

2015

**State of Utah, Plaintiff/ Appellee, v. Bryce Bell, Defendant/
Appellant.**

Utah Court of Appeals

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Case No. 20131175-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

BRYCE BELL,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for two counts of aggravated robbery, first degree felonies in the Third Judicial District, Salt Lake County, the Honorable Robin Reese presiding

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- Utah Code Ann. § 76-4-101(3)(b)(West 2014) (factual impossibility)
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Case No. 20131175-CA

IN THE
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STATE OF UTAH,
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v.

BRYCE BELL,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for two counts of aggravated robbery, first degree felonies. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2) (j) (West Supp. 2014).¹

INTRODUCTION

Defendant—armed with a knife—threatened the victim and her friend, then tried to steal her car. When Defendant realized that his plan would not work, he changed it and stole the victim’s purse instead.

Defendant was convicted of two counts of aggravated robbery, one for attempting to steal the car and one for stealing the purse. Defendant

¹ Defendant is not appealing either his threatening the use of a dangerous weapon in a fight or his interference with an officer convictions. He appeals only his aggravated robbery convictions.

does not deny that he committed aggravated robbery, but argues that the evidence supported only one conviction not two. Because his claims are unpreserved, Defendant argues that the trial court plainly erred for not sua sponte finding that his counsel was ineffective for not asserting that under the single larceny doctrine he committed only one aggravated robbery. Defendant also argues that his counsel was ineffective for: (1) not asserting a factual impossibility defense to the aggravated robbery charge related to his attempt to steal the car; and (2) not moving for a directed verdict on the ground that the State's evidence did not negate his voluntary intoxication defense.

STATEMENT OF THE ISSUES

1. Has Defendant proven that the trial court plainly erred by sending both aggravated robbery charges to the jury or that his trial counsel was ineffective for not objecting to the presentation of both charges?

Standard of Review. Plain error requires a showing of obvious, prejudicial error. See *State v. Holgate*, 2000 UT 74, ¶13, 10 P.3d 346. Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness. *State v. Lucero*, 2014 UT 15, ¶11, 328 P.3d 841.

2. Has Defendant proven that his trial counsel was ineffective for not arguing factual impossibility or moving for a directed verdict?

Standard of Review. Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness. *State v. Lucero*, 2014 UT 15, ¶11, 328 P.3d 841.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes are reproduced in Addendum A:

- Utah Code Ann. § 76-4-101(1) (West 2014) (attempt)
- Utah Code Ann. § 76-6-301 (West 2014) (robbery)
- Utah Code Ann. § 76-6-302 (West 2014) (aggravated robbery)
- Utah Code Ann. § 76-4-101(3)(b)(West 2014) (factual impossibility)
- Utah Code Ann. § 76-2-306 (West 2014) (voluntary intoxication)

STATEMENT OF THE CASE²

A. Summary of facts.

Defendant threatened Brenda and her friend with a knife and tried to steal Brenda's car. When he could not, he changed his plan and stole her purse instead.

Morah, Brenda, and Kendra were "just having a girl's day out" when they stopped at a cell phone store. R124:82-83, 104-105. Morah parked Brenda's brand-new car, leaving it unlocked with the keys to a different rental car in the cup holder. R124:84.

² Unless otherwise stated, the facts are recited in the light most favorable to the jury verdict. *See State v. Kruger*, 2000 UT 60, ¶ 2, 6 P.3d 1116.

Defendant was inside the store trying to buy a new phone for his sister. R124:107, 143; R125:50. Defendant talked to the manager, but became "impatient." R124:107,143-144. He became "kind of loud," went through the merchandise racks, "lift[ed] up his shirt," and used too much hand sanitizer. R124:87-88, 107. Defendant then argued with the manager and eventually left the store "pretty angry," "yelling and shouting." R124:107-108, 155.

In the parking lot, Defendant "started checking" car door handles. R124:155. Defendant tried the door handles of "five or six" cars. R124:178. Defendant "looked in" each car and "then tried to pull the handle." R124:178. He "checked a pickup truck first," "looked in it" and "lifted [the door] handle." R124:155. Defendant then "peered in the windows" of a small sedan and "tried to open the door." R124:177. He "walked over to the car" "next to it" and "did the same thing to that one." R124:177. Eventually, Defendant opened the door to Brenda's car and climbed into the driver's seat. R124:110.

When Morah, Brenda, and Kendra saw Defendant sitting in Brenda's car, all three ran out of the store and confronted him. R124:109-100. Morah ran to the driver's side, Brenda to the passenger side, and Kendra stood in front of the car. R124:89-90, 110. Morah reached the car first, opened the

door, and stood on the inside of the driver's door, between the door and Defendant. R124:89-90. Morah "repeatedly" told Defendant "to get out of my car." R124:89.

Ignoring Morah, Defendant repeatedly asked where the ignition was while holding the rental car keys. R124:90,125. Morah responded each time, "Get out of the car." R124:90. Defendant tried to close the car door on Morah, but she "ripped" the door back open and again told Defendant, "You need to get out of the car." R124:91.

Defendant responded by pulling a knife from underneath his shirt and pointing it at Morah. R124:91, State's Exhibit 3. Morah jumped back and yelled to Brenda, "He has a knife. You need to get back." R124:93. Defendant turned the knife on Brenda, who was standing on the passenger-side, but Brenda was in shock and unable to move. R124:94-95, 111-113.

