

2015

## State of Utah Plaintiff/Appellee vs. Chadley Keith Calvert Defendant/Appellant

Utah Court of Appeals

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Case No. 20150213-CA

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IN THE  
UTAH COURT OF APPEALS

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State of Utah  
Plaintiff/Appellee

vs.

CHADLEY KEITH CALVERT  
Defendant/Appellant

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BRIEF OF APPELLANT

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APPEAL FROM A CONVICTION OF  
THREATENING WITH A DANGEROUS WEAPON AND AGGRAVATED  
ASSAULT IN THE THIRD DISTRICT COURT

---

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Appellant Is Not Incarcerated

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UTAH APPELLATE COURTS

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## **JURISDICTIONAL STATEMENT**

On July 1, 2014, the trial court entered judgment against Chadley Keith Calvert for Aggravated Assault, a third degree felony, Utah Code Ann. §76-5-103(1995) and Threatening Or Using A Dangerous Weapon In A Fight, a class A misdemeanor, Utah Code Ann. 76 – 10 – 506. R. 231–233. The Sentence, Judgment and Commitment, is attached as Addendum A. Calvert did not timely appeal, but filed a Motion to Reinstate the Time for Appeal. R. 237 – 241. The court granted Calvert’s Motion to Reinstate the Time to File Notice of Appeal. R. 273 – 274. From that final Order Calvert filed a timely Notice Of Appeal. R.276 – 277. This Court has original jurisdiction pursuant to Utah Code Ann. §78A-4-103(2)(e)(2012).

## **STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION**

**Issue I:** Was defense counsel ineffective during trial in failing to move to merge the Threatening with a Dangerous Weapon conviction into the Aggravated Assault?

**Standard of review:** Ineffective assistance of counsel questions require a showing that counsel’s performance was deficient, “that it fell below an objective standard of reasonableness” and that the defendant was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Merger questions are reviewed for legal correctness. *State v. Lee*, 2006 UT 5, P26, 128 P.3d 1179.

**Preservation:** Unpreserved claims before the trial court are reviewed for plain error and/or ineffective assistance of counsel. *State v. Kozlov*, 2012 UT App 114, ¶ 28, 276 P.3d 1207, 1218

**Issue II:** Did defense counsel's failure to move at sentencing that the Threatening Or Using A Dangerous Weapon charge be merged with the Aggravated Assault (dangerous weapon) constitute ineffective assistance of counsel?

**Standard of Review:** Ineffective assistance of counsel presents a mixed question of law and fact. *Menzies v. Galetka*, 2006 UT 81, ¶ 56, 150 P.3d 480, 502. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

**Preservation:** Unpreserved claims before the trial court are reviewed for plain error and/or ineffective assistance of counsel. *State v. Kozlov*, 2012 UT App 114, ¶ 28, 276 P.3d 1207.

**Issue III:** Did the court err in granting the State's 404(b) Motion?

**Standard of Review:** A trial court's decision to admit evidence under rule 404(b) is reviewed under an abuse of discretion standard. *State v. Lowther*, 2015 UT App 180, ¶ 8, 356 P.3d 173.

**Preservation:** The State filed a motion to admit prior acts of the defendant pursuant to Utah R. Evid. 404(b). R.93–108. The defendant opposed the motion. R.115–127. The State's Motion was granted in part and denied in part. R.154;R.282:30. The State called one 404(b) witness. R.282:287-299.

**Issue IV:** Did providing the prosecutor's laptop computer to the jury constitute structural error? Did trial counsel's failure to object to the prosecutor's laptop computer being supplied to the jury during deliberations constitute structural error?

**Standard of Review:** Denial of the right to a jury is a “structural defec[t] in the constitution of the trial mechanism, which def[ies] analysis by ‘harmless-error’ standards.” *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302. The deprivation of counsel during trial proceedings is a structural error. *Johnson v. United States*, 520 U.S. 461, 469, 117 S.Ct. 1544, 1549 (1997).

**Preservation:** At the close of all the evidence, the State offered its laptop computer to play a CD which was in evidence. R.284:147. No objection to that procedure was raised by the defense. *Id.* Prior to sentencing the defendant moved for arrest of judgment, Utah Rule Crim. P. 23. R. 204 – 220. The court denied the motion. R.238:21.

### **RULES, STATUTES AND CONSTITUTIONAL PROVISIONS**

Rules, statutes and constitutional provisions relevant to this appeal are included at Addendum B.

### **STATEMENT OF THE CASE**

#### **Nature of the Case, Course of the Proceedings, Disposition in the Court Below**

The State filed an Information charging Calvert with Aggravated Assault (Dangerous Weapon), Utah Code Ann. 76 – 5 – 103 (1), a third degree felony; and Threatening with or Using a Dangerous Weapon in a Fight or Quarrel, Utah Code Ann 76 – 10 – 506, a class A misdemeanor. R.1-3. Mr. Calvert waived preliminary hearing with the consent of the State and the court bound the defendant over for trial on both charges. R. 21 – 22. Defendant entered pleas of not guilty to the charges as alleged in the

Information. R. 31 – 33. The State filed a motion *in limine* to admit prior acts of the defendant pursuant to Utah R. Evid. 404(b). R. 93 – 108. The defendant opposed the motion. R. 115 – 127. Oral argument was heard prior to trial. R.282:6-30.

The court granted in part and denied in part the State's Motion. R.282:30;R.154.

Trial was held April 30, 2014 through May 1, 2014. R. 154-162; R.282, 284. The jury found the defendant guilty as to both counts. R.161, 170; R.166,167; R.284:149.

Calvert made a Motion For Arrest Of Judgment, on the basis, *inter alia*, that the prosecutor's laptop computer was taken to the jury room at the time of their deliberations. Utah Rule Crim. P. 23, R. 204-214. The State filed an Objection to Calvert's Motion . R.222-228. The parties argued the Motion to Arrest Judgment. R.238:1-20. The court denied the Motion. R.283:20-21.

The court sentenced the defendant on July 1, 2014 to the indeterminate term of zero to five years in prison on the Aggravated Assault, suspended, and 365 days in jail on the Threatening or Using a Dangerous weapon, all but 275 days suspended, *inter alia*, upon serving 90 days jail and 36 months probation. R.238:21-26;R.231-233.

The defendant filed a Motion to Reinstate the Appeal Time. R.237-231. The State opposed the Motion. R.242-250. The matter was heard and the court entered a final Order granting the Motion on December 18, 2014. R.271-272. Calvert timely appealed January 5, 2015. R.276-277.

### **STATEMENT OF FACTS**

#### **A. State's Case.**

The circumstances of this case involve a birthday party for Hugo Holguin at the home of then 13 year old Anthony Canales, and his neighbor, Hugo, and Yolanda Trujillo, on July 16, 2012. R.282:91-92,101,144,258. Yolanda and Hugo lived at 6674 So. 5500 W., West Jordan for 16 years. R.282:252. Hugo's brother Adon was present, along with a lot of young and teen aged children. R282:230, 253.

The children walked or rode their bicycles in the vicinity of Calvert's property, at 6656 S. 5500 W. R.282:93,118,124,161,195;R,284:53. Depending on the witness testifying, the children present were aged anywhere from 3 to 16. R.282:124,161. Sixteen year old Kelsey Pitts testified that she and her friends were outside riding bikes and Calvert came outside his house, really upset and started yelling profanity at them and to get off his property. R.282:195. But they we were on the sidewalk. Id. Present were Araht, Karen Holguin, Andrew Holguin's little sister Vanessa, Anthony (Canales), and three or four year old Israel. Id. She attempted to apologize but he seemed to get more angry. Id. So they went to get the parents. Id. Calvert seemed to be yelling randomly, freaking them out. R.282:209. She saw nobody do anything on his property. Id.

