrates the effects of alcohol on various body systems.

The definition of moderate drinking for men is no more than two alcoholic drinks per day, and for women, it is no more than one alcoholic drink per day. Light drinking would be less than this amount. There is no standard definition of heavy drinking, although a commonly accepted number for binge drinking is consumption of five or more drinks at one sitting for men and four or more drinks for women at one sitting.

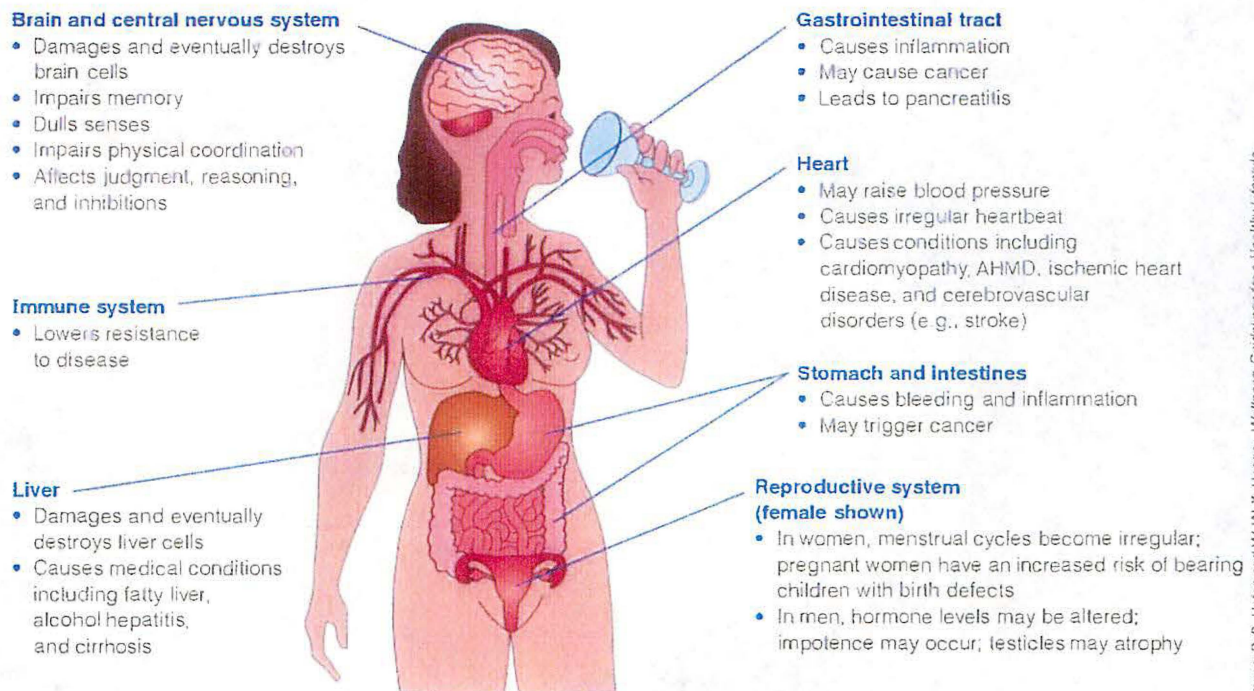
Alcohol and the Brain

The brain is highly sensitive to the effects of alcohol. Five to six drinks daily will adversely effect cognitive functioning. The extent of impairment increases with higher levels of consumption. An estimated 15% to 30% of all nursing home patients are admitted because of permanent alcohol-induced brain damage.⁸⁴ Alcohol acts on the cerebrum, affecting judgment, reasoning, and inhibitions. It stimulates the release of serotonin, which could account for the disinhibiting effect of alcohol.