Defendant then saw Brenda's purse sitting on the passenger side floor. R124:112. Continuing to threaten Brenda with the knife, Defendant picked up the purse, "got out of the car and started running with it." R124:112.

Brenda, Kendra, and Morah ran after Defendant. They chased him through the shopping center, with Morah yelling to bystanders, "He has a knife." R124:113, 127. The cell phone store manager joined the chase, yelling

"That purse is stolen." R124:127, 145. As Defendant ran through the shopping center, "someone pushed him, but he kept [his] balance and kept running with the purse in his hand." R124:147. Defendant fell down twice because "his shoe kept falling off," but he still kept running. R124:180. A car then "cut him off" and a woman leapt out, ripping "the purse from [Defendant's] hands." R124:127,156,173. Brenda's "stuff went flying everywhere," but Defendant "picked up a pair of keys that dropped out" and "kept on running." R124:127, 157, 183. Brenda, Kendra, and Morah followed. R124:127-128.

In an effort to stop Defendant, a driver "bumped" him with his car, and told Defendant to "drop the stuff." R124:157-157, 173-174. But Defendant tried to negotiate with the driver, asking whether the driver would "get [him] out of here." R124:158. The driver finally cornered Defendant with his car. Defendant rolled on the hood, but continued to try to run. Defendant finally threw the keys "in the bushes." R124:127-8, 158-159.

Officer Justin Ellis arrived and arrested Defendant. R124:159; R125:8-9. Officer Ellis found two knives and one knife sheath in Defendant's pockets. R125:14. He also found a set of car keys and "a couple of IDs" in the bushes where Defendant was cornered. R124:159, R125:18-19.

At the police station, Defendant admitted that he had "tried to take some lady's car." R125:32. Defendant told officers that he "was on methamphetamine," and that he had not slept or eaten in three days. R125:23. During questioning, Defendant responded appropriately and coherently, communicated clearly with officers, did not slur his words, and was "very communicative." R125:24-25.

When Defendant later vomited at the jail, paramedics evaluated him, but did not transport him to the hospital. R125:23-24. But because Defendant had been ill, Detective Ben Pender was concerned that the jail would not take Defendant. R125:33-34. Defendant was thereafter taken to the hospital for an evaluation. R125:33.

The trial

Trial counsel presented a voluntary intoxication defense, arguing that Defendant "was too high to form the requisite knowing and intentional intent to have committed" the crimes. R125:78. Trial counsel based her defense on Defendant's testimony and witness testimony that Defendant acted oddly and erratically, was not "himself that day," "looked like a junkie," was ill at the jail, and had admitted to officers that he had used methamphetamine that day. R124:160,187-89, 190; R125:23.

But Defendant testified that he did not admit to using methamphetamine that day. R125:47. Defendant testified only that he "honestly" did not "remember most" of what happened. R125:46. Defendant testified that he did not remember "being in the store at all" or even telling officers that he had used drugs that day. R124:47.

Yet Defendant could recall the more mundane details of that day. He remembered that his friend had brought chairs to his sister's house for his niece, that they returned the chairs at the store together, and that he later bought five 32-ounce beers. R125:46, 50. Defendant remembered that he went home, "drank one" of the beers, and agreed to help his sister get a cell phone. R125:46. Defendant testified that he then remembered running, being told "the cops are coming to get you," and that he dropped some keys. R125:46, 50-51. Defendant said that he also remembered being "in the hospital" and that one of the hospital staff members was Polynesian. R125:46-47, 50-51.

B. Summary of proceedings.

The State charged Defendant with two counts of aggravated robbery—one for the purse and one for the car; one count of aggravated assault; and one count of interference with an arresting officer. R33-34. The jury convicted Defendant of both counts of aggravated robbery and

interference with an arresting officer. R85. The jury acquitted him of aggravated assault and instead convicted him of the lesser included offense of brandishing a dangerous weapon in a fight. R85. The trial court sentenced Defendant to two indeterminate terms of five years to life in prison and to one indeterminate term not to exceed one year in prison. R126, R105-106. The court declined to impose a sentence for Defendant's conviction for interference with an arresting officer. R126:15.

Defendant timely appeals. R107.

SUMMARY OF ARGUMENT

Point 1: For the first time on appeal, Defendant challenges the sufficiency of the evidence supporting his aggravated robbery conviction for attempting to steal the car. Defendant argues that the trial court plainly erred by sending the charge to the jury because the evidence did not show that he committed two separate aggravated robberies. He also argues that his trial counsel was ineffective for failing to move to dismiss the charge on this ground.

Defendant has not carried his heavy burden to show either plain error or ineffective assistance of counsel. A person commits aggravated robbery when he either: uses or threatens to use a dangerous weapon during a robbery or attempts to steal an operable motor vehicle. The single larceny

doctrine applies only if that person commits multiple offenses that share a common intent. But the single larceny doctrine does not apply when a separate and distinct intent exists for each crime. Here, Defendant had two objectives: (1) to steal Brenda's car; and (2) to steal her purse. He also had two criminal acts: (1) he tried to steal Brenda's car; and (2) he stole her purse. Thus, he committed two separate robberies. The jury heard testimony that Defendant intended to steal the victim's car, but when he realized that he could not, he changed his plan and stole her purse instead. The evidence thus established that Defendant committed two crimes, not one. Defendant has not proved either plain error or ineffective assistance of counsel.

