

2016

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

Utah Court of Appeals

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Case No. 20150317-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

TIMOTHY NOBLE WALKER,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for aggravated assault, a third degree felony, in the Third Judicial District, Salt Lake County, the Honorable Mark Kouris presiding

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Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for aggravated assault, a third degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2012).

INTRODUCTION

Defendant punched his wife and then strangled her to unconsciousness in a violent domestic dispute. He was charged with aggravated assault causing serious bodily injury. The trial court also instructed jurors on two lesser-included offenses: aggravated assault likely to cause serious bodily injury, and assault. The jury convicted Defendant of the first lesser-included offense, aggravated assault likely to cause serious bodily injury.

The only question on appeal is whether the trial court’s strangulation instruction—“strangulation to the point of unconsciousness constitutes serious bodily injury”—comported with Utah law. It did. The Utah Supreme Court has long held that strangulation to unconsciousness constitutes serious bodily injury as a matter of law. Thus, the trial court’s strangulation instruction was a correct statement of law that this Court is bound to uphold.

STATEMENT OF THE ISSUE

Did the trial court properly instruct the jury that strangulation to unconsciousness is serious bodily injury?

Standard of Review. Jury instructions are reviewed for correctness. *Green v. Louder*, 2001 UT 62, ¶14, 29 P.3d 638.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

Utah Code Ann. § 76-5-103 (West 2015) (aggravated assault);

Utah Code Ann. § 76-1-601 (West 2015) (serious bodily injury).

STATEMENT OF THE CASE

A. Summary of facts.¹

Defendant punched his wife and then strangled her to unconsciousness in a violent domestic dispute. R162:81,83-84,86-88,108,111.

* * *

Defendant and Ann Hilton had been married less than a month when Ann's work transferred her to Utah from South Carolina. R162:102-03. The couple moved to Salt Lake City with Ann's then 14-year-old son, Anthony. R162:73. Defendant, Ann, and Anthony, stayed in a motel when they first arrived. R162:104. Defendant drove Ann to and from her work; he was not working. R162:105.

After Defendant picked up Ann from work on 15 January 2015, the couple began drinking and arguing a little in their motel room. R162:92,105. At one point, Defendant got into bed and put his drink on the nightstand. R162:76. Ann took the drink off the nightstand and put it in the freezer. *Id.* Defendant got out of bed, removed the drink from the freezer, and put it back on the nightstand. *Id.* After Ann then poured the drink down the sink, Defendant got back out of bed and "cold cocked" her on the right side of

¹ Because this is an appeal from a jury verdict, the State presents the facts in the light most favorable to the verdict. *See State v. Bond*, 2015 UT 88, ¶13, n.2, 361 P.3d 104.

her face. R162:76-77,130. Ann “fell against the refrigerator” and “slid halfway down to the floor,” “holding her face.” R162:78. Defendant lay back down on the bed. R162:78.²

Ann got back up and began searching Defendant’s jacket for her debit card and the keys to the family van. R162:78. Upon finding her keys, Ann put them in her pocket. R162:79. Defendant again got out of bed, came up behind Ann, and – after putting his right arm around her throat – lifted Ann onto her toes, using his left hand to search her pockets for the van keys. R162:79,81,110-111. When Defendant could not find the keys, he grabbed his right hand with his left and – again squeezing Ann’s throat – lifted her completely off the floor. R162:80.

Anthony watched his mother struggle unsuccessfully to free herself. *Id.* at 84. He also heard her make “choking sounds” just before “her eyes like rolled back in her head and she went limp.” *Id.* at 84-85. Defendant then “pushed” Ann away from him and – after grabbing the van keys and his belongings – fled the motel room. *Id.* at 86-87. Ann “fell against the wall with her face and just sat there,” remaining unconscious for approximately a minute. *Id.* at 86-88. Anthony dialed 911. R162:88.

² While Anthony recalled that the punch knocked his mother down, Ann did not recall falling after Defendant hit her. *See* R162:109. But she did remember Defendant saying, “Yes, I hit the bitch this time.” *Id.*

Officer Fano, from the South Salt Lake Police Department, responded. R162:134. He noted visible marks above Ann's right eye, and "what appeared to be very fresh red marks on her neck," which itself "appeared swollen." R162:139; *see also* State's Exhibits 3-5. Ann declined to be taken to a hospital because she did not want to leave Anthony alone; in any event, none of her injuries required immediate medical attention. R162:114,149.³ Ann told Officer Fano that she had difficulty remembering what happened because she was in a state of shock. R162:112. After talking to Anthony, Officer Fano called Defendant's cellphone. R162:138,141. Defendant did not answer the first few calls. R162:141. Eventually, Defendant answered, and after the officer identified himself, Defendant said, "I'm driving out of the state, don't worry about me," and hung up. R162:141. Officer Fano called Defendant a second time and received the same response. R162:142. When Officer Fano called a third time, Defendant said "there's nothing to talk about," "you can believe whatever you want to believe," and "suck my d—

³Ann saw a doctor approximately 10 days later for an unrelated thumb injury, and because her "head was hurting." R162:125. The medical record of that visit indicated that Ann was "assaulted about one week ago," that she continued "to have pain, face, neck and left thumb," that she "was hit to the face and choked," but that she was experiencing "no numbness, no weakness," although her neck was "[p]ositive for pain with movement." R162:131. The report further stated that Ann had "[m]ild, tender, swelling around the right eye," and that her neck muscles were tender. *Id.*

k," before hanging up. R162:142. Further attempts to call Defendant were unsuccessful. R162:142.

B. Summary of proceedings.

Defendant was charged with aggravated assault causing serious bodily injury, a second degree felony, Utah Code Ann. § 76-5-103(1)(b), (2)(b) (West 2015).⁴ R1-2. "'Serious Bodily Injury' means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." Utah Code Ann. § 76-1-601(11) (West 2015).

Before trial, both parties filed notice that they planned to call experts to testify about strangulation. *See* R35,81.

The State also proposed a jury instruction that stated the statutory definition of "serious bodily injury"—i.e., "injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." R77 (quoting Section 76-1-601(11)). Additionally, the State

⁴ The State cites to the current aggravated assault statute because, although the 2015 amendment rewrote subsection 76-5-103(1), it effected no substantive change. Rather, the 2015 amendment merely incorporated the language of the assault statute that the aggravated assault statute had previously referenced solely by citation.

requested an instruction “that strangulation to the point of unconsciousness constitutes serious bodily injury.” R78.

Defense counsel opposed the strangulation instruction on the ground that it took “that factual decision that the jury [has] to make on that particular element out of their hands” and violated his right to have the “jury find unanimously and beyond a reasonable doubt” “every element of the offense.” R162:4 (pertinent transcript pages are attached in Addendum B). Defense counsel argued that his expert would testify that it was possible to choke someone to unconsciousness without causing serious bodily injury. R162:4-5. Counsel argued that the instruction was akin to the trial court improperly “taking judicial notice of a particular set of facts and informing the jury that this set of facts has this legal consequence.” R162:6.

The prosecutor argued that the proposed strangulation instruction was based on two Utah Supreme Court decisions, *State v. Speer*, 750 P.2d 186 (Utah 1988), and *State v. Fisher*, 680 P.2d 35 (Utah 1984), both holding that strangulation is serious bodily injury. R162:6-10. The prosecutor disputed that the proposed strangulation instruction took an element of aggravated assault from the jury; rather, it was “an instruction on what the law is. The jury is still the finder of fact.” R162:10-11. For example, the jury still had to determine whether the evidence supported beyond a reasonable doubt that

Defendant strangled Ann, and if so, whether he strangled her to unconsciousness. R162:11,15. Finally, the prosecutor disputed that the defense expert should be allowed to testify that unconsciousness did not constitute serious bodily injury. R162:11,14.

On rebuttal, defense counsel reiterated that the proposed strangulation instruction violated Defendant's constitutional right to a jury verdict based on proof beyond a reasonable doubt. R162:19. Defense counsel also clarified that his expert would not testify that unconsciousness did not constitute serious bodily injury; rather, he would "explain . . . the sort of different levels of injury . . . without making that legal conclusion." R162:20.

