

2016

**State of Utah, Plaintiff/Appelle, v. Timothy Noble Walker,  
Defendant/Appellant : Reply Brief**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee :  
v. :  
TIMOTHY NOBLE WALKER, : Case No. 20150317-CA  
Defendant/Appellant. : Appellant is incarcerated.

---

**REPLY BRIEF**

Appeal from a conviction for one count of aggravated assault, a third degree felony, in violation of Utah Code §76-5-103(2)(b) (2012), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Mark Kouris presiding.

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Defendant/Appellant. :

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**INTRODUCTION**

This reply is “limited to answering any new matter set forth in the opposing brief.” Utah R.App.P. 24(c). First, as explained in opening and below, the trial court erred by giving Instruction 18 to the jury because Instruction 18 violated the Sixth and Fourteenth Amendments by taking necessary elements of the offense away from the jury. *See infra* at Part I; Aplt.Br. 12-26. Second, this Court should reverse and remand for a new trial because the error was prejudicial. This Court should not address prejudice because the State does not challenge prejudice in its response brief. *See infra* at Part II. Alternatively, if this Court chooses to address prejudice, this Court should apply the harmless beyond a reasonable doubt standard because the State does not challenge its application. *See infra* at Part II; Aplt.Br. 26-33. In any event, this Court should reverse and remand for a new trial because, as explained in opening, Instruction 18 was prejudicial even under the traditional prejudice standard. *See* Aplt.Br. 26-33.

## ARGUMENT

### **I. Instruction 18 violated the Sixth and Fourteenth Amendments because it took necessary elements of the offense away from the jury.**

Walker argues that the trial court erred by giving Instruction 18 because it took necessary elements from the jury. *See* Aplt.Br. 12-26. For support, Walker cites the plain language of Utah Code §76-1-601 and the Utah Code as a whole; the constitutional rights to due process, to a jury trial, and to present a complete defense; rule 19(f) of the Utah Rules of Criminal Procedure; Utah case law; and extra-jurisdictional case law. *See id.*

The State does not address Walker's constitutional arguments or rule 19(f). In particular, it does not respond to the long line of Utah cases holding that a trial court violates rule 19(f) and a defendant's constitutional rights by taking a necessary element away from the jury. *See* Aplt.Br. 14-27. To the extent that the State addresses the plain language of the statute or the Utah Code, it dismisses the plain language as "insignificant" because *State v. Fisher*, 680 P.2d 35 (Utah 1984), in the State's estimation, "interpreted section 76-1-601(11) to include strangulation to unconsciousness as a matter of law." Aple.Br. 26-27. For the same reason, the State dismisses the extra-jurisdictional cases that support Walker's position, *see* Aple.Br. 26-27, even though *Fisher* itself relies on some of those cases and even though those cases reject arguments like the State's even when, unlike here, the statute being reviewed actually lists "unconsciousness" in the definition of serious bodily injury. *See* Aplt.Br. 19-21.

In short, the State's argument rests on its reading of two cases—*Fisher* and *State v. Speer*, 750 P.2d 186 (Utah 1988). But, as explained in opening, the State's reading of

*Fisher* and *Speer* is contrary to the plain language of the Utah Code and Utah case law and would violate rule 19(f) and Walker's constitutional rights to due process, to a jury trial, and to present a complete defense. *See* Aplt.Br. 14-26.<sup>1</sup> Moreover, this Court already rejected the State's reading of *Fisher* and *Speer* in *State v. Bloomfield*, 2003 UT App 3, ¶18, 63 P.3d 110 (holding, after reviewing *Fisher* and other Utah case law, that "[n]o Utah cases have directly addressed" whether "unconsciousness cannot constitute serious bodily injury under the statute" but several Utah cases "suggest that a jury may find that an assault resulting in temporary unconsciousness meets the statutory definition of serious bodily injury"); *see* Aplt.Br. 17-23.

Thus, for the reasons stated here and in opening, this Court should hold that the trial court erred by giving Instruction 18 to the jury. *See* Aplt.Br. 12-26.