Point 2: Defendant also argues that his trial counsel was ineffective: (1) for not presenting a factual impossibility defense and (2) for not moving the court for a directed verdict on the ground that the State had not presented sufficient evidence to negate his voluntary intoxication defense. Both claims fail.

A factual impossibility defense cannot apply to an attempt crime. For Defendant to be guilty of aggravated robbery, the State had to prove only that he attempted to take the victim's car. Thus, the fact that it would have been impossible for him to do so would not have provided a defense.

Defendant, therefore, has not shown that his counsel was ineffective for asserting this inapplicable defense.

Nor was Defendant's counsel required to move for a directed verdict where the State presented sufficient evidence to support an inference that Defendant had the ability to act with the requisite mental state. While trial counsel presented a voluntary intoxication defense, the State's evidence negated it. Thus, any motion for a directed verdict would have been futile.

For these reasons, Defendant cannot show that his trial counsel's performance fell outside of the wide range of reasonable professional assistance. Nor can he show that he suffered any prejudice.

ARGUMENT

I.

DEFENDANT HAS NOT PROVEN PLAIN ERROR OR INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENDANT WAS PROPERLY CONVICTED OF TWO DISTINCT AND SEPARATE AGGRAVATED ROBBERY CRIMES

For the first time on appeal, Defendant argues that his trial counsel was ineffective and the trial court plainly erred for "allow[ing] two counts of aggravated robbery to go the jury." Br. Aplt. 18. Defendant argues that under the single larceny doctrine "only one aggravated robbery count was allowed" because "there was one criminal episode and one victim." Br.

Aplt. 11. Defendant argues that the second aggravated robbery count "must be vacated." Br. Aplt. 11

At bottom, Defendant challenges the sufficiency of the evidence for his aggravated robbery conviction for attempting to steal the car. Defendant's challenge fails because the single larceny doctrine is inapplicable. Under the single larceny doctrine, the key is Defendant's intent. The evidence here established that Defendant formed two distinct intents. Defendant first attempted to steal the car. But when that plan proved too difficult, he decided to steal the purse instead. That the crimes occurred close in time and that the Defendant victimized the same victim twice is immaterial. By forming separate and distinct intents, Defendant committed two crimes, not one. Because the single larceny doctrine is inapplicable, Defendant cannot show that the trial court plainly erred by not sua sponte applying it or that his trial counsel was ineffective for not asserting it.

A. The evidence established that Defendant committed two distinct and separate crimes.

As stated, Defendant does not dispute that he committed aggravated robbery. Rather, he argues that under the single larceny doctrine the evidence established only that he committed one aggravated robbery, not two.

When reviewing a preserved challenge to the sufficiency of the evidence, this Court “sustain[s] the trial court’s judgment unless it is against the clear weight of the evidence or if [it] otherwise reach[es] a definite and firm conviction that a mistake has been made.” *State v. Titus*, 2012 UT App 231, ¶2, 286 P.3d 941 (citation and quotations omitted). But when a sufficiency challenge is unpreserved, as Defendant acknowledges is the case here, an appellant must demonstrate both that “the evidence was insufficient to support a conviction of the crime,” and that the “insufficiency was so obvious and fundamental that the trial court erred” by not catching it on its own. *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346.

A person commits aggravated robbery “if in the course of committing robbery,” he either: (1) “uses or threatens to use a dangerous weapon”; or (2) “takes or attempts to take an operable motor vehicle.” Utah Code Ann. § 76-6-302(1)(a) & (c) (West 2014). A person commits robbery when he “unlawfully and intentionally” “takes or attempts to take personal property in the possession of another from his person, or immediate presence,” “against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property.” Utah Code Ann. § 76-6-301(1)(a)(West 2014).

The single larceny doctrine determines what constitutes a single offense of theft. See *State v. Kimbel*, 620 P.2d 515, 518 (Utah 1980). In *Kimbel*, 620 P.2d at 518, the Utah Supreme Court held that whether multiple takings constitute a single offense or multiple offenses rests solely on the defendant's intent: "The general test as to whether there are separate offenses or one offense is whether the evidence discloses one general intent or discloses separate and distinct intents." Thus, whether the victim is the same or a new victim is immaterial. *State v. Barker*, 624 P.2d 694, 696 (Utah 1981); see *State v. Mickel*, 65 P.2d 484, 485 (Utah 1901) ("where many articles are stolen at one time, there is only one theft, whether the ownership is one or many").

The single larceny doctrine limits "charging discretion in the context of aggregating or separating theft counts based on their dollar value for the purpose of maximizing criminal liability." *State v. Rasabout*, 2013 UT App 71, ¶15, 299 P.3d 625. Essentially, the single larceny doctrine prevents a defendant who steals one hundred dollars from being charged one hundred times—one charge for each dollar stolen. See *Kimbel*, 620 P.2d at 518 (Kimbel stole multiple thread protectors over time, constituting one continuous plan with one intent equating to a single offense); see also *State v. McCarthy*, 483 P.2d 890 (Utah 1971) (McCarthy was charged once for stealing 19 hams

because the thefts were part of one continuous episode committed with the same intent).

But, the single larceny doctrine does not apply if multiple crimes are committed, each with a different intent. *Kimbel*, 620 P.2d at 518. Rather, the doctrine requires that the crimes have the same objective. *See Barker*, 624 P.2d at 696; *Rasabout*, 2013 UT App 71, ¶12. Thus, the single larceny doctrine is not satisfied merely because the crimes occurred close in time and have the same victim. *See Barker*, 624 P.2d at 696; *Rasabout*, 2013 UT App 71, ¶12.