Araht testified that they were going to get bikes and heard him screaming. R.282:145. Andrew Holguin testified he was close by Calvert's House when he heard Calvert swearing, talking to his cousin, Araht, also swearing. R.282:128. They all stopped because Calvert was using the F word, directed at Araht. R. 282:119. Araht testified he told Calvert," don't be talking to little kids like that." R.282:165. But Calvert told him to shut the fuck up. Id. He said, "be quiet big boy," "before I kick your ass." R.282:145.

He told the kids to go back to their parents. Id. Araht testified the youngest child present was four or five, the oldest 15 when Calvert became really aggressive. R.282:146. So he went to get his parents and they came over. Id.

After Araht left to get his parents, along with his uncle, Hugo, Adon, his dad, and aunt Yolanda, they walked back together. R.282:176. Calvert had a gun. R.282:175. Araht saw a laser pointing to the ground right outside Calvert's house. R.282:177. Araht observed a laser pointing and threatening Hugo, who was trying to get Calvert to put his gun down. R.282:178. Adon was there, saw Hugo get mad, and tried to calm him down. Id. Araht maintained that Hugo got mad, but was not drunk, and that "No one had been drinking that day." R.282:179. Testimony is conflicting on that point, however, as Anthony Canales had previously testified that Hugo was pretty drunk. R.282:102.

Adon Holguin, Araht's dad, R.282:169, testified he was at his brother, Hugo's, house, having a peaceful party when the kids came and said a person was screaming at them. R.282:231. Hugo went out, then older kids came and said there was a man with a gun. Id. So Adon walked with Hugo over to Calvert's house. Id. They were talking, and "I took Hugo and I asked him to go—just go back to his house." He asked Hugo's wife to take him home and have Hugo call 911. Id.

According to Adon, Calvert was initially calm but nervous, chatting peacefully. R.282:232. While Adon was standing on the sidewalk, Calvert told him the kids had gone into his garage and destroyed his property. Id. Suddenly Calvert changed his attitude, saying twice he was done talking. Id. He noticed something under Calvert's



arm, but didn't know what and Calvert said three times he was done talking and was going to bring out his dogs. R.282:233. Calvert continued demanding he leave or "things are going to go down." R.282:235. At that point he noticed the laser pointing halfway between the two of them going back and forth. Id. Calvert continued threatening them to leave or things are going to get really bad, with a "big mess" to "clean up on floor." Id. Adon told him he didn't have to leave as he wasn't on his property. Id.

In the meantime, as his dad and uncle were in front of Calvert's garage, Araht called the police on his cell phone from two houses down. R.282:149. He said Calvert pointed a gun with a laser at them. R.282:151. He informed dispatch that Calvert went inside with the gun when he was told they were calling the cops. R.282:155.

Hugo Holguin testified that when he approached the house on the sidewalk, conceding "maybe both said bad words," that Calvert was offensive and told him to leave and go to hell. R.282:254. Calvert had a gun in his hand, and when Hugo asked him what happened, he pointed it toward his chest. Id. He put the laser on him for probably 30 seconds. Id. Contrary to Yolanda's testimony that no one had drunk any alcohol that day, R.282:279-280, Hugo testified that he had had 2 or 3 beers. R.282:255. Adon also testified to having one or two beers. R.282:238.

Yolanda testified that when they approached Calvert's property the first thing she heard was Calvert saying get the F off my property and go back to your F-ing house. R.282:281. She saw a gun in his hand and a red laser dot. Id. Calvert was moving the

laser around and pointed at Hugo several times. R.282:265. At first the gun was at his waist and then it was pointed at Hugo's chest, which is when she got scared and told Hugo to go back to the house and both him and Araht to call 911. R.282:282. Hugo was as angry as she had ever seen him. R.282:285. Hugo did not talk long, then left with Yolanda to go back to the house while Adon was still talking to Calvert. R.282:283.

Adon stayed and tried to maintain talking to him until police arrived. When police arrived Calvert ran in to the garage and deposited the gun. R.282:236. Adon testified Calvert never pointed gun at him, just threatened him, moving the gun up and down insisting he should leave the property or things would get ugly. R.282:246. He said he felt threatened, but didn't leave because Calvert was doing something wrong. Id.

The State put on a witness, Camille Little, for Utah R. Evid., Rule 404(b) purposes. Her testimony will be discussed in Point II.

What role alcohol played in this misadventure is unclear from the various positions taken. Bryan Majors, a former neighbor of Mr. Calvert, testified that one of the men he observed, presumably either Hugo or Adon, the individual he saw step off Calvert's driveway, seemed intoxicated by his mannerisms, the way he was walking and talking. R.284:16-17, 24. The individual acted like he wanted to fight Chad, sounding angry, loud and hostile. R.284:25.

## **B. Defense Case**

Mr. Calvert testified that a couple of days prior to the incident he had had a triple neurectomy involving three nerves from groin to back to thigh. R.284:54. He was doing

alright that night, just experiencing pain and discomfort from sutures and surgery. Id. At roughly 10:30 p.m. he was awakened by his two Rottweilers barking in the basement. R.284:55. When he looked outside he saw a bunch of children causing all sorts of ruckus in his front yard. Id. The children were tall and big, but not adults. One was hanging in his tree bending the limbs down on top of his vehicle, bouncing up and down scratching the hood. Id. So he told them to get out of the tree. Id. The children started yelling at him, one picked up something and threw it at him, and there was a verbal shouting match. R.284:56. One was shouting profanities, as was he. Id. Calvert was upset about the damaging of his property and the kid came unglued. Id. Calvert remained on the porch. Id. They slowly left and Calvert went back in his house through the garage, grabbed a flashlight and went to check out his property. Id. When he got to the corner of his property, a sprinkler had been uprooted and broken and he started fixing it. Id. At that time, two young ladies approached him and said they were sorry. Id. He said he took pride in his yard, they were vandalizing his stuff, it is 10:30 at night, and they should be home. R.284:57. They said they were sorry and walked away. Id.

Calvert went inside after fixing the sprinkler, grabbed a burrito came back out on his porch and was eating. R.284:57. Laying on an angle on the porch because of the surgery, he heard a scuffle behind him, turned around and somebody was trying to reach through his railing to grab him. Id. This scared him, he jumped up, went back in, alarms went off, and the garage alarm went off, indicating someone's presence. Id. He did not know who reached for him. R.284:58.

The alarm system indicates the part of the house or garage penetrated through motion detectors. R.284:59. When he went out to fix the sprinkler, he opened the garage door, leaving it open. Id. The alarm going off indicated somebody was in the garage. Id. It does not stop unless whoever is present removes himself from the garage. R.284:60.

At that point, the alarm still going off, Mr. Calvert ran into the house, shut the door, called Brian Majors, and said he had an "incident" and needed help. R.284:61. He told Bryan he was going to get his gun. Id. He then went upstairs to the third floor and retrieved the firearm from his gun safe. Id. The alarm was still going off, indicating someone's presence remaining in the garage. Id. The basement door alarm had not gone off, so he knew no one had penetrated the house itself. Id. He opened the basement door and "there is a gentleman three feet, right there standing in my garage. Pitch black." Id. The laser had already been turned on. Id. Calvert told him to get out of his garage and off his property. R.284:62. He had never before seen the man, who put his hands up, which made Calvert feel a bit safer, and started backing out of the garage. R.284:62,65. The man backed down the driveway, and halfway down Calvert holstered his handgun, a Glock 27 with a laser, locking it in a "paddle," a type of locking secure holster, with the laser still on. R.284:62,77. Calvert believed it was understandable with the paddle at his side as he moved around that someone would testify that it was jumping around on the ground. Id.