The trial court ruled that the State's proposed strangulation instruction was "a correct statement of law," and adopted it. R162:21; *see also* R109 (Instruction 18) (copies of all pertinent Instructions are attached in Addendum C).

The State ultimately elected not to call an expert. Defendant presented expert testimony from a former emergency room doctor—Dr. Rothfeder. *See* R162:156-166. Rothfeder testified that strangulation can result in two types of injuries—i.e., neck fractures and brain damage. R162:158-159. While fractures could occur in a matter of seconds, it would

take approximately 2-3 minutes of sustained compression to cause brain damage. R162:159,165. According to Rothfeder, it was "not realistic that 15 seconds of manual compression" would "cause death by brain damage." R162:165. However, applying pressure to the carotid sinus could cause someone to faint in as little as ten to fifteen seconds, but the person would also quickly recover once the pressure was removed. R162:161. Rothfeder explained that this type of "submission hold" is used by professional cage fighters because it "is specifically aimed at putting pressure on the carotid sinus and the carotid artery so people go to sleep in, you know, maybe 10 seconds if that." *Id.* Rothfeder also described the physical symptoms of a strangulation injury, e.g., petechia, or pin-sized hemorrhages "in the whites of the eyes," and "in the skin of the face." R162:164. Also, "ligature marks," or "bruising from gripping and fingertips," and "cracks or fractures in the neck cartilages." *Id.* According to Rothfeder, an intoxicated person's brain is "more fragile." *Id.*

On cross examination, Rothfeder acknowledged that he had not worked in an emergency room for nearly a decade, and that he had not seen any strangulation patients in that time. R162:167-168. He also acknowledged that it was possible for a person to be strangled to unconsciousness without exhibiting any signs of petechial hemorrhage or

the other symptoms he described. *See* R162:171-172. He also affirmed that he had never conducted any original research or published any articles or books, including chapters in books, on strangulation; nor had he read any books on strangulation. R162:172.

The trial court instructed jurors on aggravated assault causing serious bodily injury, *see* R111 (Instruction 20), and two lesser included offenses: aggravated assault likely to cause serious bodily injury, and assault, *see* R108,110,112-113 (Instructions 17,19,21,&22). The trial court included instructions on bodily injury—i.e., “physical pain, illness or an impairment or physical condition,” an element of the lesser-included offense of assault, and serious bodily injury—i.e., “injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death,” an element of both the charged offense (aggravated assault *causing* serious bodily injury) and the first lesser-included offense (aggravated assault *likely* to cause serious bodily injury). R108 (Instruction 17). As noted, the trial court also instructed jurors that “strangulation to the point of unconsciousness constitutes serious bodily injury.” R109 (Instruction 18).⁵

⁵ Copies of pertinent instructions are attached in Addendum B.

In closing, the prosecutor argued that jurors should convict Defendant of aggravated assault causing serious bodily injury, as opposed to either of the two lesser included offenses, because the evidence showed that Defendant strangled Ann to unconsciousness. *See* R162:196-200.

Defense counsel disputed that Defendant choked Ann to unconsciousness, challenging both Ann and Anthony's credibility on the basis that their "memories have changed about what happened," and that "the allegations just seem to get worse as time goes by." R162:204. Counsel also emphasized Rothfeder's testimony that it would take two to three minutes of choking to induce brain injury or death, and that while strangling someone for ten to fifteen seconds could cause unconsciousness, the person could also quickly regain consciousness and go "back to normal." R162:206. But even if Ann did pass out here, counsel disputed whether that was a result of Defendant's strangulation or of Ann hitting her head when she fell. R162:206,210.

Counsel also argued that jurors should acquit Defendant of the charged and lesser-included offenses, but acknowledged that Ann suffered bodily injury; therefore, the lesser-included-offense of simple assault made "the most sense." R162:207. In support, counsel argued that temporary

unconsciousness did not constitute serious bodily injury under the statutory definition of serious bodily:

That is not protracted injury, that is not permanent disfigurement, that is not impairment of the function of any bodily member or organ or creating a substantial risk of death. Not all choking situations are created equally and this was one where it should have never happened if it happened, but . . . Ann went on with her life without interruption.

R162:208. Because Ann suffered at most temporary unconsciousness, counsel argued that the State had not proven beyond a reasonable doubt that she suffered serious bodily injury. R162:209-10. Defense counsel concluded that the evidence did not therefore support "either of the varieties" of aggravated assault in the jury instructions and jurors should therefore convict Defendant of the lesser-included offense of assault: "This was an assault, plain and simple, this was an assault and that's how you should come back with your verdict." R162:210.

On rebuttal, the prosecutor reiterated that under Utah law, "strangulation to the point of unconsciousness constitutes serious bodily injury." R162:213. Jurors thus needed only to determine whether Ann in fact lost consciousness. *Id.* If jurors were "firmly convinced that she was strangled to unconsciousness," then Defendant "was guilty of aggravated assault with serious bodily injury. It's that simple." *Id.*

During deliberations, the jury asked the trial court to define “constitutes” as that term was used in Instruction 18—the strangulation instruction: “What is the definition of constitutes as in Instruction 18?” R162:221; *see also* R117. After conferring with the parties, the trial court instructed the jury as follows: “Use the common and ordinary meaning of the word. A dictionary meaning is to amount to or add up to.” R162:224. Defense counsel objected to only the last sentence of the instruction, where the trial court provided an actual dictionary meaning of the term. *Id.*

The jury convicted Defendant of the first lesser-included offense, aggravated assault likely to cause serious bodily injury. R87. The trial court imposed the statutory prison term of zero-to-five years. R145. The trial court then suspended the prison term and placed Defendant probation for 48-months. *Id.* Thereafter, at Defendant’s request, the trial court amended the sentence to re-impose the statutory prison term. R150. Defendant timely appealed. R152.

SUMMARY OF ARGUMENT

Defendant argues that the trial court’s strangulation instruction—“strangulation to the point of unconsciousness constitutes serious bodily injury”—did not comport with Utah law and thus took an element away from the jury. But the Utah Supreme Court has long held that strangulation

to unconsciousness constitutes serious bodily injury as a matter of law. Accordingly, the trial court's instruction was a correct statement of Utah law that this Court is bound to uphold.

ARGUMENT

I.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT STRANGULATION TO UNCONSCIOUSNESS IS SERIOUS BODILY INJURY

Defendant argues that the trial court's strangulation instruction took an element away from the jury in violation of the Sixth and Fourteenth Amendments. R109 (Instruction 18); *see* Aplt.Br.12. Defendant argues that "whether an act of choking constitutes force likely to cause serious bodily injury and whether the injury caused by an act of choking constitutes serious bodily injury are questions for the jury." Aplt.Br.15. In support, Defendant cites a sufficiency case from the Utah Supreme Court, two cases from this Court, "extra-jurisdictional cases," and Utah's "non-criminal code." *See* Aplt.Br.19-25. But under decades-old authority from the Utah Supreme Court, strangulation to unconsciousness is serious bodily injury as a matter of law. *See State v. Fisher*, 680 P.2d 35, 37 (Utah 1984). The trial court's strangulation instruction was thus a correct statement of law that this Court is bound to uphold.

* * *

Under Utah's graduated statutory scheme, a person commits assault, a class B misdemeanor, when, with unlawful force or violence, he "causes bodily injury to another or creates a substantial risk of bodily injury to another." Utah Code Ann. § 76-5-102(1)-(2) (West 2015). "'Bodily injury' means physical pain, illness, or any impairment of physical condition." Utah Code Ann. § 76-1-601(3) (West 2015).

A person is guilty of aggravated assault, a third degree felony, when the assault is accomplished by "means or force *likely* to produce death or serious bodily injury." Utah Code Ann. § 76-5-103(1)(b)-(2)(a) (emphasis added). A person is guilty of aggravated assault, a second degree felony, when the assault "*results* in serious bodily injury." Utah Code Ann. § 76-5-103(2)(b) (emphasis added). "Serious bodily injury" is "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." Utah Code Ann. § 76-1-601(11).