Alcohol acting on the cerebral cortex affects motor activity, and moods change quickly. Alcohol stimulates the release of dopamine, accounting for feelings of pleasure or euphoria. The senses are impaired when alcohol affects the cerebellum. Many alcoholics experience memory loss and difficulty with problem-solving and decision-making.⁸⁵ At some level of consumption of alcohol, the medulla is sedated to the point that respiration could stop. A report released from the National Institute on Drug Abuse states that autopsy studies show chronic alcohol use shrinks the brain, especially in women.⁸⁶

Although drinking small amounts of alcohol daily does not affect memory adversely, occasional large amounts could harm memory. A study of teenagers in the United Kingdom found that those who used excessive amounts of alcohol suffered from memory problems.⁸⁷ Similarly, U.S. middle-school students experienced memory loss after drinking.⁸⁸

Alcohol-induced amnesia usually lasts a short time. Some people appear conscious and even function when they drink, but later, they have no memory of what transpired. This condition, referred to as an alcohol-induced blackout, may be an early indication



Source: B. C. Hatton and W. W. K. Lindegar, *Widening: Guidelines for a Healthy Lifestyle*, (Englewood, CO: Morton Publishing, 1998), 341

Figure 6.3 Effects of Alcohol Use on Body Systems Over Time

of alcoholism. Finally, prenatal exposure of the fetus to alcohol possibly affects its attention and memory for the long term even with no more than one drink per day.⁸⁹

One condition resulting from chronic alcohol abuse is Wernicke-Korsakoff syndrome, which occurs in about 20% of chronic alcohol users. This syndrome develops because alcohol impedes the body's ability to utilize thiamine, one of the B vitamins.⁹⁰ The person with this disorder is able to remember events or facts learned early in life but unable to recall recent events or facts. Other characteristics of this disease are disorientation, nerve damage, poor coordination, and rapid horizontal eye movement.

Chronic alcohol use is associated with neurotic and psychotic symptoms ranging from depressive reactions to generalized anxiety disorders and panic attacks. One study reported that about 20% of people diagnosed with a mood or anxiety disorder were alcoholic.⁹¹ Dutch youths aged 12 to 18 who engaged in binge drinking experienced higher rates of mental health problems.⁹²

Among college students, those who have higher levels of social anxiety are more likely to consume alcohol.⁹³ Adolescents with mood disorders who self-medicate with alcohol and other drugs are more likely to exacerbate their problems and may be at greater risk for suicide.⁹⁴ Clinical depression is common. Depressed adolescents are more likely to drink alcohol and use other drugs than nondepressed

adolescents.⁹⁵ It is unclear if alcohol abuse leads to depression or if depression leads to alcohol abuse. Nonetheless, one-third to one-half of alcoholics exhibit symptoms of depression at some time. Treating depression could help prevent relapse in recovering alcoholics.

Alcohol and the Liver

Chronic alcohol consumption increases the risk for cancer in many organs, including the liver.⁹⁶ Because the liver is the main site of metabolism of alcohol, heavy alcohol use can have devastating effects on that organ. The three main conditions associated with overuse of alcohol are fatty liver, alcohol hepatitis, and cirrhosis. If one already has hepatitis C, then alcohol will exacerbate the condition, resulting in a shorter lifespan. The mean age of death for women with hepatitis C who drink heavily is reduced from 61.0 years to 49.1 years. The comparable reduction for males is 55.1 years to 50.0 years.⁹⁷ Cirrhosis is irreversible, even if alcohol use stops. Some signs of fatty liver are evident in 90% to 100% of heavy drinkers, whereas 10% to 35% develop alcohol hepatitis, and 10% to 20% develop cirrhosis.⁹⁸ Fatty liver can develop within a few days of heavy drinking. Symptoms of alcohol hepatitis include jaundice (a yellowish skin color), fatigue, low-grade fever, reduced appetite, dark urine, and occasional vomiting and nausea.

Stephen A. **Maisto**

Mark **Galizio**

Gerard J. **Connors**



Drug Use & Abuse

SEVENTH EDITION

intoxication

A transient state of physical and psychological disruption caused by the presence of a toxic substance, such as alcohol, in the CNS.