As Calvert reached the threshold of his garage, another man was standing in the darkness to his left and yet another at his right. R.284:63,80. Also there was a man

standing in front by the tree. Id. Calvert did not know them, one was speaking Spanish, and he did not leave the confines of the garage. Id. He had called his friend, Bryan, asking him to call the police, and he could see Brian across the street. R.284:66-67. Bryan was the closest person to him, and although there were people around at that point they started to dissipate except for the man in front of him who was not leaving. R.284:67. Calvert just kept saying get off my property, leave, and Brian was saying the same thing. Id. Some people approached Brian and he told them to back off and go home. Id. Brian was very loud which seemed to take the heat off with everyone knowing he was on the phone with 911. R.284:68. The police showed up shortly after that. Id.

Calvert had not shut the garage when the police arrived. They went to Brian's house, and immediately the "shadows" started going away heading back toward their property. R.284:69. Calvert took his paddle and firearm out of his shorts and set it on his four wheeler. R.284:69,80. It accidentally fell and hit the floor, so he unlocked and removed it from the paddle, setting it on the foot peg of the four wheeler. R.284:69,81.

Officers came up and Calvert told them the story about the gentleman trying to grab him. R.284:70. They indicated it appeared to be self-defense and sounded justified. Id. Other officers were talking to the intruders, those that were causing the problem, more or less to corral them and get them to go back to their house. Id. They got them out of his yard and officer Jex pulled up. Id. He approached and asked Calvert where all his guns were and how many he had. Id. Calvert said he did not need to tell them where or

how many guns he had, at which point Jex immediately put Calvert in handcuffs and said okay do not step off of your property. R.284:70,82.

Officer Jex told him he could not go in his house, that he was calling animal control and applying for a search warrant. R.284:71. Calvert was flabbergasted after having talked to the two other officers. Id. After putting Calvert in handcuffs Jex went and talked to the other people then came back and uncuffed him for some reason. Id. Jex said he would screen the case with the prosecutor's office. Id. Nevertheless, Jex was still going to apply for a search warrant and take his animals. R.284:72. With that information, Calvert gave him consent to search and conveyed information about his firearms, walked Jex into the bedroom, showed him where the gun safe was and other firearms he wanted to know about. Id. Calvert consented as he had nothing to hide. Id.

Calvert indicated he had never met Hugo Holguin before this trial. R.284:74. He could have been the man that night but it was too dark to tell. R.284:82. He did not deny having a gun when asked by Officer Jex, but never talked to him about a laser. Id. He told Officer Jex the Glock was loaded, that the kids were damaging his property, specifically the tree, and Jex again arrested Calvert. R.284:84. He told Officer Jex he initially had a flashlight. R.284:89. The gun should have been loaded, but upon their inspection, Calvert was surprised it was not. Id. The defense rested. R.284:90.

### **C. State's Rebuttal.**

Officer Jex was recalled and commented on Mr. Calvert's testimony. He said Calvert had mentioned his tree being damaged and was worried that the tree would touch

his car but mentioned no damage. R.284:92. He talked about his yard, not recalling the sprinkler, but conceding he might have. R.284:92,94. Calvert did not mention someone grabbing him through the railing, or anyone in the garage. Id. That would have changed his approach as it would have been investigated as a residential burglary. R.284:93,97. The State thereupon rested.

Each of the parties gave closing arguments. R.284:129-144. The bailiff was sworn and jury excused for deliberation. R.284:144-146. The State indicated that the jury would need some way of listening to the CD, which was a recording of Araht's 911 call, State's Exhibit 2. R.283:157;R.284:146. The State indicated, "I have got a laptop if they – if they need it." R.284:147. Defense counsel made no objection to the prosecutor's laptop going to the jury. Id.

### **SUMMARY OF THE ARGUMENT**

1. At trial, defense counsel should have moved, no later than at the close of all the evidence, to either dismiss one of the two charges, Threatening With a Dangerous Weapon or Aggravated Assault, merge the lesser threatening charge into the greater assault, or request a jury instruction that Threatening With a Dangerous Weapon is a lesser included offense of Aggravated Assault (2012). Failure to take any action was ineffective assistance of counsel subjecting Mr. Calvert to double convictions and sentences for the same conduct.

2. Defense counsel was ineffective at the time of sentencing for failing to move to merge the conviction for Threatening With A Dangerous Weapon into the

aggravated assault.

3. As only one isolated instance of an alleged prior bad act was presented, the “doctrine of chances” was inapplicable, and the trial court erred in admitting the evidence on that basis. Additionally, however, the trial court failed to conduct the necessary 404(b) “scrupulous examination.” Even had it done so, it would have been an abuse of discretion to admit this extrinsic evidence. Even if it were admissible, the prejudicial effect of the evidence outweighed its probative value.

4. It was a complete abdication of defense counsel in failing to object and deprivation of the right to counsel to allow the state’s laptop computer to be utilized by the jury during deliberations. It was a complete deprivation of the right to an impartial jury to allow the state’s laptop computer to be utilized by the jury during deliberations. The error constitutes a structural defect for which prejudice need not be shown to require reversal. The error being structural, the trial court erred in denying defendant’s Motion To Arrest Judgment based upon the State’s laptop being utilized by the jury during deliberations.

## **ARGUMENT**

### **POINT I**

**COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE, NO LATER THAN AT THE CLOSE OF ALL THE EVIDENCE, TO EITHER DISMISS ONE OF THE TWO CHARGES, MERGE THE LESSER CHARGE INTO THE GREATER, OR REQUEST A JURY INSTRUCTION THAT THREATENING WITH A DANGEROUS WEAPON IS A LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT.**



Analysis of this Point necessarily begins with the question of whether Threatening with a Dangerous Weapon is, under the facts presented by the State, a lesser included offense.

Several considerations come in to play. The single criminal episode statute, which is pertinent, at least to some extent, states, in its entirety,

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; *however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.*

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

- (a) The offenses are within the jurisdiction of a single court; and
- (b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) *A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense.* An offense is so included when:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
- (c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be 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.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that

included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

Utah Code Ann. § 76-1-402 (Emphasis added). The emphasized portions of the statute are relevant to a determination of whether counsel was ineffective and the defendant prejudiced as a result.

One alternative rule, inapplicable in the instant matter, is that, when the prosecutor seeks to introduce a lesser-included offense, all of its elements must necessarily be included in the greater offense. This "more restrictive standard," the "necessarily-included standard," is "limited to cases where the prosecution requests the instruction". *State v. Baker*, 671 P.2d 152, 156 (Utah 1983); accord *State v. Houskeeper*, 2002 UT 118, ¶¶12-13, 62 P.3d 444.

Different concerns are raised when the defense requests a lesser included offense instruction. *Baker* at 156. The defendant's right to a lesser included offense instruction is limited by the evidence presented at trial. *Baker* at 157 (Utah 1983). Baker rejected the "mechanical comparison of statutory elements," concluding that although such a comparison "may be appealing in its promise of certainty and intellectual purity, . . . its artificiality is unresponsive to the underlying purposes of the lesser included offense doctrine . . ." *Baker* at 158 quoting *United States v. Johnson*, 637 F.2d 1224, 1238 (9th Cir. 1980). The evidence must provide the jury a "rational basis" to acquit on the greater offense and convict on the lesser. *Baker* at 158-59. "The court shall not be 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.” § 76-1-402(4). When both parts of the *Baker* test are satisfied, a trial court must instruct the jury on the lesser-included offense. *State v. Spillers*, 2007 UT 13, ¶12, 152 P.3d 315 (remanding for a new trial when the trial court declined to instruct the jury on a lesser included offense); *State v. Knight*, 2003 UT App 354, ¶ 17, 79 P.3d 969 (explaining that “when an element of the crime . . . is in dispute, and the evidence is consistent with both the defendant's and the State's theory of the case, failing to instruct on the lesser included offense presumptively affects the outcome of the trial . . . [and] our confidence in the verdict is undermined.”).