In *Barker*, Barker smashed the windshields of multiple cars “at the same place and in rapid succession.” 624 P.2d at 695-96. The Utah Supreme Court held that the single larceny doctrine was inapplicable because each car had a separate owner whose windshield was destroyed by “separate acts of the defendant.” *Id* at 696. While the Court considered that the each car had a different owner, ownership was not the determining factor. *Id.* at 695 (when the taking is a single act, there is one offense; “multiple ownership” is immaterial). The bottom line was Barker’s intent. Because Barker had a separate intent for each windshield that he damaged, “each separate act of destruction constitutes” a separate crime. *Id.*

So too here. Defendant's aggravated robberies, while part of the same criminal episode, were separate and distinct crimes. Defendant had a separate intent for attempting to steal the car and stealing the purse. See *Kimbel*, 620 P.2d at 518. As Defendant admitted that his initial plan was to steal a car: "I tried to steal some lady's car." R125:32. But when Defendant realized he could not accomplish that goal, he changed his plan. In that instant, Defendant's intent was to steal the purse. See *State v. Rudolph*, 970 P.2d 1221, 1228 (Utah 1998)(guilty of aggravated burglary despite forming intent to sexually assault victim after breaking into victim's house); *State v. Garcia*, 2010 UT App 196, ¶13, 236 P.3d 853 (defendant formed intent to assault victim after he broke into her home). As in *Barker*, Defendant committed two separate crimes, each with distinguishable intents. The single larceny doctrine therefore does not apply.

And because Defendant committed two separate and distinct acts with separate and distinct intents, his case is distinguishable both from *State v. Irvin*, 2007 UT App 319, 169 P.3d 798 and *State v. Fischer*, 1368 N.E.2d 332 (Ohio Ct. App. 1977). Irvin held up a convenience store clerk and, in one fell swoop, stole the cash from the register and the clerk's car key, and then used the clerk's car to make his getaway. 2007 UT App 319, ¶¶2, 19. This Court held that only one act of aggravated robbery occurred because taking

the keys was part of “one intention, one general impulse, and one plan,” likely to facilitate Irvin’s escape with the stolen money. *Id.* at ¶19 (citation omitted). Unlike Irvin, however, Defendant here formed two separate plans: first to steal the car and, second, to steal the purse. Moreover, unlike in *Irvin*, the jury was properly instructed on the aggravated operable motor vehicle factor. R207, 208³; *Irvin*, 2007 UT App 319, ¶¶19-20, ¶20 n. 4. And, here, Defendant attempted to steal the car in the presence of the victim, unlike *Irvin* where the car was not taken from the victim’s presence. R124:90-91, 110; *Irvin*, 2007 UT App 319, ¶19.

Defendant’s reliance on *State v. Fischer* is also unpersuasive. Fischer stole a truck containing automotive tools and was charged with two thefts—one for the truck and one for the tools. 368 N.E. 2d at 333. The Ohio Court of Appeals held that Fischer committed one act by stealing the truck, and therefore could be charged with only one crime. *Id.* at 334. Like Irvin, Fischer had “one intention, one general impulse, and one plan,” to steal the

³ The record was supplemented to include the jury instructions. R135, 197-230. The jury instructions were transcribed from the trial audio recording. R154; *see* R144. The supplemental index lists R53-76 as the jury instructions, but those documents are Defendant’s proposed instructions and not the instructions read to the jury. This brief, therefore, cites to the transcript of the jury instructions.

truck, but never had a separate plan to steal the tools. *Irvin*, 2007 UT App 319, ¶19; *Fischer*, 368 N.E. 2d at 333.

Thus, *Fischer* is likewise inapposite here because, as explained, Defendant had separate intentions and plans. Admittedly, if Defendant had actually stolen the car with the purse in it, he could be charged only with one crime, because in that case he would have only possessed one intent—to steal the car. In that scenario, stealing the purse would be incidental. But Defendant had two separate intents—first, to steal the car, and, when that wouldn't work, to steal the purse. Stealing the purse was not incidental, it was a separate and distinct act motivated by a separate and newly formed plan.

In sum, the evidence demonstrates that Defendant committed two separate and distinct crimes because he had two separate and distinct intents.

B. Defendant cannot show either deficient performance or plain error because his counsel had a conceivable reasonable strategy for not objecting.

Defendant has not shown—and cannot show—either ineffective assistance of counsel or plain error. To prove ineffective assistance, Defendant must prove deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove plain error, Defendant must

show obvious, prejudicial error. *Holgate*, 2000 UT 74, ¶13. As explained below, ineffective assistance and plain error share a common prejudice standard: that absent counsel's or the trial court's alleged error there is a reasonable probability of a more favorable outcome for the defendant. If Defendant fails to meet "any one of these requirements," neither ineffective assistance nor "plain error is ... established." *State v. Dunn*, 850 P.2d 1201, 1209 (Utah 1993); *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah 1994).

1. Defendant has not proved deficient performance.

Defendant argues that his trial counsel was ineffective for not incorporating the single larceny doctrine as part of his trial strategy and thus allowing both aggravated robbery charges to be sent to the jury. Br. Aplt. 21. But Defendant has not met his heavy burden of proof.