For purposes of the aggravated assault statute, the Utah Supreme Court has held that strangulation to unconsciousness is serious bodily injury as a matter of law. *See Fisher*, 680 P.2d at 37. In *Fisher*, the defendant fatally strangled a prostitute whom he suspected was having an affair with

his wife. See 680 P.2d at 36. He "was charged with three variations of second degree murder: intent to kill, intent to cause serious bodily injury, and acting under circumstances evidencing a depraved indifference to human life." *Id.* at 37. In opening statement, the prosecutor said that Fisher's friend would testify that Fisher repeatedly threatened the victim's life, declared that if he could "do away" with her, then his wife "would come back to him," and also described "different methods" that he would use to kill the victim, including strangulation. *Id.* Although Fisher's friend testified to most of these statements at preliminary hearing, and was subpoenaed to testify at Fisher's trial, the friend ultimately refused to testify "due to threats he had received from fellow inmates at the Utah State Prison." *Id.* Fisher moved unsuccessfully for a mistrial based on the prosecutor's opening statement. *Id.*

Although Fisher's friend did not testify, the State produced other evidence of Fisher's intent that "was not as strong as it would have been under the anticipated testimony," but which still "gave the jury a basis to infer [Fisher's] intent to kill" the victim. *Id.* at 38. Fisher also testified and admitted the strangulation, but claimed that he did not intend to kill the victim. *Id.* Rather, he testified that he intended only that the victim go unconscious. *Id.* at 36. The jury convicted Fisher of second degree murder,

but its general verdict did not specify which of the three variations of murder it had relied upon. *Id.* at 37.

On appeal, the supreme court upheld the trial court's denial of a mistrial on two grounds: first, notwithstanding the prosecutor's opening statement, other "independent, credible evidence" sufficed to support a jury verdict on the first variation, that Fisher intended to kill the victim. *Id.* Second, and "[m]ore importantly," the evidence amply supported a jury verdict on the second variation—i.e., intent to commit serious bodily injury—where Fisher "testified that he intentionally placed his hands on the victim's neck, that he intentionally squeezed her throat, and that he intended to 'get her to go unconscious.'" *Id.* The supreme court explained that Fisher "intentionally committed an act that is dangerous to human life (strangulation), intending to cause serious bodily injury (protracted loss or impairment of both the heart and the brain, i.e., unconsciousness)." *Id.* The supreme court therefore held that "strangulation constitutes 'serious bodily injury.'" *Id.* Given the factual context, *Fisher's* holding may be more precisely read as being that strangulation that results in unconsciousness is serious bodily injury. *See id.* The court then observed that its holding was "consistent with the case law on this question," citing, e.g., *State v. King*, 604 P.2d 923 (Utah 1979), where it had upheld a jury finding of "'serious bodily

injury'" in an aggravated sexual assault case where King strangled the victim to unconsciousness and stabbed her with scissors. *Fisher*, 680 P.2d at 37, n.3.

Shortly after *Fisher* was decided, the supreme court decided *State v. Peterson*, 681 P.2d 1210 (Utah 1984), an aggravated assault case. Peterson broke in to the victim's home and strangled her, causing her to "black out" briefly. *Id.* at 1219. On appeal, Peterson challenged the trial court's refusal to reduce his aggravated assault conviction to a simple assault. *Id.* at 1218. He argued that the evidence did not show that he caused serious bodily injury to the victim where she required no medical attention and suffered no "permanent disfigurement or protracted loss or impairment of the functions of any bodily member or organ." *Id.* at 1218-1219. He further argued that what bodily injury she did suffer "did not create a substantial risk of death." *Id.* at 1219.

But the issue in *Peterson* was not whether the defendant caused serious bodily injury. Rather, the issue was only whether he used means or force likely to produce death or serious bodily injury, because the prosecution had amended the Information to charge only that variant of aggravated assault. *Id.* The supreme court affirmed Peterson's aggravated assault conviction because he "attacked [the victim], placed his hands

around her neck and applied sufficient pressure to cause her to black out,” which conduct “clearly could have caused the death or serious bodily injury of [the victim] and was therefore sufficient under the statute.” *Id. Peterson* thus recognizes that strangulation is at least “means or force likely to cause serious bodily injury.” *Id.* Granted, in reaching this result, *Peterson* neither cited to nor acknowledged *Fisher*. But there was no reason to do so, where, unlike in *Fisher*, the State did not have to prove that Peterson intended to, or actually caused, serious bodily injury. *Peterson*, 681 P.2d at 1219.

A few years later, in *State v. Speer*, 750 P.2d 186, 191 (Utah 1988), the supreme court reaffirmed that strangulation constitutes means or force likely to cause death or serious bodily injury, even when the victim does not go unconscious. *Speer* broke into his former wife’s home and assaulted her in various ways, including dragging her by her hair back inside the home when she tried to escape and grabbing her by the throat—choking her. *Id.* at 188. When Mrs. *Speer* received a phone call during the incident, *Speer* “threw down the phone and knocked her against a dresser.” *Id.* The caller, overhearing the struggle, called police. *Id.* *Speer* was arrested shortly thereafter, and his former wife was “taken to the hospital, where she was treated and released.” *Id.*

At trial, Speer testified and “admitted choking Mrs. Speer about the throat until, by her testimony, she almost passed out.” *Id.* at 191. The trial court instructed the jury on “aggravated assault, aggravated burglary, aggravated kidnapping, and kidnapping.” *Id.* at 188. Speer did not request or receive instructions on the lesser included offenses of burglary or assault. *Id.* The aggravated assault instruction included the “means or force likely to produce death or serious bodily injury” element. *Id.* The jury ultimately acquitted Speer of kidnapping, but convicted him of both aggravated burglary and aggravated assault. *Id.*

On appeal, Speer argued that the trial court committed manifest error in not instructing the jury “on lesser included offenses of simple assault and simple burglary.” *Id.* at 190. The supreme court rejected Speer’s argument, holding that “under our statutory requirements,” Speer “would not have been entitled to instructions on the lesser offenses, even if he had requested them.” *Id.* A court is not “obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.” *Id.* (quoting Utah Code Ann. § 76-1-402(4) (1978)). The supreme court held that there was no rational basis for acquitting Speer of aggravated assault and convicting him of only assault because it was

“uncontroverted” that Speer – who had admitted choking his former wife – “used ‘force likely to cause death or serious bodily injury,’ thereby satisfying the requirements” of the aggravated assault statute, section 76-5-103(1)(b) (“other means or force likely to produce death or serious bodily injury”). *Speer*, 750 P.2d at 190. In support, the supreme court cited *Fisher*, 680 P.2d at 37, where it had earlier held that “strangulation constitutes ‘serious bodily injury.’” *Id.* at 191, n.4.

Fisher held that strangling a victim to unconsciousness constitutes serious bodily injury as a matter of law. 680 P.2d at 37. *Speer* recognized the validity of this holding. See 750 P.2d at 191, n.4. Instruction 18 therefore correctly stated the law.

Defendant nevertheless disputes that strangulation to unconsciousness is serious bodily injury as a matter of law, citing a sufficiency case from the supreme court, *State v. King*, 604 P.2d 923 (Utah 1979), two cases from this court, *State v. Bloomfield*, 2003 UT App 3, 63 P.3d 110 and *State v. Boone*, 820 P.2d 930 (Utah App. 1991), “extra-jurisdictional cases,” and Utah’s “non-criminal code.” See Aplt.Br.19-25. Defendant’s reliance on these authorities is unavailing.