In *State v. Oldroyd*, 685 P.2d 551(Utah 1984), the defendant was charged with Aggravated Assault using a gun in an altercation between his wife and him. The State’s evidence differed from the defendant’s. The State presented evidence that Oldroyd pointed a gun at a police officer witness. *Id.* at 552. Oldroyd denied that he had pointed the gun at the officer. *Id.* Oldroyd requested a lesser included offense of Threatening or Using a Dangerous Weapon, which request the trial court refused. *Id.* at 553.

Employing the standards enunciated in *State v. Baker, supra*, the Supreme Court held that this was reversible error. *Oldroyd* at 556.

The Court in *Oldroyd* reasoned that the elements of the two offenses sufficiently overlap to meet the first *Baker* requirement: “It is apparent that these two statutes have elements in common. Both require a form of threat and both require the use of a weapon.

Thus, the statutes do have overlapping elements, and the first segment of the *Baker* test has been met." *State v. Oldroyd*, 685 P.2d at 554. That analyses applies to this case.

As to the second prong of *Baker*, "if there is a sufficient quantum of evidence to raise a jury question regarding a lesser offense, then the court should instruct the jury regarding the lesser offense." *Baker* at 159. The Court in *Oldroyd* found that, viewing the evidence in the light most favorable to defendant, there was a rational basis for acquitting Oldroyd of aggravated assault and convicting him of threatening with a dangerous weapon. *Oldroyd*, at 555. Thus a lesser included instruction is appropriate when "the evidence is ambiguous and therefore susceptible to alternative interpretations, and one alternative would permit acquittal of the greater offense and conviction of the lesser." *Baker* at 159. This is especially true when "the critical question is either the credibility of certain evidence or the determination of what inferences may legitimately be made on the basis of the evidence." *Id.*

In this case, both the State and the defense produced evidence that could reasonably allow a jury to acquit Mr. Calvert of Aggravated Assault and instead convict him of Threatening With Or Using A Dangerous Weapon. The lesser-included offense would require proof that Mr. Calvert used a dangerous weapon "in a threatening or angry manner." This was supported by the prosecution's case that he was swearing, yelling, using the f word, and threatening, gun in hand, that if people didn't leave there would be a "mess" to clean up, etc. R.282:119,128, 178, 235, 246,293-294. Under the evidence presented by Calvert, the elements of assault, essentially a threat of force or violence,

accompanied by a show of immediate force or violence, to do bodily injury to another using a gun, were not present, except perhaps as self-defense. The evidence at trial would have allowed a jury to reasonably acquit Calvert of Aggravated Assault and convict him of Threatening With Or Using A Dangerous Weapon. The discrepancies between the testimonies of Mr. Calvert and the internally conflicting testimony of the State's witnesses as to how he was using the gun would have "rationally" allowed the jury to convict him of the lesser offense while acquitting him of the greater.

The legislature amended the Threatening statute, Utah Code Ann. § 76-10-506, effective May 13, 2014. The statute took effect subsequent to trial but prior to Mr. Calvert's sentencing. By its amendment of section 2, adding the phrase, "and not amounting to a violation of Section 76-5-103," it appears the legislature intended to codify the fact that under such circumstances as exist here, §76-10-506 is a lesser included offense of § 76-5-103. This supports the argument made here. Both the 2012 version and the current version of Utah Code Ann. § 76-10-506 (as well as the 2012 and 2015 versions of Aggravated Assault§ 76-5-103) are included in Addendum C.

The next step of the analysis requires consideration of the issue of multiplicity. Once the facts were in, it should have been obvious to defense counsel that the Information was multiplicitous. Multiplicity is explained as follows:

The problem of multiplicity arises when "a single offense [is charged] in several counts." Charles Alan Wright et al., 1A Federal Practice & Procedure: Criminal § 142, at 10 (4th ed. 2008). The "rule against multiplicity . . . 'is intended to prevent multiple punishments for the same act,'" thus guarding against double jeopardy by "'prohibit[ing] the Government from charging a single offense in several counts.'" *State v.*

*Morrison*, 2001 UT 73, ¶ 26, 31 P.3d 547 (emphases omitted) (quoting *United States v. Kimbrough*, 69 F.3d 723, 729 (5th Cir. 1995)).

*State v. Rasabout*, 2013 UT App 71, ¶ 10, 299 P.3d 625. The statutes themselves must be analyzed to determine, under the facts of the case, whether a charge is multiplicitous.

The rule against multiplicity stems "from the 5th Amendment [Double Jeopardy Clause], which prohibits the Government from charging a single offense in several counts and is intended to prevent multiple punishments for the same act." *State v. Morrison*, 2001 UT 73, ¶ 24, 31 P.3d 547 (citation and internal quotation marks omitted). "The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . . If the latter, there can be but one penalty." *Blockburger v. United States*, 284 U.S. 299, 302, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (omission in original) (quoting Wharton's Criminal Law § 34 n.3 (11th ed.)). Thus, evaluation of a multiplicity claim requires analysis of the statutes under which a criminal defendant is charged. *State v. Rasabout*, 2013 UT App 71, ¶¶ 16—17, 299 P.3d 625.

*State v. Hattrich*, 2013 UT App 177, ¶ 33, 317 P.3d 433. In this instance, clearly the "course of conduct" as opposed to "individual acts" is what is prohibited. Therefore there can be "but one penalty." This is supported by *State v. Oldroyd*, at 554. It was there stated,

The facts of this case tend to prove the elements of § 76-10-506, as well as those of § 76-5-103(1)(b). Assuming for the purposes of this analysis that the facts were as Officer Evans stated them to be, Oldroyd did point a gun (a dangerous or deadly weapon) at Evans. Use of the gun under the circumstances of this case could either constitute an assault with intention to do bodily harm, or the lesser offense of exhibition of a dangerous weapon in a threatening manner. Therefore, the facts tend to prove the elements of both statutory offenses.

*State v. Oldroyd*, 685 P.2d 551, 554 (Utah 1984). That is precisely the circumstance presented in this case.

The State submitted its requested jury instructions. R.57-77. It requested certain instructions related to Aggravated Assault and Threatening Or Using A Dangerous Weapon In A Fight Or Quarrel. R.67-68, 70-71, 74-77, as contained in Addendum D. Mr. Calvert filed a Motion to Modify the Government's Proposed Instructions, however it contains no objection to simultaneously giving both an Aggravated Assault and a Threatening with a Dangerous Weapon as two separate charges to the jury. R.128-133. The instructions given by the court on these charges are virtually identical to the State's requested instructions. R.188-199, as contained in Addendum E.

Defense counsel could have early on made a motion to deal with the multiplicity of the Information. But until all the State's evidence was in, the court may not have been in a position to rule decisively. However, at least as early as the close of the State's case or, at the latest, when all parties had rested, defense counsel had several options, none of which he exercised. He could have moved to dismiss one or the other of the two offenses charged. He could have requested that the court require the State to elect which of the charges it wished to go to the jury; to avoid multiple verdicts for the same conduct, multiplicity, the prosecution should have been required to elect upon which offense it would proceed. Counsel could have moved the court to dismiss the Threatening charge and give it as a lesser-included offense instruction to the jury. He could have moved to merge the lesser Threatening with a Dangerous Weapon charge into the Aggravated Assault as the statute existed in 2012 (It was amended in 2015). Defense counsel did none of these things.

Defense counsel failed to take any action, thus subjecting Mr. Calvert to a conviction twice for essentially the same conduct. Defense counsel explicitly okayed the Threatening elements instructions to these charges, in addition to the Aggravated Assault instruction, except for matters not relevant to this point. R.282:107, Defense counsel made no motions either prior to the jury being instructed or thereafter. R.284:319;282:97 et seq., 148, 152. Nor did counsel file any post-conviction motions addressing the problem, not even a motion to merge at or prior to sentencing.