As explained, the single larceny doctrine was inapplicable. Defendant's trial counsel had no duty to invoke a trial strategy that did not apply, and thus would have been futile to assert. *See State v. Chacon*, 962 P.2d 48, 51 (Utah 1998) ("Neither speculative claims nor counsel's failure to make futile objections establishes ineffective assistance of counsel."); *see also State v. Featherhat*, 2011 UT App 154, ¶36, 257 P.3d 445 (holding that because sufficient evidence supported the jury's verdict, trial counsel's failure to make "such a futile motion cannot establish ineffective assistance of

counsel"). Defendant therefore has not shown that his counsel was ineffective. *See Featherhat*, 2011 UT App 154, ¶36.

Defendant argues that trial counsel did not use the single larceny doctrine because she did not "understand[] the law." Br. Aplt. 20-21; *see State v. Litherland*, 2000 UT 76, ¶11, 12 P.3d 92 (a defendant bears the burden of ensuring the record is adequate). On the contrary, and as demonstrated above, trial counsel's decision not to assert the single larceny doctrine showed that counsel correctly understood that the doctrine was inapplicable. Indeed, trial counsel's duty was to invoke strategies grounded in the application of the correct law. She did that here by choosing not to assert an inapplicable theory and by instead focusing on Defendant's claimed inability to form the requisite intent. *Strickland*, 466 U.S. at 688-689. Trial counsel cross-examined each witness on Defendant's behavior, setting up an involuntary intoxication defense and Defendant's testimony that he did not remember the crime at all. R124:99, 118, 130, 137, 152, 159, 174, 180, 184; 125:22, 34, 45-48. Thus, Defendant cannot prove his trial counsel's performance was not "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

2. Defendant has not proved obvious error.

For essentially the same reasons, Defendant cannot prove that the trial court obviously erred in not sua sponte dismissing the aggravated robbery charge for attempting to steal the car. Defendant has not proven that the evidence supporting his aggravated robbery conviction for the car was “inherently improbable” or “sufficiently inconclusive.” *State v. Mead*, 2001 UT 58, ¶65, 27 P.3d 1115 (citations and quotations omitted). As explained, the evidence demonstrated that Defendant committed two separate and distinct crimes. Defendant therefore cannot show that any alleged “evidentiary insufficiency is so obvious and fundamental” that the trial court should have sua sponte intervened. *Holgate*, 2000 UT 74, ¶17.

C. Defendant has not proved prejudice.

As stated, ineffective assistance and plain error share a common standard: “absent the error, there is a reasonable likelihood of a more favorable outcome.” *Dunn*, 850 P.2d at 1208-9; *Strickland*, 466 U.S. at 694. Defendant “bears the burden of establishing prejudice as a demonstrable reality,” and “the likelihood of a different result must be substantial, not just conceivable.” *State v. McNeil*, 2013 UT App 134, ¶30, 302 P.3d 844 (quotations and citations omitted); *Harrington v. Richter*, 131 S.Ct. 770, 792 (2011).

To prove prejudice here, Defendant must show that if he had objected—or the trial court intervened—the trial court would have dismissed one of the aggravated robbery counts. *See McNeil*, 2013 UT App 134, ¶30. He cannot do so because, as explained, the single larceny doctrine was inapplicable. Asserting that doctrine therefore would not have led to the dismissal of one of the aggravated robbery charges.

In sum, Defendant has shown neither plain error nor ineffective assistance.

II.

DEFENDANT HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR NOT ARGUING FACTUAL IMPOSSIBILITY OR FOR NOT MOVING FOR A DIRECTED VERDICT⁴

Defendant argues that his trial counsel provided ineffective assistance in two additional ways. First, he argues that it was factually impossible to steal the car because he had the wrong car keys. He, thus, reasons that his trial counsel was ineffective for not presenting a factual impossibility defense. Br. Aplt. 23. Second, he argues that his trial counsel was ineffective for not moving for a directed verdict on the ground that the State did not present sufficient evidence to negate his voluntary intoxication defense. Br. Aplt. 28. Defendant has not proved either claim.

⁴ This point responds to Appellant's Points II and III. *See* Br. Aplt. 23-37.

As stated, to prove that his counsel was ineffective, Defendant must prove both that his counsel's performance was deficient and that, "but for" her deficient performance, there is a reasonable probability of a different outcome. *Strickland*, 466 U.S. 689-690, 694.

To prove deficient performance, a defendant must overcome the strong presumption that counsel's performance "fell 'within the wide range of reasonable professional assistance'" and that the challenged action is "considered sound trial strategy." *State v. Tennyson*, 850 P. 2d 461, 465 (Utah Ct. App. 1993) (quoting *Strickland*, 466 U.S. at 689); *State v. Lucero*, 2014 UT 15, ¶43, 328 P.3d 841 (trial counsel given "wide latitude in making tactical decisions"); see *State v. Walker*, 2010 UT App 157, ¶ 14, 235 P.3d 766 (whether to call expert witness is matter of trial strategy not questioned unless there is no reasonable basis for it). A court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," not in hindsight. *Strickland*, 466 U.S. at 690. Judicial scrutiny of an attorney's performance "must be highly deferential" because it is "too easy for a court, examining counsel's [performance] after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Menzies v. Galetka*, 2006 UT 81, ¶89, 150 P.3d 480 (quoting *Strickland*, 466 U.S. at 689). A defendant is entitled to relief only if

he “persuade[s] the court that there was no conceivable tactical basis for counsel’s actions.” *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (citation and quotation omitted) (emphasis omitted); *see also Strickland*, 466 U.S. at 689.