First, Defendant argues that *King* somehow limits *Fisher*, or that *Fisher* did not hold that strangulation to unconsciousness is serious bodily injury

as a matter of law because it relied on *King*, and other extra-jurisdictional cases, all of which were only sufficiency cases. See Aplt.Br.19. But *Fisher's* reliance on *King* and other sufficiency cases does not limit *Fisher*. The *Fisher* court held that any error regarding the prosecutor's opening statement in that case was harmless because *Fisher's* admission—that he intended to strangle the murder victim to unconsciousness—established *as a matter of law* that he committed second degree murder. See 680 P.2d at 37. The supreme court's citation to *King* and the other sufficiency cases supports, but does not limit this holding. Indeed, the error in *Fisher* could not have been harmless if a factual issue remained about whether *Fisher* had admitted an intent to cause serious bodily injury. See *id.*

Defendant next argues that a case from this Court, *Bloomfield*, somehow limits the supreme court cases, *Fisher* and *Speer*, and that another case from this Court, *Boone*, limits yet another supreme court case, *Peterson*. See Aplt.Br.21. But even assuming that Defendant correctly characterizes *Bloomfield* and *Boone*, neither case could limit authority from a higher court—i.e. the Utah Supreme Court. See *State v. Menzies*, 889 P.2d 393, 399, n.3 (Utah 1994) (recognizing “lower courts are obliged to follow the holding of a higher court” under vertical stare decisis).

In *Bloomfield*, the defendant beat the victim to unconsciousness – the victim did not regain consciousness until the next day – and the question on appeal was whether beating someone to unconsciousness satisfied the “serious bodily injury” element of aggravated robbery. 2003 UT App 3, ¶18. As Defendant points out, *Bloomfield* observes that no Utah case had previously addressed this question directly. *See id.* (“No Utah cases have directly addressed this question.”); *see also* Utah Code Ann. § 76-6-101(11) (defining serious bodily injury).⁶ However, *Bloomfield* goes on to recognize that “several” cases “suggest that a jury may find that an assault resulting in temporary unconsciousness meets the statutory definition of serious bodily injury.” *Id.* (citing, e.g., *Peterson*, 681 P.2d 1219, and *Fisher*, 680 P.2d at 37). *Bloomfield* thus correctly holds that it was “‘within the province of the jury to consider the means and manner by which the victim’s injuries were inflicted along with the attendant circumstances’ in determining whether Bloomfield caused serious bodily injury.” *Id.* The Court upheld Bloomfield’s aggravated robbery conviction because the evidence “was sufficient for the jury to determine that [Bloomfield’s] beating” of the victim

⁶ The State cites the current statute which has been renumbered since *Bloomfield* was decided.

“caused serious bodily injury within the meaning of” the aggravated robbery and serious bodily injury statutes. *Id.*

In arguing that *Bloomfield* somehow limits *Fisher* and *Speer*, Defendant apparently reads *Bloomfield*'s holding that “a jury *may* find that an assault resulting in temporary unconsciousness” is serious bodily injury, to mean that a jury *may* also find to the contrary – i.e., that it is not serious bodily injury. See Aplt.Br.22-23. Defendant then posits that the *Bloomfield* court's observation that no Utah case had directly addressed the question whether beating someone to unconsciousness is serious bodily injury somehow limits *Fisher* and *Speer*. See Aplt.Br.22-23. But this observation does no such thing.

Turning first to *Fisher*, the issues in *Fisher* and *Bloomfield* were distinct. As explained, *Fisher* held that strangulation to unconsciousness is serious bodily injury because that act directly causes protracted loss or impairment of both the heart and brain. *Fisher*, 680 P.2d at 37. *Bloomfield* addressed a different question – i.e., whether beating someone to unconsciousness is serious bodily injury. *Bloomfield*, 2003 UT App 3, ¶18. Thus, *Bloomfield*'s observation that no court, including the *Fisher* court, had addressed this precise question does not somehow limit *Fisher*. Rather, *Fisher* supports the *Bloomfield* holding. If, as *Fisher* holds, strangulation to unconscious is

serious bodily injury as a matter of law, *see Fisher*, 680 P.2d at 37, then an assault resulting in unconsciousness is necessarily serious bodily injury as a matter of law, *see Bloomfield*, 2003 UT App 3, ¶18. In any event, *Bloomfield* is a decision of a lower court and thus could not—even if it purported to—limit *Fisher*. *See Menzies*, 889 P.2d 393, 399, n.3.

The same holds true for Defendant's suggestion that *Bloomfield* limits *Speer*, which case *Bloomfield* does not even cite to or acknowledge. *See Bloomfield*, 2003 UT App 3, ¶18; *see also* Aplt.Br.21. *Speer*, like *Fisher*, addressed a different issue than *Bloomfield*. The issue in *Speer* was whether strangulation is means or force likely to cause serious bodily injury. *See Speer*, 750 P.2d at 191. Thus, *Bloomfield's* recognition that beating someone to unconsciousness is serious bodily injury does not limit *Speer*. Rather, *Speer* reinforces *Bloomfield's* holding that it is within the province of a jury to find that an assault that *results* in unconsciousness is serious bodily injury. 2003 UT App 3, ¶18. But again, even if *Bloomfield* had purported to do so, it could not limit *Speer*. *See Menzies*, 889 P.2d 393, 399, n.3.

As for Defendant's reliance on *Boone*, he incorrectly characterizes *Boone* as a supreme court opinion that purports to limit another supreme court opinion, *Peterson*. *See* Aplt.Br.21. But *Boone* is a court of appeals case; thus, even if *Boone* purported to limit *Peterson* it could not have done so. *See*

Menzies, 889 P.2d at 399, n.3. Moreover, *Boone* is an aggravated burglary case that turned on the definition of “bodily injury,” not “serious bodily injury.” See *Boone*, 820 P.2d at 936. In any event, to the extent that Defendant reasonably characterizes *Boone* as suggesting that *Peterson* “noted that strangulation to the point of brief unconsciousness did not constitute serious bodily injury,” Aplt.Br.21 (citing *Boone*, 820 P.2d at 936), both Defendant and *Boone* mischaracterize *Peterson*.

As shown, *Peterson* interpreted a former version of the aggravated assault statute and recognized that while one subsection of that statute required proof of intent to cause serious bodily injury, the subsection *Peterson* was charged under required “only that the actor used means or force likely to have that result.” *Peterson*, 681 P.2d at 1219. Thus, the supreme court was not asked to consider—and did not have to decide—if strangulation with unconsciousness constituted serious bodily injury in *Peterson*. *Id.*

Finally, Defendant’s reliance on “extra-jurisdictional cases not cited in *Fisher*,” and Utah’s “non-criminal code” is as unavailing as his reliance on *King*, *Bloomfield*, and *Boone*. Aplt.Br.20,25. Regardless of what courts in other states may have decided, *Fisher* controls in Utah and has interpreted section 76-1-601(11) to include strangulation to unconsciousness as a matter

of law. *See Fisher*, 680 P.2d at 37. It is similarly insignificant that the other definitions of serious bodily injury in Utah's criminal or civil code may or may not expressly include unconsciousness. Section 76-1-601(11) controls the definition of serious bodily injury for purposes of the aggravated assault statute and the Utah Supreme Court has interpreted that section to include strangulation to unconsciousness. *See Fisher*, 680 P.2d at 37.

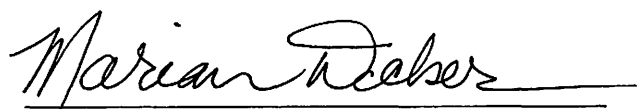
Given all of the above, the trial court's strangulation instruction was a correct statement of Utah law that this Court must uphold.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on March 23, 2016.

SEAN D. REYES
Utah Attorney General

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MARIAN DECKER
Assistant Attorney General
Counsel for Appellee

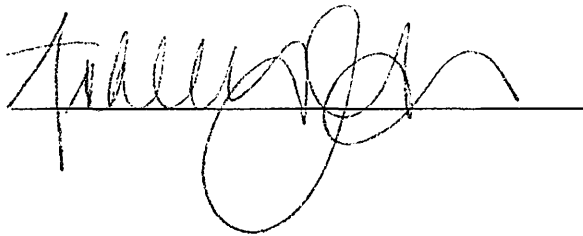
CERTIFICATE OF SERVICE

I certify that on March 23, 2016, two copies of the Brief of Appellee were mailed hand-delivered to:

Lori J. Seppi
Michael R. Sikora
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300 Salt Lake City, Utah 84111

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.

A handwritten signature in black ink, appearing to read "Michael R. Sikora", is written over a horizontal line. The signature is cursive and somewhat stylized.