To demonstrate ineffective assistance of counsel,

[A] defendant must first demonstrate that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment. See *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997). Second, the defendant must show that counsel's deficient performance was prejudicial--i.e., that it affected the outcome of the case. See *Strickland*, 466 U.S. at 687-88. The first prong of the *Strickland* standard further requires that a defendant rebut the strong presumption that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 100 L. Ed. 83, 76 S. Ct. 158 (1955)).

*State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92.

An "ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." *State v. Thompson*, 2014 UT App 14, ¶ 23, 318 P.3d 1221. In this case, counsel's failure cannot be considered strategy. He opted to do nothing in the face of a multiplicity of charges, causing his client to be subjected to conviction on two charges, at least one of which was avoidable. That was a failure to bring the skill and knowledge expected of defense



counsel. *State v. Classon*, 935 P.2d 524, 533 (Utah Ct. App. 1997) quoting *Strickland*, 466 U.S. at 685, 104 S. Ct. at 2063 (1984). Counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 687.

Because of counsel's failures, the jury convicted Mr. Calvert of two charges penalizing the same course of conduct, and for which he was doubly sentenced. R.231-233. Counsel's deficient performance was prejudicial, satisfying the second prong of *Strickland*, i.e., it affected the outcome of the case. *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92. As a direct consequence of these failures, confidence in the verdict is sufficiently undermined that this Court should grant a new trial. *State v. Eyre*, 2008 UT 16, ¶ 19, 179 P.3d 792; *State v. Thompson*, *supra*, ¶91.

## POINT II

### **COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE AT THE TIME OF SENTENCING TO MERGE THE CONVICTION FOR THREATENING WITH A DANGEROUS WEAPON INTO THE AGGRAVATED ASSAULT.**

Counsel made no post-conviction motion to merge the threatening with a dangerous weapon charge into the aggravated assault. If trial counsel fails to request the consolidation of charges under the merger doctrine, and consolidation would be in order, trial counsel has failed to provide effective assistance of counsel. *State v. Perez-Avila*, 2006 UT App 71, ¶ 9, 131 P.3d 864, 868, citing *State v. Finlayson*, 2000 UT 10, PP24-26, 994 P.2d 1243; *State v. Crosby*, 927 P.2d 638, 645-46 (Utah 1996); *State v. Ross*, 951 P.2d 236, 246 (Utah Ct. App. 1997).

As with the previous related Point, the motivating principle behind the merger doctrine is to prevent violations of constitutional double jeopardy protection. *State v. Lopez*, 2004 UT App 410, P8, 103 P.3d 153 ("Courts apply the merger doctrine as one means of alleviating the concern of double jeopardy that a defendant should not be punished twice for the same crime."); see also *Brown v. Ohio*, 432 U.S. 161, 169, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977) ("The [Double Jeopardy Clause] forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").

The test applicable here is set forth in *State v. Lee*, 2006 UT 5, ¶ 27, 128 P.3d 1179, (2006), citing *State v. Finlayson*, 2000 UT 10, ¶ 23, 994 P.2d 1243 (*Finlayson*) ("crimes may be so related that they must merge even though neither is a lesser included offense of the other under section 76-1-402," *Lee* at ¶ 31). This doctrine alleviates a concern of double jeopardy. *Id.*; *State v. Lopez*, 2004 UT App 410, ¶8, 103 P.3d 153; *State v. Diaz*, 2002 UT App 288, ¶17, 55 P.3d 1131. The State must show the detention is "'significantly independent' from the detention inherent in the violent crime." *State v. Mecham*, 2000 UT App 247, ¶30 (citing *State v. Couch*, 635 P.2d 89, 92 (Utah 1981) and quoting *Finlayson*). This requires courts to "look beyond the statutory elements and compare the evidence" giving rise to the two crimes. *Lee*, 2006 UT 5, ¶¶31-32. Where the kidnapping charge and the underlying charge are "so [factually] related . . . they must merge even though neither is a lesser included offense of the other." *Id.* ¶31.

The statute dealing with included offenses is clear that,

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein . . .

Utah Code Ann. § 76-1-402. Only when an explicit indication of legislative intent is present in the specific offense statute will it be considered appropriate to exempt that statute from operation of the general merger requirements in section 76-1-402(3). *State v. Smith*, 2005 UT 57, ¶ 11, 122 P.3d 615. This “plain language analysis is also consistent with the constitutionally guaranteed double jeopardy interests that section 76-1-402(3) was designed to protect.” *Id.*

As stated above, regarding the issue of the lesser included offense, when a defendant is charged with Threatening With Or Using A Dangerous Weapon and Aggravated Assault, the elements of the two offenses sufficiently overlap to meet the first requirement: "It is apparent that these two statutes have elements in common. Both require a form of threat and both require the use of a weapon. Thus, the statutes do have overlapping elements, and the first segment of the *Baker* test has been met." *State v. Oldroyd*, 685 P.2d 551, 554 (Utah 1984).

As to the second prong of requirement, "if there is a sufficient quantum of evidence to raise a jury question regarding a lesser offense, then the court should instruct the jury regarding the lesser offense." *Baker* at 159. The instruction must be given when "the evidence is ambiguous and therefore susceptible to alternative interpretations, and

one alternative would permit acquittal of the greater offense and conviction of the lesser.” Id. This is especially true when “the critical question is either the credibility of certain evidence or the determination of what inferences may legitimately be made on the basis of the evidence.” Id. In this case, there was evidence that could reasonably allow a jury to acquit Mr. Calvert of aggravated assault and instead convict him of threatening with or using a dangerous weapon. The lesser-included offense would require proof that Mr. Calvert used a dangerous weapon “in a threatening or angry manner.” This was well supported by the prosecution’s own evidence.

Ultimately, paraphrasing from other cases not involving these specific statutes, to deny merger the State must show that Threatening With A Dangerous Weapon is “significantly independent” from the Aggravated Assault. See *State v. Mecham*, 2000 UT App 247, ¶30 (citing *State v. Couch*, 635 P.2d 89, 92 (Utah 1981)). This requires courts to “look beyond the statutory elements and compare the evidence” giving rise to the two crimes. *Lee*, 2006 UT 5, ¶¶31-32. Where the aggravated assault and the threatening charge are “so [factually] related . . . they must merge even though neither is a lesser included offense of the other.” Id. ¶31. Ultimately, the question is whether Threatening With A Dangerous Weapon is sufficiently independent of the Aggravate Assault to justify a separate conviction for Threatening With A Dangerous Weapon. Id. ¶1130, 32. In this case it is not.

Utilizing the test for ineffective assistance of counsel as set forth in the previous Point, it is evident that defense counsel failed to employ the skill and expertise expected.

*State v. Classon*, 935 P.2d at 533. Such failure prejudiced Mr. Calvert, subjecting him to double punishment for the same crime where it was obvious the convictions merged. *State v. Perez-Avila*, *supra*, 131 P.3d 864, ¶ 9.

As a consequence of counsel's ineffective assistance, the trial court failed to merge the convictions under the foregoing tests. This Court should reverse and remand for the trial court to do so. This Court, however, has authority to do so based upon Utah R.Crim. P. 22(e). See *State v. Candedo*, 2010 UT 32, ¶ 9, 232 P.3d 1008, 1011.