To prove prejudice, as stated, Defendant must establish that there is a reasonable probability that “but for” counsel’s unprofessional errors, “the result” “would have been different.” *Strickland*, 466 U.S. at 694; *see also Chacon*, 962 P.2d at 50; *McNeil*, 2013 UT App 134, ¶30. Again, Defendant “bears the burden of establishing prejudice as a demonstrable reality.” *McNeil*, 2013 UT App 134, ¶30 (citation and quotation omitted). To carry that burden, Defendant must show that that “the likelihood of a different result” is “substantial, not just conceivable.” *Harrington*, 131 S.Ct. at 792.

A. Defendant has not shown that his trial counsel was ineffective for not presenting a factual impossibility defense.

Defendant argues that because he had the wrong car keys, it was factually impossible for him to steal the car. Br. Aplt. 24. On this basis, Defendant argues his counsel was ineffective for not arguing factual impossibility or “object[ing] to the second aggravated robbery count.” Br. Aplt. 26-28. Defendant cannot show that his counsel was ineffective because a factual impossibility defense was inapplicable where the State had to show only that Defendant attempted to steal the victim’s car.

As explained, a person commits aggravated robbery if, during a robbery, he “takes or attempts to take an operable vehicle.” Utah Code Ann. § 76-6-302(1)(c)(emphasis added). Thus, the State had to show only that Defendant attempted to steal the victim’s car, not that he actually stole it or could have succeeded in stealing it.

The statute provides that when the State has to prove only an attempt, an impossibility defense does not apply: “A defense to the offense of attempt does not arise”: (b)“due to factual or legal impossibility.” Utah Code Ann. § 76-4-101(3)(b)(West 2014). Defendant argues that this statute cannot apply because he was not charged with an attempt crime. Br. Appt. 24. True, the State did not charge Defendant with attempted aggravated robbery. But that is because, as explained, aggravated robbery includes either a completed or an attempted robbery of an operable motor vehicle. Utah Code. § 76-6-302(1)(c).

The evidence showed here that Defendant attempted to steal the victim’s car. Utah Code Ann. § 76-4-101(1)(a)(attempt requires substantial step and intent to commit the crime). Defendant took a substantial step towards stealing the car when he got in the driver’s seat, grabbed keys that he apparently believed belonged to the car, and searched for the ignition. All these actions were indicative of Defendant’s intent to steal the car. In

fact, Defendant admitted to police that he attempted to steal the victim's car.
R125:32.

Because the aggravated robbery was complete when Defendant attempted to steal the victim's car from her immediate presence by force or fear, any effort by counsel to raise an impossibility defense would have been futile. As explained, counsel cannot be ineffective for failing to make a futile objection. *Chacon*, 962 P.2d at 51 ("Neither speculative claims nor counsel's failure to make futile objections establishes ineffective assistance of counsel."); *Featherhat*, 2011 UT App 154, ¶36 (trial counsel's failure to make "such a futile motion cannot establish ineffective assistance of counsel"). Thus, Defendant has not shown that his counsel was ineffective for not asserting the impossibility defense.

B. Defendant has not shown that his counsel was ineffective for not moving for a directed verdict on the ground that the State's evidence did not overcome his voluntary intoxication defense because ample evidence supported a finding that Defendant acted with the requisite mental state.

Finally, Defendant argues that his counsel was ineffective for not moving for a directed verdict because the "State did not put on sufficient evidence to overcome" his voluntary intoxication defense. Br. Aplt. 28. But because sufficient evidence supported the inference that Defendant could form the requisite mental state, Defendant has not shown that no reasonable

trial attorney would have forgone an objection. *Clark*, 2004 UT 25, ¶6. Nor can Defendant show that had his counsel objected, the outcome would have been different.

A person is entitled to a voluntary intoxication defense only if it “negates the existence of” a knowing or intentional mental state “which is an element of the offense.” Utah Code Ann. § 76-2-306 (West 2014). As with any affirmative defense, the defendant has the initial burden to adduce evidence providing a reasonable basis for the defense, after which the State must disprove it beyond a reasonable doubt. *State v. Sellers*, 2011 UT App 38, ¶15, 248 P.3d 70. “Unless defense counsel could make” the “precise showing” that “the alcohol deprived [him] of the capacity to form the mental state necessary” for the offense, “evidence of defendant’s excessive intoxication would be wholly counterproductive.” *State v. Cummins*, 839 P.2d 848, 857 (Utah App. 1992); see also *State v. Gunn*, 132 P.2d 109, 111 (Utah 1942) (holding evidence of intoxication insufficient for reasonable person to conclude that it negated mental state for burglary and affirming trial court’s refusal to instruct jury on voluntary intoxication).

The requisite mental state for aggravated robbery, as relevant here, is that a defendant: (1) “intentionally” takes or attempts to take another’s property; (2) “with a purpose or intent to deprive the person permanently

or temporarily of the personal property"; (3) while using or threatening to use a dangerous weapon; or that a Defendant takes or attempts to take an operable motor vehicle. Utah Code Ann. §§ 76-6-301(1)(a), §76-6-302(1)(a)&(c). Thus, to assert a voluntary intoxication defense, Defendant had to prove that his intoxication prevented him from either: (1) intentionally taking or attempting to take the victim's car or purse; (2) intending to deprive her of her car or purse; (3) or understanding that he was using a dangerous weapon or attempting to take an operable motor vehicle.