Addenda

Addenda

Addendum A

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5. Offenses Against the Person (Refs & Annos)
Part 1. Assault and Related Offenses

U.C.A. 1953 § 76-5-103

§ 76-5-103. Aggravated assault--Penalties

Currentness

(1) Aggravated assault is an actor's conduct:

(a) that is:

(i) an attempt, with unlawful force or violence, to do bodily injury to another;

(ii) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(iii) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another; and

(b) that includes the use of:

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

(ii) 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.

Credits

Laws 1973, c. 196, § 76-5-103; Laws 1974, c. 32, § 10; Laws 1989, c. 170, § 2; Laws 1995, c. 291, § 5, eff. May 1, 1995; Laws 2010, c. 193, § 4, eff. Nov. 1, 2010; Laws 2015, c. 430, § 2, eff. May 12, 2015.

Notes of Decisions (140)

U.C.A. 1953 § 76-5-103, UT ST § 76-5-103
Current through 2015 First Special Session

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West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 1. General Provisions (Refs & Annos)
Part 6. Definitions

U.C.A. 1953 § 76-1-601

§ 76-1-601. Definitions

Currentness

Unless otherwise provided, the following terms apply to this title:

- (1) "Act" means a voluntary bodily movement and includes speech.
- (2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.
- (3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.
- (4) "Conduct" means an act or omission.
- (5) "Dangerous weapon" means:
 - (a) any item capable of causing death or serious bodily injury; or
 - (b) a facsimile or representation of the item, if:
 - (i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or
 - (ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.
- (6) "Grievous sexual offense" means:
 - (a) rape, Section 76-5-402;
 - (b) rape of a child, Section 76-5-402.1;
 - (c) object rape, Section 76-5-402.2;

- (d) object rape of a child, Section 76-5-402.3;
 - (e) forcible sodomy, Subsection 76-5-403(2);
 - (f) sodomy on a child, Section 76-5-403.1;
 - (g) aggravated sexual abuse of a child, Subsection 76-5-404.1(4);
 - (h) aggravated sexual assault, Section 76-5-405;
 - (i) any felony attempt to commit an offense described in Subsections (6)(a) through (h); or
 - (j) an offense in another state, territory, or district of the United States that, if committed in Utah, would constitute an offense described in Subsections (6)(a) through (i).
- (7) "Offense" means a violation of any penal statute of this state.
- (8) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.
- (9) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.
- (10) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.
- (11) "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.
- (12) "Substantial bodily injury" means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.
- (13) "Writing" or "written" includes any handwriting, typewriting, printing, electronic storage or transmission, or any other method of recording information or fixing information in a form capable of being preserved.

Credits

Laws 1973, c. 196, § 76-1-601; Laws 1989, c. 170, § 1; Laws 1995, c. 244, § 1, eff. May 1, 1995; Laws 1995, c. 291, § 1, eff. May 1, 1995; Laws 1996, c. 205, § 26, eff. April 29, 1996; Laws 2007, c. 339, § 2, eff. April 30, 2007.

Addendum B

15-05050-12

IN THE THIRD DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : Case No. 141904012 FS
 Plaintiff, : Appellate Court Case No. 20150317
 v :
 TIMOTHY NOBLE WALKER, :
 Defendant. : With Keyword Index

JURY TRIAL FEBRUARY 24, 2015


BEFORE

THE HONORABLE MARK KOURIS

FILED DISTRICT COURT
Third Judicial District

MAY 15 2015

SALT LAKE COUNTY

By:  Deputy Clerk

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

FILED
UTAH APPELLATE COURTS

JUN 22 2015

20150317-CA

ORIGINAL

APPEARANCES

For the Plaintiff: PETER D. LEAVITT
Deputy District Attorney

For the Defendant: MICHAEL R. SIKORA
Attorney at Law

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1 SALT LAKE CITY, UTAH; FEBRUARY 24, 2015

2 JUDGE MARK KOURIS

3 (Transcriber's note: Identification of speakers
4 may not be accurate with the audio recordings.)

5 PROCEEDINGS

6 THE COURT: Good morning. I've assembled, as you
7 can see, a preliminary set of instructions that I put
8 together last night that you can look through when you have a
9 minute. That said, I know that we want to talk about the
10 strangulation instruction that Mr. Leavitt has offered. I've
11 had a chance to read both cases that you refer to last night.

12 I guess, Mr. Sikora, response to that?

13 MR. SIKORA: Yes, just one moment, Your Honor.

14 Your Honor, I think the appropriate instruction to
15 inform the jury of what serious bodily injury is, is actually
16 the definition of serious bodily injury under Utah law which
17 is 76-1-601(11) and that definition is, "The term serious
18 bodily injury means bodily injury that creates or causes
19 serious permanent disfigurement, protracted loss or
20 impairment of the function of any bodily member or organ or
21 creates a substantial risk of death. I think what the State
22 has done here is taken a case, that particular factual
23 pattern in a case and then interweaved that factual pattern
24 with the jury instruction that it wants and I don't think
25 that that's the appropriate way to do it.

1 THE COURT: Let me ask by the same token, it seems
2 like you've done a very similar thing with regard to all the
3 self defense instructions. Why -

4 MR. SIKORA: The self defense -

5 THE COURT: - don't we just take the self defense
6 statutory instruction and give that to them?

7 MR. SIKORA: Well, I'm going to be removing that
8 anyway because we're not going to be running that defense.

9 THE COURT: Oh, okay.

10 MR. SIKORA: Yeah, but most of the defense - and
11 I'd have to know, you know, which ones you're talking about
12 because some of those I am just parroting the statute.

13 THE COURT: Right, but there are others that come
14 directly out of cases that you pulled.

15 MR. SIKORA: That may be. The problem now is we're
16 talking about an element.

17 THE COURT: Okay.

18 MR. SIKORA: We're talking about an element of the
19 offense which is the jury has to find serious bodily injury
20 in order to convict my client. Now, what is happening is
21 there is a particular factual scenario that the Court is
22 telling the jury in that jury instruction, this is serious
23 bodily injury.

24 THE COURT: But isn't that what the Supreme Court
25 has told us? I mean, the reason we're doing that because the

1 Supreme Court in that one instance has said this is the
2 definition and by the way, this qualifies under the
3 definition, right?

4 MR. SIKORA: Well, the question then becomes, is
5 that really - I'm not sure though that's what the Supreme
6 Court is saying in those two cases.

7 THE COURT: Oh, okay.

8 MR. SIKORA: Okay. Because what the Supreme Court
9 is not saying in either of those cases is that they're not
10 making that connection to an appropriate jury instruction in
11 a given criminal case. They're saying based on our review of
12 this person's conviction, we believe that the conviction
13 should be affirmed and that under the circumstances
14 presented, the choking in this case rises to the level of
15 serious bodily injury.

16 I think if you read that too far, you're then
17 saying that a defense, the defendant is actually foreclosed
18 from even arguing otherwise in a case. It almost appears as
19 sort of, you know, to look at the civil prospective of it,
20 it's almost being used as fact preclusion or collateral
21 estoppel, that now we're being estopped from even arguing
22 that choking to the point of unconsciousness, if that's what
23 happened, rises to the level of serious bodily injury. The
24 jury is being told that choking to the point of
25 unconsciousness rises to the level of serious bodily injury.

1 You're basically taking that factual decision that the jurors
2 have to make on that particular element out of their hands
3 and I think it runs very close then at that point to
4 violating my client's right to have the jury find unanimously
5 and beyond a reasonable doubt of every element of the offense
6 because it almost is getting very close and maybe is the
7 equivalent of a judicial finding and then dictating to the
8 jury, this has already been proven. That's my concern with
9 that particular element, that I think it does run very close,
10 if not over the line of violating my client's constitutional
11 right to reasonable doubt on every element of the offense.

12 THE COURT: Well, if we argue it backwards then,
13 are you saying that there's a possibility that you could
14 choke a person to unconsciousness and there could be a
15 situation where that would not be serious bodily injury?