### POINT III

**THE TRIAL COURT MISAPPLIED THE INAPPLICABLE "DOCTRINE OF CHANCES" DOCTRINE, FAILED TO CONDUCT THE NECESSARY 404(b) "SCRUPULOUS EXAMINATION," AND ABUSED ITS DISCRETION IN ADMITTING EXTRINSIC "BAD ACT" EVIDENCE. IN EITHER EVENT THE PREJUDICIAL EFFECT OF THE ALLEGED PRIOR BAD ACT OUTWEIGHED ITS PROBATIVE VALUE.**

This Court recently explained the basic principals underlying admission of 404(b) evidence under the "doctrine of chances:"

In reviewing a motion to admit prior bad acts under rule 404(b), a trial court must make three inquiries. A "trial court must first determine whether the bad acts evidence is being offered for a proper, noncharacter purpose, such as one of those specifically listed in rule 404(b)." *Nelson-Waggoner*, 2000 UT 59, ¶ 18, 6 P.3d 1120. Next, "the court must determine whether the bad acts evidence meets the requirements of rule 402 [of the Utah Rules of Evidence], which permits admission of only relevant evidence." *Id.* ¶ 19. *The doctrine of chances "is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over," State v. Verde*, 2012 UT 60, ¶ 47, 296 P.3d 673 (citation and internal quotation marks omitted), and therefore, the doctrine may satisfy either or both of these first two rule 404(b) inquiries. Last, in determining whether prior bad acts evidence should be admitted, a "trial court must determine whether the bad acts evidence meets the requirements of rule 403 of the Utah Rules of Evidence," which provides that relevant

evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Nelson-Waggoner*, 2000 UT 59, ¶ 20, 6 P.3d 1120 (quoting Utah R. Evid. 403).

*State v. Lowther*, 2015 UT App 180, ¶ 9, 356 P.3d 173(emphasis added). The 404(b) evidence allowed by the trial court in this case cannot pass any of these tests.

The Motion filed by the State relied upon a *summary* of a police report filed in an incident involving Camille Little. R.95, contained in Addendum F. It indicated that on October 28, 2008, Mr. Calvert called the police to report that he approached Little, told her to move, that she pushed and punched him, but she was drunk and fell on the ground. R.95. Little reported that he was taking pictures of her house, that she went outside he yelled at her, calling her names and "made threats at my life like always." *Id.* He then attacked her, pushing her and hitting her twice in the head. *Id.* The State contended that this evidence was admissible for the purpose of rebutting the defendant's claims that the subject incident was fabricated, and Calvert's gun was pointed at Hugo Holguin inadvertently and in self-defense. R.96. The State further contended the evidence met all of the requirements of the "doctrine of chances" and that its probative value substantially outweighed the danger of unfair prejudice per Utah R. Evid. 403. *Id.*

Calvert filed an Opposition to the State's Motion. R.115-127. Calvert rebutted the State's claim of the alleged defense of fabrication, *inter alia*, on the basis that, the State actually sought to introduce the evidence in order to establish Mr. Calvert's "propensity to commit crime," an improper basis which outweighed any proffered legitimate purpose. R.117. A "trial court must first determine whether the bad acts

evidence is being offered for a proper, noncharacter purpose, such as one of those specifically listed in rule 404(b)." *Lowther* at ¶ 9. Although, fabrication is not listed in the Rule, it has been considered. See *Lowther* at ¶ 11 and *Verde* at ¶ 24. Calvert accurately asserted that the court must look past the purported basis set forth by the State and "evaluate the true purpose of evidence of past misconduct, determining at the threshold whether the evidence is presented for a proper purpose, or only for the purpose of suggesting an improper inference of action in conformity with alleged bad character." R.118, citing *State v. Verde*, 296 P.3d 673 at ¶ 24.

Calvert addressed the State's "doctrine of chances" argument in detail. R.120-125. Regarding the purported defense of fabrication, Calvert noted that the fabrication discussed in *Verde* related to a situation where the defendant completely denied that the incident occurred. R.118; See *Verde*, 296 P.3d at ¶ 9, ("Verde testified . . . , denying that he ever sat next to N.H. on the couch or touched N.H. in a sexual manner."). Calvert's Opposing Memorandum stated that,

Defendant is not and has not denied that an altercation took place between himself and several individuals during the night in question. Neither has he suggested that any particular witness has fabricated the critical factual elements. While defendant does and will challenge the reliability of the government's theory and its own witnesses (who the government admits are unreliable) this is entirely different than 'fabrication' where the only evidence is two competing versions of events – with no outside witnesses.

R.119. This argument alone should have barred admission of the Little evidence to counter the State's assertion of "fabrication."

As to the self-defense argument, Calvert distinguished the case cited by the government, *State v. Labrum*, 2014 UT App 5, 318 P.3d 1151, wherein the defendant, Labrum, claimed he “instinctively hit” his wife with a Gatorade bottle “in self-defense.” R.119 citing *Labrum* at ¶ 23. The Court in *Labrum* explained that “other bad acts” evidence was introduced to explain why the victim “armed herself” and brought a weapon to bed. R.119. In *Labrum* the State sought to introduce evidence that the defendant had attacked his victim-wife three times previously in the prior eight months. *Id.* ¶ 6. The prosecutor asked the wife why she felt it necessary to arm herself, and she gave voice to the prior incidents involving her and the defendant. *Id.* ¶ 7. The Court of Appeals explained,

The evidence of Labrum's prior acts of violence against Wife supports Wife's testimony that she armed herself with the keys to protect herself and not, as Labrum contends, to ambush Labrum when he came to bed. As the trial court noted, "The taking [of] some type of a weapon to bed with someone has to be explained . . . ." Without an understanding that Wife had reason to fear Labrum, the State would be unable to explain why she brought the keys to bed and would be unable to challenge effectively Labrum's testimony that Wife was the aggressor and that he was merely defending himself. The other acts evidence was thus directly relevant to the contested issues of Wife's actions and state of mind and whether Labrum was acting in self-defense.

*Labrum* at ¶ 23. As Calvert observed, this is not analogous to the incident involving Ms. Little. R.120.

Calvert further contested the State’s argument that the evidence was necessary to counter the defense of accident or mistake by stating, that the defendant admitted having a gun with a laser to the police and gave them permission to retrieve it, that the State’s



witnesses had changed their positions and their stories were confused, and that the defendant in any event did not intend to rely upon or assert the defense of mistake or inadvertence to the jury. R.119. In reviewing the trial testimony of Ms. Little, it is very difficult to determine how the incident would assist the State in overcoming such a defense of “accident or mistake” in any event. There simply is no relationship to the facts testified by Ms. Little and the incident in the instant matter.

Even if deemed non-character evidence, however, next the court must determine whether the bad acts evidence is relevant under Utah R. Evid. 402. *Lowther* at ¶9. Did the Little incident have any, “tendency to make a fact more or less probable than it would be without the evidence” and was her testimony of any “consequence in determining the action.” Utah R. Evid. 401. The incident, while demonstrating that Mr. Calvert previously got into a domestic dispute, was of no relevance to the instant situation. “Irrelevant evidence is not admissible.” Utah R. Evid. 402. It was thus inadmissible.

The next question is whether the doctrine of chances “theory of logical relevance” can be demonstrated in this instance “on the objective improbability of the same rare misfortune befalling one individual over and over.” *Lowther* at ¶9, citing *Verde* at ¶ 47. It is patently obvious that Ms. Little’s irrelevant testimony, cannot demonstrate that such “rare misfortunes” befell Mr. Calvert “over and over.” It was at best an unrelated isolated incident. It did not fit the premise of the “doctrine of chances.”

Finally, even if otherwise admissible, the trial court must determine if the evidence can withstand scrutiny under Utah R. Evid. 403. *Lowther* at ¶9. Utah R. Evid.