One point about alcohol's acute effects is that alcohol generally acts on the body as a depressant, and its acute effects are proportional to the magnitude of the BAC. Simply put, as the BAC increases, acute effects increase in number and intensity. However, how humans experience some degree of **intoxication** and behave under different doses of alcohol may be modified by psychological and situational factors as well as alcohol dose and tolerance to this drug. For some behaviors, these nondrug factors may be even more powerful determinants of alcohol's acute effects than drug factors.

Physiological Effects

Alcohol taken at low doses has several physiological effects.¹ Alcohol inhibits the secretion of the antidiuretic hormone, which causes increased urination. The effect happens when the BAC is rising but not when it is falling. Alcohol also reduces the amount of body fat that is oxidized. This acute effect of alcohol accumulates to result in long-term increased body fat and weight gain when alcohol is used in addition to normal food intake (Suter, Schutz, & Jequier, 1992). Such weight gain is commonly called a "beer belly." Alcohol is a peripheral dilator and causes the skin to feel warm and turn red. A number of authors have cautioned against using alcoholic beverages to warm up in cold environments. This advice is counterintuitive to many drinkers, who experience the warmth that occurs with peripheral dilation and know of the Saint Bernard and its keg of brandy rescuing victims in snow-covered mountains. Alcohol's dilating effect on peripheral blood vessels causes some loss of body heat, however, and such action was thought to ultimately decrease protection against the cold. It turns out the problem is not a serious one, as experimental studies have shown that alcohol does not significantly tilt the balance of the body's temperature regulation in cold environments.

An acute alcohol effect with wide practical application is that it increases gastric secretion, which is one basis for the U.S. cocktail hour. The increase in gastric secretion stimulates the appetite. Unfortunately, alcohol at high doses harms the stomach mucosa and causes gastric distress. Nausea and vomiting may occur at BACs greater than 0.15%. Another physiological effect of alcohol when taken in high doses and when the BAC increases rapidly is a release of corticosteroids, part of the body's general reaction to stress. In this case, the stressor is a high dose of alcohol, which is toxic to the body.

An important acute effect of alcohol is disruption of sleep patterns. Even at lower doses, alcohol suppresses **REM sleep**, which is the stage of the sleep cycle when most dreaming occurs (REM stands for "rapid eye movements," which characterize this stage of sleep). When the dose is low, REM sleep is suppressed only in the first half of the night, but REM time rebounds and increases in the second half. At larger doses of alcohol, REM sleep is suppressed throughout the night.

Alcohol impairs memory. Its acute effects are on short-term memory, and when high BACs are reached rapidly, a **blackout** may occur. Blackouts are an individual's amnesia about events when drinking, even though there was no loss of consciousness. For example, a person who had a lot to drink the night before may wake up and have absolutely no recollection of where he or she parked the car. Blackouts are thought to result from a failure in the transfer of information in **short-term memory** to **long-term memory**. Animal studies suggest that the mechanism for this effect is alcohol's interference with receptors in the brain that enhance connections among neurons and are fundamental to learning and memory (Tokuda, Izumi, & Zorumski, 2011). People also have "grayouts," in which they can partially recall events that occurred in full

REM sleep

Acronym for "rapid eye movements," which are associated with dream activity and are one stage in a cycle of sleep.

blackout

Failure to recall events that occurred while drinking even though there is no loss of consciousness.

short-term memory

Memory for recent events; thought to differ from long-term memory in several important ways.

long-term memory

Memory for remote events. According to one theory of memory, information enters long-term memory through short-term memory.

¹Much of the discussion of alcohol's acute effects is based on Becker et al. (1975), Jacobs and Fehr (1987), McKim (2000), and Sobell and Sobell (1981).