16 MR. SIKORA: Yes, I am and that's -

17 THE COURT: Tell me what -

18 MR. SIKORA: - that's -

19 THE COURT: - that would -

20 MR. SIKORA: - what my medical expert will talk
21 about. I've designated Dr. Rothfeder as my expert in this
22 case and he's going to say that there are ways that
23 unconsciousness might occur after a very short period of
24 time, even 10 seconds which is what the evidence is in this
25 case, the State's evidence is in this case, but as soon as

1 the pressure is released, everything goes back to normal and
2 there is no serious bodily injury. So the one thing - that's
3 the other thing, in that particular - in neither of those
4 cases does it appear that there was any scientific evidence,
5 it looks like the appellate court just sort of concluded
6 based on no particular science that serious bodily injury
7 results from choking to the point of unconsciousness. In one
8 of those cases I'm not sure that unconsciousness even
9 occurred as I recall.

10 Here's some of the examples I want to bring up. If
11 this is legitimate, if this is a kosher way of creating a
12 jury instruction, of blending the facts with the law, then I,
13 we'd also get into that situation with, let's say the way I
14 was thinking about it in terms of cruel and heinous murder
15 under the aggravated assault statute. If you have a case
16 that says nine stab wounds equals cruel and heinous murder,
17 then you could have another aggravated murder case subsequent
18 to that where maybe there were 12 stab wounds and the jury
19 would be told in a jury instruction, you are, you are
20 instructed that nine or more stab wounds to the back equals
21 cruel and heinous murder. There are any number of examples
22 of that that you can come up with where you have a reported
23 case that the Supreme Court or Court of Appeals has decided
24 and they've decided it on a particular set of facts and then
25 you can take those set of facts because that fits with the

1 prosecution's case and then form a jury instruction based on
2 the set of facts in that case. I don't think that that's an
3 appropriate way to inform the jury and I think it's an
4 unconstitutional way of informing the jury.

5 I think that my client has a right to present the
6 evidence, the jury is the fact finder, this isn't a civil
7 case and the jury has to make that determination of proof
8 beyond a reasonable doubt on each and every element of the
9 offense without basically, you know, the Court taking
10 judicial notice of a particular set of facts and informing
11 the jury that this set of facts has this legal consequence
12 and I think that's what that jury instruction does.

13 The other part of it is if you look at the State's
14 instruction, the first paragraph talks about force of means
15 likely to cause death or serious bodily injury.

16 THE COURT: Right.

17 MR. SIKORA: And I'm not sure that the cases support
18 that. I think that the cases do talk about strangulation to
19 the point of unconsciousness. That first part of it though,
20 I don't know - and maybe I read those cases sort of quickly
21 but it seemed to me that's, that was for the most part what
22 they were talking about was the unconsciousness problem, but
23 I may be wrong about that.

24 THE COURT: Mr. Leavitt?

25 MR. LEAVITT: Your Honor, first of all, just a

1 again a quick factual background, what we have a good faith
2 belief that the evidence is going to show in this case. I
3 believe the testimony of a couple of witnesses is that,
4 indeed, the allegations are that Mr. Walker, the defendant,
5 strangled the victim in this case until her eyes rolled back
6 in her head, her body went limp and she fell to the floor,
7 indicating everything, every level of unconsciousness. That,
8 yes, is very similar to these cases but what the Court is not
9 doing by giving this instruction is making a finding for
10 them. What the Court is doing is instructing them on what
11 the actual law is in the state of Utah.

12 For example, in Fisher - and do you have a copy
13 with you?

14 THE COURT: I do.

15 MR. LEAVITT: I've got a courtesy copy if you need
16 one. You all...okay.

17 So, in Fisher what that was - and a lot of Mr.
18 Sikora's example, those are sufficiency of the evidence
19 cases. If someone was convicted of something and then they
20 appealed and they said there wasn't sufficient evidence to
21 convict me of this charge and then the Court affirmed it.
22 That's not the situation here. What Fisher was, Fisher was a
23 murder case and he had strangled someone and her neck snapped
24 and she died. At trial Mr. Fisher was claiming he didn't
25 intend to kill her and so the context of this quote in Fisher

1 - of this language in Fisher and it's on, I guess Page 4 of
2 the West Law printout, it's just right before Page 38 of the
3 Reporter, they get two different ways of proving murder.
4 Intentional murder, but then there's also this, an act
5 clearly dangerous to human life intending to cause serious
6 bodily injury. So this wasn't a sufficiency of the evidence.
7 He was claiming that I didn't intend to, that he didn't
8 intend to kill them and actually the context of this is that
9 the prosecutor's statements whether about intent were
10 imperfect. That's the context of this discussion and what
11 the Court does is the Court says, Look, yeah, what the
12 prosecutor said that witness didn't testify but it doesn't
13 matter because clearly, under these facts, it wouldn't have
14 made a difference because then they go into this definition
15 of serious bodily injury. And the context, they're
16 interpreting a statute. That's what the law is. There's
17 statutes and then the courts interpret those statutes and
18 that also becomes - that's what a holding is. That's how we
19 do it and here they're interpreting that statute, serious
20 bodily injury, the exact definition that Mr. Sikora is
21 proposing the exact definition in the statute and then they
22 give the definition and they say, "the defendant's conduct
23 falls squarely within the (inaudible) second degree murder.
24 He testified he intentionally placed his hands on her neck,
25 intentionally squeezed her throat and intended her to go

1 unconscious. In other words, the defendant intentionally
2 committed an act endangering life, strangulation, intending
3 to cause serious bodily injury, i.e. protracted loss or
4 impairment of both the heart and brain, i.e.
5 unconsciousness." So they talk about strangulation and
6 unconsciousness.

7 Now, is this dicta? Is this their reasoning?
8 After that look at the words, "Our holding that strangulation
9 constitutes serious bodily injury is consistent with case law
10 on the question" and then they cite cases from other
11 jurisdictions. Now, is there a question that was a holding?
12 They used the word holding. The court's holding
13 unconsciousness is serious bodily injury. If there was any
14 question, the same court, Utah Supreme Court, four years
15 later in Spear had an issues come up where a victim was
16 strangled until she almost passed out and on that one the
17 context of this one -

18 Do you both have a copy of this one as well?

19 THE COURT: Yes.

20 MR. LEAVITT: Okay. The context of the Spear case
21 is dealing with a submitted, proposed jury instruction by the
22 defendant. He had requested an assault jury instruction
23 because again I believe that under the theory that it was a
24 force likely to cause death or serious bodily injury and so
25 the context of this again, it's not a sufficiency of the

1 evidence, it's a - sorry - and it's on Page 9 and Page 191 of
2 the Pacific Reporter, this isn't sufficiency of the evidence.
3 This is whether or not that instruction was appropriate.

4 So again, that test is going to be could a jury
5 reasonable acquit the defendant of the greater and convict
6 him of the lesser and the court, if there was any question
7 that this is a holding, that this is an actual law that's set
8 by this same court, the court in that one said - and it's
9 marked as Paragraph 11, "As for aggravated assault, the
10 defendant admitted to choking Ms. Spear, choking Ms. Spear
11 about the throat until her - and by her testimony, she almost
12 passed out. This uncontroverted testimony establishes that
13 he used force likely to cause death or serious bodily injury;
14 thereby satisfying the requirements. And if we wonder if
15 Fisher is an actual binding case law, they cite Fisher in
16 that footnote and say where we held strangulation constitutes
17 serious bodily injury. It's pretty clear what the state of
18 the law is.

19 Now let's talk about what this instruction doesn't
20 do. This instruction doesn't take away from the jury. It's
21 not the Court taking judicial notice of a certain fact.
22 That's absolutely not what it's doing. It's the Court
23 instructing the jury on what the law is in the state of Utah.
24 If the instruction said you are instructed that Ann Hilton
25 suffered serious bodily injury, that's what that would be.

1 You're instructed that Mr. Walker used force or means likely
2 to cause death or serious bodily injury, that's what that
3 would be. This is an instruction on what the law is. The
4 jury is still the finder of fact. That's the law. The facts
5 that they hear from the stand, they apply to that law. The
6 jury still has to determine whether or not she was - whether
7 or not they believe she was strangled, whether or not she
8 actually went unconscious, whether they believe any of the
9 story at all, whether they believe any of the witnesses.
10 It's like any other element that we have to prove. The
11 jury's going to apply the facts they hear during this trial
12 and see if they match what the law says.