Defendant did not adduce sufficient evidence to be entitled to the defense, but regardless, the State's evidence negated it. Trial counsel elicited testimony that Defendant behaved oddly, was not "acting [like] himself," and was ill at the jail. R124:187-88, 189; R125:23. And the officer testified that Defendant admitted to drug use. R125:23. But Defendant testified only that he suffered from amnesia, although he could remember that he drank one 32-ounce beer before the robberies. R125:46,50. He never admitted to drug use. *See* R125:46-51. This evidence was not enough to prove intoxication, let alone intoxication sufficient to negate Defendant's mental state.

Mere "proof of drinking or being drunk" does not support the defense. *Adams v. State*, 2005 UT 62, ¶22, 123 P.3d 400 ("proof of drinking or

being drunk” provides no reasonable basis for the defense); *Honie v. State*, 2014 UT 19, ¶55, 342 P.3d 182 (although defendant consumed alcohol and marijuana before the crime, no evidence showed he was so intoxicated during crime that he could not form requisite mental state); *State v. Bryan*, 709 P.2d 257, 260 (Utah 1985)(defendant was “culpable, before the onset of the alleged blackout” from alcohol, “of knowing the risks he would likely create by drinking and driving”); *State v. Wood*, 648 P.2d 71, 90 (Utah 1982) (defendant must “prove much more than [the fact that] he had been drinking” before committing the offense to be entitled to a voluntary intoxication defense); *State v. Burke*, 2011 UT App 168, ¶84, 256 P.3d 1102 (“mere fact” defendant was drinking and intoxicated “to a degree” could not entitle him to voluntary intoxication instruction). As stated, Defendant had to make the “precise showing” that the alcohol or methamphetamine “deprived [him] of the capacity to form the mental state necessary” for the offense. *Cummins*, 839 P.2d at 857. Defendant offered no evidence to show that he was so intoxicated that he did not have the capacity form the requisite mental state.

Claiming amnesia does not support the defense either. See *State v. Adams*, 2005 UT 62, ¶22, 123 P.3d 400; see also *State v. Howell*, 554 P.2d 1326, 1328 (Utah 1976) (upholding trial judge’s finding that amnesia is not a

defense where defendant knew "what he was doing at the time."); *State v. Jiron*, 882 P.2d 685, 689 (Utah App. 1994) (motion for new trial denied, where "amnesia is easy to feign and hard to disprove"); *see also People v. Lucas*, 548 N.E.2d 1003, 1017 (Ill. 1989) (affirming admission of expert testimony "that a blackout, or alcohol-induced amnesia, does not indicate that the person suffering the blackout was incapable of acting knowingly or voluntarily during the period which he later cannot remember."); *Duffy v. State*, 415 N.E.2d 715, 718 (Ind. 1981) (affirming conviction where expert testimony showed blackouts do "not affect an individual's behavior at the time; it simply affects the memory of that behavior," and where lay testimony showed that defendant "did not slur his words when talking, did not stumble when he walked, was able to respond to commands, and did not appear to be drunk"). This is especially true where Defendant testified that he could remember, in detail, events before the crime, but conveniently could not remember the crime itself. R125:46-51; *see Howell*, 554 P.2d at 1328.

Nor does Defendant's behavior while in police custody support the defense. Defendant could answer questions and communicate with officers. Merely because he was ill at the police station and went to hospital sometime after committing the crimes does not prove that he could not form the requisite intent when he committed them. *Wood*, 648 P.2d at 89

("Evidence of intoxication must have relevance to the defendant's mental state at the time of the crime.")(citation omitted).

In sum, Defendant did not make the "precise showing" that the alcohol or drugs prevented him from forming the requisite mental state. Thus he was not entitled to the voluntary intoxication defense. *Cummins*, 839 P.2d at 857. Regardless, Defendant has not shown that the State's evidence was so lacking that all reasonable counsel would have moved for a directed verdict.

A directed verdict motion is granted only when the State fails to establish a prima facie case against the defendant. *See State v. Montoya*, 2004 UT 5, ¶ 29, 84 P.3d 1183 (directed verdict motion granted only when State fails to establish "prima facie" case). And this Court upholds the denial of a directed verdict motion when "upon reviewing the evidence and all inferences that can be reasonably drawn from it," "some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *Id.* (citation omitted); *State v. Gutierrez*, 714 P.2d 295, 296 (Utah 1986) ("Intent is rarely susceptible to direct proof."); *State v. Porter*, 705 P.2d 1174, 1176-77 (Utah 1985) (defendant's intent inferred from his actions); *State v. Sisneros*, 631 P.2d 856, 858-859 (jury reasonably inferred defendant had requisite mental state

despite evidence of intoxication); *Chacon*, 962 P.2d at 51 (facts and reasonable inferences support defendant had requisite mental state to commit crime despite evidence of drinking before committing crime).

Here, the State presented ample evidence from which the jury could reasonably infer that, despite his alleged intoxication, Defendant was capable of forming the requisite mental state. Multiple witnesses testified that Defendant acted intentionally. Defendant tried to break into “five to six” cars before finding the victim’s unlocked car. R124:110, 155, 178. Defendant sat in the driver’s seat—not in the passenger seat or the back seat—while holding car keys and searching for the ignition. R124:90, 120. When confronted by the victim and her friends, Defendant pulled out a large knife, threatened them, and yelled repeatedly—without slurring—“where is the ignition.” R124:90, 125. The only reasonable explanation for Defendant’s actions is that he intended to steal the victim’s car. R125:32.