403 provides, *inter alia*, for the exclusion of relevant evidence, “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .” *State v. Castillo*, 2007 UT App 324, ¶6, 170 P.3d 1147. The prejudicial effect in this instance of evidence of the prior unusual, but hardly analogous, behavior of Mr. Calvert and surrounding circumstances so far outweighs its supposed probative value as to be “beyond the limits of reasonability.” See *State v. Downs*, 2008 UT App 247, ¶ 6, 190 P.3d 17 citing *State v. Castillo, Id.*, at ¶ 6, quoting *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 6, 63 P.3d 686.

The Court in *Verde* stated,

Sometimes, however, the evidence in question has no legitimate narrative value, as in cases where it is not plausibly linked to any charged conduct. That will often be the case for evidence of prior misconduct. *Such evidence may be worse than immaterial to a legitimate narrative. It may risk creating an alternative, illegitimate narrative—that the defendant has a reprehensible character, that he probably acted in conformity with it, and that he should be punished for his immoral character in any event.*

*Id.* at ¶ 29(emphasis added). This is highlighted by observation made in *State v. Shickles*, 760 P.2d 291, discussed *infra*, that prior bad act evidence is “objectionable not because it has no appreciable probative value but because it has too much.” *Id.*, 295. Mr. Calvert’s character was simply smeared by Little’s testimony, creating an “alternative, illegitimate narrative,” tending to show he likely acted in conformity with his reprehensible character. The evidence has too much probative value.

At trial, Camille Little testified she was attacked by Mr. Calvert on Halloween night when they both lived in the same neighborhood in 2008. R.282:289-292. She

claimed that he had harassed her mother many times. R.282:293. As she walked outside, he was right there, and grabbed and pushed her down, saying “crazy stuff,” like “I will kill you” and swearing. R.282:293-294. She said I am calling the cops and he pushed her down again and he hurried and speeded out. R.282:293. On cross-examination she indicated that Calvert called the police as he pulled off and she went to the hospital. R.292:296. She saw no gun and didn’t claim one was involved. Id. Charges were brought against her for domestic violence, and she counter charged. Id. All charges were mutually dismissed. R.292:297. She claimed Calvert would say all kinds of strange things every time she saw him, and had threatened to kill her. Id. She herself never called the police. R.292:298. She claimed they moved from the neighborhood a few months later out of fear. R.292:299.

This evidence had an "unusual propensity to unfairly prejudice, inflame, or mislead the jury," and was inadmissible under Rule 403, *State v. Guzman*, 2006 UT 12, ¶ 25, 133 P.3d 363. It was sufficiently consequential that there was a reasonable likelihood “that the error affected the outcome of the proceedings.” *State v. Verde*, 770 P.2d 116, 120 (Utah 1989). Unfair prejudice within the context of Rule 403, as applicable to this case, involving evidence of a substantially unrelated incident, “means an undue tendency to suggest (a) decision on an improper basis, commonly, though not necessarily, an emotional one.” *Castillo*, ¶ 7, quoting from *State v. Maurer*, 770 P.2d 981, 984. Thus, the Rule 403 focus under the doctrine of chances is "on the risk that the jury may draw an

improper 'character' inference from the evidence or that it may be confused about the purpose of the evidence." *Lowther* at ¶ 22, citing *State v. Labrum*, 2014 UT at ¶28.

At the time of trial, it may not have been entirely clear what the state of the law was respecting the traditional method of weighing the probative value versus prejudicial effect of the evidence. *Labrum* at ¶ 26. It stated that, "(where the context involves a doctrine of chances analysis, we read *Verde* as having displaced the *Shickles* factors—for purposes of assessing the "probative value" aspect of the Rule 403 analysis—with a focus on materiality, similarity, independence, and frequency." *Id.* at ¶ 28. Viewing the Little incident through the prism of the doctrine of chances, it is obvious that it does not apply. The entire concept of the "doctrine of chances" is that the chances of mistake in admitting prior bad acts evidence decreases proportionately as the number of similar prior incidents increase. See *Labrum* ¶ 29. It can properly be used to rebut a charge of fabrication if it is grounded in the logical relevance theory of the "objective improbability of the same rare misfortune befalling one individual over and over." *Verde* at ¶ 47. In application to the instant matter, given one isolated incident, the "chance" of making a mistake is no better than a coin toss. The doctrine is thus inapplicable on its face.

The "doctrine of chances" requires a positive response relating to certain inferences: The inferences required follow this pattern: "evidence of prior similar tragedies or accusations;" "an intermediate inference that the chance of multiple similar occurrences arising by coincidence is improbable;" "and a conclusion that one or some of the occurrences were not accidents or false accusations." *Id.* ¶ 50. Without going into

detailed analysis, it is plain that none of these inferences are satisfied by the Little testimony. First there is only one incident. Second, for the same reason, “the chance of multiple similar occurrences arising by coincidence” must be ruled out. And lastly, as the charges which were leveled at Mr. Calvert in the Little incident were dismissed by the State, State’s Memorandum R.95, and the civil charges were mutually dismissed according to Little’s own testimony, R.292:297, it is impossible to conclude that “one or some of the occurrences were not accidents or false accusations.” *Lowther* at ¶ 11 quoting *Verde* at ¶¶ 50-51.

The Supreme Court, as correctly predicted by *Labrum*, did not abandon the *Shickles* factors. *State v. Reece*, 2015 UT 45, ¶ 69 n.122, 349 P.3d 712, 734 referencing *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988), abrogated on other grounds by *State v. Doporto*, 935 P.2d 484 (Utah 1997). Those factors include,

the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

*Reece* at ¶ 69. Not all of those factors must be satisfied, only those relevant to the case at hand. *Id.* Thus applying the *Shickles* factors to this case, first, it cannot be said that the Little testimony bore the kind of evidentiary strength one would hope for in overcoming the possible prejudicial effect. Secondly, there are virtually no similarities between the Little incident and the crime of which Calvert was convicted. The Little incident is entirely devoid of any circumstantial background

evidence, consisting essentially of an uncorroborated domestic kerfuffle between two people. There is absolutely no mention of Mr. Calvert having or brandishing a weapon of any kind during the Little incident. Third, there was considerable time between the incident in 2008 and the instant matter of 2012. Fourth, the State had little need for this prior incident. It called numerous witnesses, adult and child, in addition to Officer Jex. The Little testimony did no more than besmirch Mr. Calvert's character. It certainly added nothing by way of proof of the underlying allegation. The same can be said for the fifth factor, the efficacy of alternative proof, there being so many witnesses, contradictory though they may have been, against Mr. Calvert's sole testimony. The sixth and last factor, "the degree to which the evidence probably will rouse the jury to overmastering hostility," must be held against the State. While a bit bizarre, the Little testimony undoubtedly had an extremely negative impact upon the jury, rising to the level of "overmastering hostility."

Admission of the prior assault was inflammatory and prejudicial, not probative of any necessary element of the alleged crime against Mr. Calvert, and tended to suggest a decision on an improper basis. 404(b) evidence is to be excluded if it has "an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror." *State v. Pedersen*, 2010 UT App 38, ¶ 36, 227 P.3d 1264. The evidence was not needed to establish the defendant's identity, his relationship to the alleged assault victim, Hugo

Holguin, and was totally unrelated to him and the allegation set forth in the Information. Nor did it aid in establishing motive, design, intent, or any other such matter. It was essentially gratuitous, the sole purpose being to demonstrate Mr. Calvert's bad character.

In determining whether the trial court abused its discretion, this Court decides "whether, as a matter of law, the trial court's decision that 'the unfairly prejudicial potential of the evidence outweighs [or does not outweigh] its probativeness' was beyond the limits of reasonability." *State v. Hamilton*, 827 P.2d 232, 239-40 (Utah 1992) (internal quotations omitted). The trial court's decision to admit the evidence in this case was "beyond the limits of reasonability" and given its inherent volatility, the error was harmful. No rational juror could help but be impressed after hearing such evidence, that Calvert must simply be a bad, or perhaps crazy, man. "(T)he trial court must take special care in admitting evidence of a defendant's other bad acts." See *State v. Marchet*, 2009 UT App 262, ¶ 44, 219 P.3d 75, 86, citing *State v. Shickles*, 760 P.2d 291 (Utah 1988).