**II. This Court should reverse because the State does not challenge Walker's prejudice argument or, in the alternative, because giving Instruction 18 was not harmless beyond a reasonable doubt.**

In opening, Walker asked this Court to reverse and remand for a new trial because Instruction 18 was prejudicial under either the harmless beyond a reasonable doubt standard or the traditional prejudice standard. *See* Aplt.Br. 26-33. The State does not challenge Walker's argument that the harmless beyond a reasonable doubt standard applies. *See* Aple.Br. 1-27. Nor does it challenge Walker's argument that Instruction 18

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<sup>1</sup> At pages 21-22, Walker cites *State v. Boone*, 820 P.2d 930 (Utah Ct.App. 1991), for its interpretation of our supreme court's decision in *State v. Peterson*, 681 P.2d 1210 (Utah 1984). Walker's citation inadvertently labeled *Boone* as a Utah Supreme Court case. Walker apologizes for the oversight but notes that the incorrect designation does not change the analysis. *Peterson*, *Boone*, and the other Utah cases cited in the opening brief support that the question of whether an injury, including unconsciousness, constitutes serious bodily injury is a question for the jury. *See* Aplt.Br. 14-23.



was prejudicial. *See id.* Its only argument is that Walker’s appeal fails because, in its opinion, Instruction 18 “was a correct statement of Utah law.” Aple.Br. 1-27.

As explained above and in opening, the State’s claim that Instruction 18 “was a correct statement of Utah law” fails. *See* Aplt.Br. 12-26. Thus, because Instruction 18 was erroneous and the State has not challenged Walker’s prejudice argument, this Court should reverse and remand for a new trial. *See State v. Roberts*, 2015 UT 24, ¶¶19-20, 345 P.3d 1226 (holding that the State risks default where it “fails to respond to the merits of an appellant’s argument”); *Broderick v. Apartment Management Consultants, L.L.C.*, 2012 UT 17, ¶¶19-20, 279 P.3d 391 (accepting appellant’s claim where appellee failed to address argument). Alternatively, if this Court chooses to address prejudice, this Court should apply the harmless beyond a reasonable doubt standard because the State does not challenge its application. *See Roberts*, 2015 UT 24, ¶¶19-20; *Broderick*, 2012 UT 17, ¶¶19-20; Aplt.Br. 26-33. In any event, this Court should reverse and remand for a new trial because, as explained in opening, Instruction 18 was prejudicial even under the traditional prejudice standard. *See* Aplt.Br. 26-33.<sup>2</sup>


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<sup>2</sup> As stated in opening, Walker was originally granted probation, but the trial court later imposed the zero-to-five year prison commitment because Walker filed a motion to review sentence and request for prison commitment. *See* Aplt.Br. 3; *see also* Addendum A (Sentence, Judgment, Commitment, dated April 13, 2015). The record shows that the trial court imposed strict terms of probation, which included 365 days in jail “with no credit, no good time, and no ankle monitor,” “[c]omplete 180 AA classes in 180 days,” “[s]ubmit to weekly drug and alcohol tests,” and “complete the CATS Program.” *See* R.145-46. Walker would like the Court to know that he filed the motion to review sentence and requested to go to prison because he was concerned about the strict terms of probation imposed by the trial court. *See* R.145-46.

**CONCLUSION**


Walker asks this Court to reverse and remand for a new trial.

SUBMITTED this 18<sup>th</sup> day of April, 2016.

  
\_\_\_\_\_  
LORI J. SEPPI  
Attorney for Appellant

**CERTIFICATE OF COMPLIANCE**

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 1,129 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

  
\_\_\_\_\_  
LORI J. SEPPI

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Court of Appeals, 450 South State, 5<sup>th</sup> Floor, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 18<sup>th</sup> day of April, 2016.

Lori Seppei

DELIVERED this 18<sup>th</sup> day of April, 2016.

[Signature]

Tab A

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

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STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCING REVIEW  
 : SENTENCE, JUDGMENT, COMMITMENT  
 :  
vs. : Case No: 141904012 FS  
TIMOTHY NOBLE WALKER, : Judge: MARK KOURIS  
Defendant. : Date: April 13, 2015  
Custody: Salt Lake County Jail

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PRESENT

Clerk: sierras

Defendant

Defendant's Attorney(s): SIKORA, MICHAEL R

DEFENDANT INFORMATION

Date of birth: August 30, 1963

Sheriff Office#: 378775

Audio

Tape Number: W48 Tape Count: 8.54-8.56

This case involves domestic violence.

CHARGES

1. AGGRAVATED ASSAULT - 3rd Degree Felony

Plea: Not Guilty - Disposition: 02/24/2015 Guilty

HEARING

Defendant requests his sentence be amended.

SENTENCE PRISON

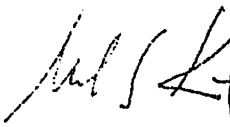
Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

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

Case No: 141904012 Date: Apr 13, 2015

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Date: 4-14-15

  
\_\_\_\_\_  
MARK KOWALSKI  
DISTRICT COURT JUDGE  
SALT LAKE