Upon realizing that he would not get away with the car, Defendant decided to take the purse. He pointed the knife at the victim, grabbed her purse, and ran. R124:112. Defendant ran through the parking lot holding the purse and did not stumble—despite being chased by at least four people and being pushed. R124:127, 145, 147. Defendant tripped during the chase, but only because his shoe kept falling off. R124:180. Yet he continued to run.

R124:180. And, when a woman jumped out of a car and wrestled the purse from Defendant, he maintained his balance, stooped down, picked up the keys that had dropped from the purse, and then kept running. R124:127,157,183. Lastly, Defendant keenly knew of his actions and his surroundings—he even tried to make a deal to escape. R124:158. Thus, the State presented sufficient evidence from which the jury could reasonably infer that Defendant had the ability to act with the requisite mental state.

Counsel had no reason to move for a directed verdict where sufficient evidence supported the inference that Defendant could act with the requisite mental state. Thus, a directed verdict motion would have been futile. As explained, counsel cannot be ineffective for failing to make a futile motion. *See Chacon*, 962 P.2d at 51 (“Neither speculative claims nor counsel’s failure to make futile objections establishes ineffective assistance of counsel.”); *see also Featherhat*, 2011 UT App 154, ¶36 (holding that because sufficient evidence supported the jury’s verdict, trial counsel’s failure to make “such a futile motion cannot establish ineffective assistance of counsel”).

Defendant argues that a directed verdict motion was required because he acted oddly and because he claimed to be unable to remember the actual crime. Br. Aplt. 34-37. As explained, however, this is does not

negate Defendant's ability to form the requisite mental state to commit the crime. See *Adams*, 2005 UT 62, ¶22 ("proof of drinking or being drunk" provides no reasonable basis for the defense); *Honie v. State*, 2014 UT 19, ¶55 (although defendant consumed alcohol and marijuana before crime, no evidence showed that he was so intoxicated at time of crime that he could not form requisite mental state); see also *Bryan*, 709 P.2d at 260 (defendant was "culpable, before the onset of the alleged blackout" from alcohol, "of knowing the risks he would likely create by drinking and driving"); *Howell*, 554 P.2d at 1328 (amnesia not a defense where Howell knew "what he was doing at the time."); *Lucas*, 548 N.E.2d 1003 at 1017 ("alcohol-induced amnesia, does not indicate that the person suffering the blackout was incapable of acting knowingly or voluntarily during the period which he later cannot remember."); *Duffy*, 415 N.E.2d 715 at 718 (noting that blackouts do "not affect an individual's behavior at the time; it simply affects the memory of that behavior," and affirming where lay testimony showed that defendant "did not slur his words when talking, did not stumble when he walked, was able to respond to commands, and did not appear to be drunk").

Thus, even assuming that Defendant could not remember the robberies, that alone was insufficient to require the trial court to take the

case from the jury and to enter a verdict of acquittal based on a voluntary intoxication defense.

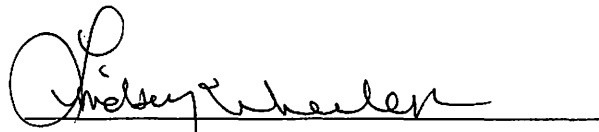
In sum, Defendant has not proven that his counsel was ineffective.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on July 15, 2015.

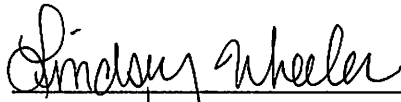
SEAN D. REYES
Utah Attorney General

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LINDSEY WHEELER
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 7,329 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

A handwritten signature in cursive script, reading "Lindsey Wheeler", is written over a horizontal line.

LINDSEY WHEELER
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on July 15, 2015, two copies of the Brief of Appellee were

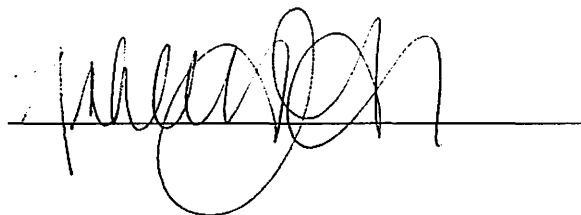
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Also, in accordance with Utah Supreme Court Standing Order No. 8,
a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

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Addenda

Addenda

Addendum A

§ 76-4-101. Attempt--Elements of offense

- (1) For purposes of this part, a person is guilty of an attempt to commit a crime if he:
 - (a) engages in conduct constituting a substantial step toward commission of the crime;
and
 - (b)(i) intends to commit the crime; or
 - (ii) when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result.
- (2) For purposes of this part, conduct constitutes a substantial step if it strongly corroborates the actor's mental state as defined in Subsection (1)(b).
- (3) A defense to the offense of attempt does not arise:
 - (a) because the offense attempted was actually committed; or
 - (b) due to factual or legal impossibility if the offense could have been committed if the attendant circumstances had been as the actor believed them to be.

§ 76-6-301. Robbery

(1) A person commits robbery if:

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

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

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

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

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

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

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

76-6-302. Aggravated robbery

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

- (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;
- (b) causes serious bodily injury upon another; or
- (c) takes or attempts to take an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

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

§ 76-2-306. Voluntary intoxication

Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense; however, if recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense.