13 THE COURT: So the expert that Mr. Sikora is
14 talking about then will be testifying on something that would
15 be completely contrary to the law; is that right?

16 MR. LEAVITT: Exactly. He shouldn't be able to do
17 that. Either way, Dr. Rothfeder can't come in here and say
18 she didn't suffer serious bodily injury, he can't say that.
19 That's a legal definition. What he can come in - he can talk
20 about the physiology of what happens to the body and whether
21 or not, you know, what happens when someone goes unconscious.
22 He certainly - even if this instruction is not given, he's
23 not going to come in and say she suffered serious bodily
24 injury. He's going to talk about what a doctor can talk
25 about. But under this law if Dr. Rothfeder is going to come

1 in and say unconsciousness in my opinion is not serious
2 bodily injury, I don't think he can do that and I'd object to
3 that testimony. I don't think it's appropriate because the
4 law says something and you can't, even if, even if an expert
5 is going to come in and say in their opinion something, if
6 their opinion conflicts with the law, the law wins. That's
7 how it works.

8 And you know, this isn't, this isn't an abnormal
9 situation. For example, let's put it on the other side of
10 the table, State vs. Watkins, everyone is pretty familiar
11 with that case. It was a case involving an aggravated
12 assault - or I'm sorry an aggravated sexual abuse of a child
13 where the defendant was charged under the theory of he
14 occupied a position of special trust, it was a couple of
15 years ago. In that case the defendant was a adult cohabitant
16 in the home which under the definition in the statute is
17 someone who occupies a position of authority. Now that case
18 they came out and they said - and they analyzed whether or
19 not the statute requires just his position of authority or
20 whether or not they have to exercise that authority in order,
21 in order to achieve lack of consent of the victim. And what
22 they did in that case is they said, Look, the statute
23 actually isn't saying this is a position of special trust.
24 They're saying - what the statute says is if it's enumerated
25 in that list, it's a position of authority. But the State

1 still has to prove that they exercised that authority, that
2 authority, they exercised that undue influence in order for
3 the person to give lack of consent and from that day forward
4 that, if, if - in that type of case, the instruction has to
5 be given, the State still must prove to you that the
6 defendant not only occupied a position of special authority
7 but exercised undue influence over the victim by way of that
8 special authority and if the defense asks for that
9 instruction, they get it 100 percent of the time because
10 that's what the Court said, that's what the law is.

11 And additionally, another example is - a case
12 that's near and dear to my heart because it was my case - Joe
13 McNairy. It was the Court interpreting the definition, again
14 the statutory definition of a dwelling in a burglary case.
15 McNairy was charged with burglary of a dwelling but the house
16 that he had burglarized was a new construction home, it had
17 never been lived in before. At trial, we argued that it was
18 a dwelling because it's, it's the typical use of the building
19 and he was convicted. He appealed that and the court said,
20 No, if, it may be its intended use but no one has ever lived
21 in it, it's a building, it's not a dwelling. From that day
22 forward, if someone, we can no longer charge a house as a
23 dwelling. Now, is there a good faith argument to be made
24 that under the definition that a new home of construction is
25 a dwelling? Absolutely. If we just look at that statutory

1 definition, can I convince the jury of it, I did; but now I
2 don't get to because the Court came down and said this is the
3 law.

4 So Dr. Rothfeder's testimony isn't appropriate if
5 he's going to come and say unconscious is not serious bodily
6 injury because that's what the law is. He can certainly come
7 in and talk about physiology, he can come in and talk about
8 people surviving, he can talk whatever he wants to but he
9 certainly can't say in my opinion this does not constitute
10 serious bodily injury because that would be contrary to the
11 law.

12 The defendant's right to a fair trial, the
13 defendant's right to due process doesn't carry over to argue
14 things that are against the law. The jury is entitled to be
15 instructed on what the appropriate law is and the appropriate
16 law in this case is extremely clear via these two cases.

17 Further, there's a - in 2010 there was a joint
18 resolution as far as the legislature is concerned that dealt
19 with strangulation to unconsciousness. They didn't correct
20 the law and in the joint resolution, they talk about it and
21 encourage - again it says that they encourage prosecutors to
22 file these as felonies which again would require force or
23 mean likely to cause death or serious bodily injury, if
24 unconsciousness is bodily injury. And the reasoning behind
25 that and behind not actually doing anything, just doing a

1 joint resolution, is on Line 32 of that copy where they
2 actually recognize Spear and Fisher, these two cases, that
3 this law in the state of Utah is well settled. The court has
4 given us an opinion, they have given us direction on it. It
5 isn't just the definition in the statute and then you need to
6 argue something that the Supreme Court said is not the case.
7 The court has spoken on this, this is an appropriate
8 instruction because it still gives the jury the province to
9 apply the facts that they are going to hear, to decide
10 whether or not she was strangled, to decide whether or not
11 she did lose consciousness, to decide whether to believe any
12 witness at all and even overall just to decide whether or not
13 we proved our case beyond a reasonable doubt. The defendant
14 is still getting every single right he's afforded by the
15 Constitution and this instruction is appropriate.

16 If you have any questions for me I'd be glad to
17 answer them.

18 THE COURT: Let's see, you have two here,
19 strangulation to the point of unconsciousness, the one above
20 it however says you're instructed strangulation constitutes
21 force, means or likely to cause serious bodily injury. That
22 one is also included in these cases? I thought the
23 strangulation part was but the other wasn't I -

24 MR. LEAVITT: If you look at, if you look at Spear-

25 THE COURT: Yes.

1 MR. LEAVITT: - I added that after reviewing
2 Spears. The original instruction I submitted only had
3 strangulation to the point of unconsciousness, serious bodily
4 injury.

5 THE COURT: Okay.

6 MR. LEAVITT: However, if you look at the Spear
7 case, she wasn't unconscious, she almost passed out. And in
8 Spear, if you look at that paragraph that I cited, it's right
9 above subsection 5 or Roman Numeral V, it says, "as for
10 aggravated assault, the defendant admitted choking her until,
11 by her testimony, she almost passed out. This uncontroverted
12 testimony established he used force likely to cause death or
13 serious bodily injury, thereby satisfying the requirements of
14 that." So that's based on that paragraph there. The
15 unconsciousness part is based on that reference to Fisher and
16 the case in Fisher.

17 THE COURT: All right. Response Mr. Sikora?

18 MR. SIKORA: Yes, very briefly. With respect so
19 Spears, I mean what isn't quoted in that particular passage
20 that Mr. Leavitt just read out was the choking was also
21 combined with Mr. Spear's statement earlier on that "this is
22 going to be our last day together." So there was definitely
23 sort of a, a context there that went well beyond what we're
24 dealing with here which was a spur of the moment sort of
25 thing that lasted maybe all of 10 seconds as far as the

1 choking, if the choking actually occurred.

2 THE COURT: Aren't you arguing just intent now?

3 MR. SIKORA: Well, I'm wondering whether intent
4 figured into the Court's analysis there. We're not really
5 sure. It looks to me like -

6 THE COURT: Well, I think the language -

7 MR. SIKORA: - (inaudible).

8 THE COURT: - says it does because it says he
9 intended to get her to go unconscious, right?

10 MR. SIKORA: Yes.

11 THE COURT: So, so -

12 MR. SIKORA: Intent and maybe even wanted to kill
13 her.

14 THE COURT: Right. So if, in fact, you can say he
15 grabbed her throat because he was trying to stop her from
16 falling off of a chair, that's one thing; or if he grabbed
17 her throat and pushed his thumbs into her windpipe, maybe a
18 jury can infer from that that he intended for her to go
19 unconscious. It seems like those are issues of fact but the
20 reality is that if they conclude that in fact he wanted her
21 to go unconscious and she did go unconscious, then it seems
22 like this jury instruction would be well taken.

23 MR. SIKORA: Well, I agree that what that case says
24 is under the facts of this case, under the facts it supports
25 serious bodily injury.