RECENT DEVELOPMENTS IN **ALCOHOLISM**

VOLUME 17 **ALCOHOL PROBLEMS** **IN ADOLESCENTS** **AND YOUNG ADULTS**

Epidemiology
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EDITED BY MARC GALANTER

An Official Publication of the American Society of Addiction Medicine
and the Research Society on Alcoholism.
This series was founded by the National Council on Alcoholism.

almost infinite diversity of symptoms that may ensue from the action of this single toxic agent." In addition to impairing balance, motor coordination, decision making, and a long list of other functions, alcohol impairs the ability to form new memories. Alcohol primarily disrupts the ability to form memories that are explicit in nature, including memories for facts (e.g., names, phone numbers, etc.) and events (e.g., what you did last night) (Lister et al., 1991). The impact of alcohol on the formation of new long-term explicit memories is far greater than the drug's impact on the ability to recall previously established memories or to hold new information in memory for a few seconds. When intoxicated subjects are asked to repeat new information immediately after its presentation or following short delays (e.g., a few seconds), they often do fine (see Ryback, 1971, for an early review). Similarly, subjects typically do quite well at retrieving information acquired prior to acute intoxication. In contrast, intoxicated subjects have great difficulty storing new information across delays lasting more than a few seconds, particularly if they are distracted between the stimulus presentation and testing. For instance, Acheson et al (1998) observed that intoxicated subjects could recall items on words lists immediately after the lists were presented, but had great difficulty recalling the items 20 minutes later.

Ryback characterized the impact of alcohol on memory formation as a dose-related continuum with minor impairments at one end and very large impairments at the other, with all impairments representing the same fundamental deficit in the ability store new information in memory for longer than a few seconds. Consistent with this view, research indicates that the magnitude of alcohol-induced memory impairments increases with dose but the same general pattern, greater difficulty forming new memories than recalling existing memories, remains. When doses of alcohol are small to moderate, such as those producing blood alcohol concentrations below 0.15%, memory impairments tend to be small to moderate, as well. At these levels, alcohol produces what Ryback (1971) referred to as cocktail party memory deficits, lapses in memory that one might experience after having a few drinks at a cocktail party, often manifested as "problems remembering what the other person said or where they were in conversation." Several studies have revealed difficulty forming memories for items on word lists or learning to recognize new faces at these doses. As the doses increase, the resulting memory impairments can become much more profound, sometimes culminating in blackouts, a complete inability to remember critical elements of events, or even entire events, that transpired while intoxicated (White et al., 2002a).

4. Mechanisms Underlying Alcohol-Induced Memory Impairments

Until recently, a lack of knowledge regarding the neuropharmacological effects of alcohol hampered progress toward an understanding of the mechanisms underlying alcohol-induced memory impairments. Alcohol was long assumed to affect the brain in a very general way, causing a ubiquitous



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self-confident, his or her reaction time, judgment, senses, and movement are impaired.

- **Level 3:** When the blood alcohol content reaches .08 to .15 percent, the person is in a risky state. Thoughts can become muddled, and speech can become slurred. Vision and hearing are affected as well. Balance, coordination, and muscle control are impaired, sometimes resulting in a staggered walk. The individual may have nausea or vomiting. At or above .08 BAC, a person is considered legally intoxicated. Driving with a BAC of .08 or greater is illegal for adults older than twenty-one in the United States. It is unlawful for drivers under twenty-one to have any amount of alcohol in their blood.
- **Level 4:** From .15 to .30 BAC, the person is in a high-risk state. All physical and mental functions are impaired considerably. The person is unable to walk without help. Breathing is labored, body temperature may go down, and reflexes are depressed. There may be a loss of bladder control. The person does not know what he or she is doing or saying and is unable to remember events. Loss of consciousness may occur.
- **Level 5:** Above a .30 BAC, a person is unconscious or in a coma. The part of the brain that controls breathing and heartbeat is dangerously affected. The person is close to death and could die without medical attention.