1 THE COURT: Right.

2 MR. SIKORA: The question is then, does - is the
3 State entitled to that jury instruction?

4 THE COURT: Right.

5 MR. SIKORA: One of the, one of the - another
6 example I wanted to say is what if you have a case dealing
7 specifically with serious bodily injury, not some other
8 context, but serious bodily injury and the reported case is a
9 bullet wound to the liver constitutes serious bodily injury
10 and they affirm the conviction based on that. Are you then
11 entitled to the subsequent case involving a bullet wound to
12 the liver to a jury instruction that says, you are instructed
13 that bullet wound to the liver constitutes serious bodily
14 injury? I think that maybe is more parallel to what we're
15 dealing with here. I've never seen a jury instruction like
16 that. I don't think I ever will see a jury instruction like
17 that because that, like in this case, is blending that report
18 of - the facts of a reported case with the jury instruction
19 the way the jury is going to be informed how they should sort
20 of structure their deliberations.

21 With respect to -

22 THE COURT: Well, let me interrupt you for just one
23 sec, and that is the example you give is so specific, where I
24 think the strangulation is a little less specific because
25 it's not that unusual for somebody to put their hands around

1 somebody else's throat. Comment on Mr. Leavitt's point
2 concerning the dwelling of the house, the fact that the
3 statute stops but the case law then continues and from this
4 day forward we argue the case law that that's part of a jury
5 instruction and why would this be different?

6 MR. SIKORA: And we know that. We know that but
7 because now we're talking about the constitutional rights of
8 the defendant and to a jury verdict where he is entitled that
9 that jury determine proof beyond a reasonable doubt of each
10 and every element and my position is that the way this, this
11 frames up a little bit differently because now this has the
12 real potential of taking that constitutional right away from
13 the defendant because the jury is being directed how to focus
14 their deliberations. I think that's the -

15 THE COURT: Well -

16 MR. SIKORA: - difference.

17 THE COURT: Well, doesn't the, the example given by
18 Mr. Leavitt take that providence away from the jury in favor
19 impacting the State because the State also has a right too,
20 right?

21 MR. SIKORA: The State does not have a right under
22 the Fifth and Sixth Amendments to a jury verdict based on
23 proof beyond a reasonable doubt. That is the defendant's
24 right, that's not the State's right. So that is the primary
25 way that that is different.

1 This is not - I don't know if Mr. Leavitt misspoke
2 and maybe I heard him wrong but my understanding of this is
3 this is a legislative declaration, this is not from the
4 Court, this is not judicial -

5 THE COURT: Right.

6 MR. SIKORA: - this is - I'm not sure exactly what
7 it is and I understand that they make this sort of joint
8 resolution and here's how they want law enforcement to behave
9 and how they want prosecutors to go after these cases. That
10 doesn't mean that this Court is bound by this particular
11 legislative directive.

12 THE COURT: I don't think he argued that.

13 I do believe that the -

14 MR. SIKORA: One of the things that -

15 THE COURT: - oh go ahead.

16 MR. SIKORA: - Dr. Rothfeder, if I misspoke before,
17 Dr. Rothfeder is not going to opine that choking to the point
18 of unconsciousness does not rise to the level of serious
19 bodily injury. That will not be his - he is just going to
20 explain in his view sort of the, I hate to use the word
21 serious because that's the word in the statute but what the
22 sort of different levels of injury are and without making
23 that legal conclusion. That will not be his position. I
24 don't know if it's Mr. Leavitt's position that if you adopt
25 or accept this jury instruction, that there will be no

1 medical testimony and that you will preclude any medical
2 testimony.

3 THE COURT: I don't think that's his position. I
4 think that he just can't make a legal conclusion -

5 MR. LEAVITT: Yeah, it's just going to depend on
6 what he says obviously.

7 THE COURT: Right. Well, I think that both sides
8 are very well taken. I think that the way the case law - and
9 I re-read these cases a number of times last night trying to
10 wrap my head exactly about what they're saying and I do agree
11 that I believe that this is the law of the land starting with
12 the Court of Appeals and then ending with the Supreme Court
13 that has been referenced to and I think the second statement
14 there is a correct statement of law, that is "You are further
15 instructed that strangulation to the point of unconsciousness
16 constitutes serious bodily injury" and for that reason, that
17 one will be read first. The first line, however, I don't
18 think it is - although it is stated in the case, I'm not sure
19 that's the holding. So I'm going to eliminate that part of
20 it, the second part will be used.

21 MR. LEAVITT: And Your Honor, the first
22 instructions that I submitted, I actually submitted one
23 without that first -

24 THE COURT: Oh, you did?

25 MR. LEAVITT: - and so you should have a copy of

Addendum C

INSTRUCTION NO. 17

"Assault" is:

- (a) an attempt, with unlawful force or violence, to do bodily injury to another; or
- (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.

"Bodily injury" means physical pain, illness or an impairment of physical condition.

"Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

"Unlawful" means without legal justification.

INSTRUCTION NO. 18

You are instructed that strangulation to the point of unconsciousness constitutes serious bodily injury.

Instruction No. 19

The law permits the jury to find an accused guilty of any lesser-included offense, which is included in the crime charged in the information, if consistent with the facts found by the jury from the evidence.

In this case, with regard to Count 1, you are permitted to consider both the primary offense of Aggravated Assault causing serious bodily injury and the lesser-included offenses Aggravated Assault and Assault.

If you determine that the defendant is guilty of BOTH the primary offense (Aggravated Assault causing serious bodily injury) AND the lesser-included offenses (Aggravated Assault and Assault), then you must find the defendant guilty of the primary offense (Aggravated Assault causing serious bodily injury).

Alternatively, if you determine that the defendant is not guilty of the primary offense (Aggravated Assault causing serious bodily injury), but guilty of the lesser-included offenses (Aggravated Assault and Assault), then you must find the defendant guilty of the lesser-included offense (Aggravated Assault).

Alternatively, if you determine that the defendant is not guilty of the primary offense (Aggravated Assault causing serious bodily injury), and not guilty of the lesser-included offense (Aggravated Assault) but guilty of the lesser-included offense (Assault), then you must find the defendant guilty of the lesser-included offense (Assault).

In the alternative, the defendant may be found not guilty of the primary offense or the lesser-included offenses.

INSTRUCTION NO. 20

Before you can convict the defendant, Timothy Walker, of the crime of Aggravated Assault with Serious Bodily Injury, as charged in Count I of the information, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense occurring on or about the 15th of January, 2014, in Salt Lake County, Utah;

1. That the defendant, Timothy Walker
2. intentionally, knowingly, or recklessly;
3. Committed an assault on Anne Hilton; and
4. Used force or means likely to cause death or serious bodily injury; and
5. The defendant caused serious bodily injury to Anne Hilton.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Assault as charged in Count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Count I.

INSTRUCTION NO. 21

The defendant, Timothy Walker, is charged in count 1 with the crime Aggravated Assault with Serious Bodily Injury on or about January 15th, 2014. The crime of Aggravated Assault is a lesser included offense of Aggravated Assault with Serious Bodily Injury, which you may consider instead of count 1. You cannot convict Timothy Walker of the lesser included offense of Aggravated Assault unless based on the evidence you find beyond a reasonable doubt each of the following elements:

1. That the defendant, Timothy Walker
2. Intentionally, knowingly, or recklessly;
3. Committed an assault on Anne Hilton; and
4. Used force or means likely to cause death or serious bodily injury.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Assault. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Aggravated Assault.

INSTRUCTION NO. 22

The defendant, Timothy Walker, is charged in count 1 with the crime Aggravated Assault with Serious Bodily Injury on or about January 15th, 2014. The crime of Assault is a lesser included offense of Aggravated Assault with Serious Bodily Injury, which you may consider instead of count 1. You cannot convict Timothy Walker of the lesser included offense of Assault unless based on the evidence you find beyond a reasonable doubt each of the following elements:

1. That the defendant, Timothy Walker
2. Intentionally, knowingly, or recklessly;
3. Committed an act with unlawful force of violence;
4. Causing bodily injury to another or creating a substantial risk of causing bodily injury to another.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Assault. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Assault.