The trial court appeared to give some analysis to the doctrine of chances. R.282:12-30. It found that the State had established a doctrine of chances basis for the Little testimony, and that the probative value outweighed the prejudicial effect. R.282:30. But for this reasoning was inaccurate. The court should have applied the *Shickles* factors. However, based upon the record of the court's consideration of the evidence as a whole, R.282:12-30, no such analysis is apparent. This Court has discussed the "scrupulous examination" which should attend a trial court's decision to allow or disallow prior bad acts evidence.

Because the record is devoid of any indication that the trial court undertook the scrupulous examination required, we conclude that it exceeded its discretion by admitting evidence of Ferguson's other bad acts under rule 404(b). See *State v. Nelson-Waggoner*, 2000 UT 59, ¶ 16, 6 P.3d 1120 (holding that the trial court has properly exercised its discretion if it scrupulously examined the admission of the other bad acts evidence); *State v. Webster*, 2001 UT App 238, ¶ 11, 32 P.3d 976 (holding that the "failure of a trial judge to undertake a scrupulous examination in connection with the admission of prior bad act evidence constitutes an abuse of discretion").

*State v. Ferguson*, 2011 UT App 77, ¶ 18. The record must demonstrate that the admission of other bad acts evidence was 'scrupulously examined' by the trial judge 'in the proper exercise of that discretion.'" *State v. Nelson-Waggoner*, 6 P.3d at ¶ 16. Limited deference is accorded a trial court's decision to admit 404(b) evidence but only if the evidence falls within the bounds marked by the legal standards set forth in the rules of evidence. *State v. Verde*, 2012 UT 60, ¶ 19, 296 P.3d 673. A scrupulous examination involves balancing the competing considerations. The obligation to conduct this scrupulous examination falls on the trial court. See *Nelson-Waggoner*, ¶ 16; see also *State v. Decorso*, 1999 UT 57, ¶ 18 & n. 2, 993 P.2d 837; and *State v. Webster*, 2001 UT App 238, ¶ 11, 32 P.3d 976. And that responsibility must be undertaken in a thoughtful and scrupulous fashion due to the important competing interests involved when other bad acts evidence is offered. *Ferguson* at ¶ 2.

A trial court is hard pressed to make such a scrupulous examination of the evidence without an evidentiary hearing. Without the benefit of knowing how a witness would actually testify, as opposed to the *summarized* police report proffered by the State, it is difficult to envision how the necessary pre-trial "scrupulous examination" can occur.



In virtually all of the cases discussing the application of Utah R. Evid. 404(b), an evidentiary hearing has provided the factual basis for this Court's review. Yet neither the court nor counsel insisted that witnesses be called to testify, and the court heard counsel's arguments and made its ruling solely on the basis of the State's summary of a police report. R.282:6-30.

Consequently, the trial court's process and conclusions did not flow from the "scrupulous examination" contemplated. *Id.* This in itself is error. For one example, this Court's most recent decision on the subject reversed because, "the trial court failed to scrupulously examine the proposed Rule 404(b) evidence in evaluating the evidence's admissibility under Rule 403." *State v. Lowther* at ¶ 35.

The factors used to weigh prejudice versus probative value include the *Shickle's* factors previously mentioned. See *State v. Pedersen*, 2010 UT App 38, ¶ 36, quoting *Shickles*, 295-296 (Utah 1988). Had the court scrupulously examined the *Shickles* factors, it would have found that few, if any, lend support to its decision to admit the evidence. Moreover, to be admissible, such inflammatory evidence must have "special relevance." *State v. Cox*, 787 P.2d 4, 5 (Utah App. 1990). The Little incident had no such "special relevance."

Given all the circumstances, the aggravated assault and surrounding milieu was precisely the type of evidence which was likely to "rouse the jury to overmastering hostility." *State v. Reece, supra*, at ¶ 69. Given the relative strength of the other arguably

legitimate 404(b) evidence, the Little evidence was literally calculated to rouse the jury to overmastering hostility.

The evidence was prejudicial, in the absence of which there may well have been a different result. "For an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." *State v. Knight*, 734 P.2d 913, 920 (Utah 1987). It is appropriate to recall that "[C]onfidence in the outcome may be undermined at some point substantially short of the 'more probable than not' portion of the spectrum." *State v. Leber*, 2010 UT App 387, ¶ 10, 246 P.3d 163, quoting *Knight* at 920. As a result of the erroneous admission of this extrinsic bad act evidence, confidence in the verdict is sufficiently undermined that reversal is warranted.

#### POINT IV

**IT WAS INNEFFECTIVE ASSISTANCE AND A COMPLETE DEPRIVATION OF THE RIGHT TO COUNSEL TO ALLOW THE STATE'S LAPTOP COMPUTER TO BE UTILIZED BY THE JURY DURING DELIBERATIONS. IT WAS A COMPLETE DEPRIVATION OF THE RIGHT TO AN IMPARTIAL JURY TO ALLOW THE STATE'S LAPTOP COMPUTER TO BE UTILIZED BY THE JURY DURING DELIBERATIONS. THE ERROR CONSTITUTES A STRUCTURAL DEFECT FOR WHICH PREJUDICE NEED NOT BE SHOWN TO REQUIRE REVERSAL. BECAUSE THE ERROR WAS STRUCTURAL, THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO ARREST JUDGMENT FOR GOOD CAUSE.**

During the presentation of the State's case, one of the witnesses, Araht Holquin, testified that he called the police. R.282:149. The 911 call was recorded and played for the jury. R.282:150. The recording was identified and received as State's Exhibit 2. R.282:157. At the close of the evidence and closing arguments, discussing the exhibits, the State indicated that Exhibit 2 is a CD. R.284:146. At that point the State indicated, "I

have got a laptop if they – if they need it.” R.284:147. Defense counsel was mute and lodged no objection to the procedure. Id.

After the verdict of guilty on both counts was returned, prior to sentencing, defense counsel made a Motion to Arrest Judgment. R.204-220. Defense counsel stated that he learned from courtroom observers several days after trial that the prosecutor’s laptop was taken back to the jury room and remained throughout deliberations. R.209. Several exhibits, in the form of letters from attendees at the trial confirming the fact that the laptop was given to the jury were attached to the motion. R.215–218. Those exhibits are appended hereto as Addendum G. The motion further referenced an email from the prosecutor indicating that the laptop had been taken back to the jury room, but that he did not know whether it had been used. R.209–210,219. The email from the State’s Attorney, William Carlson, is attached hereto as Addendum H.

The Motion to Arrest Judgment cited some Utah authority. For example,

“The right to trial by a fair and impartial jury is an important one which should be scrupulously safeguarded.” *State v. Durand*, 569 P.2d 1107, 1109 (Utah 1977); art. one section 12 Utah Const. Unauthorized contact with the jury, particularly during deliberations, raises a presumption of prejudice and impropriety. See *Glazier v. Cram*, 71 Utah 465, 267 Pac. 188 (1928) (because “it is probable that a doubt must and will continue to exist in the mind of the losing party and that of his friends as to whether or not he had a fair trial.”) *State v. Crank*, 105 Utah at 268, 141 P.2d 178, 194 (1943) (“in such instances the verdict of the jury, like Caesar’s wife, must be above suspicion.”).

R.210. Defense counsel did not request an evidentiary hearing on the issue and none was had.

The State opposed the Motion. R.222-228. The State took the position that the

mere possibility that the jury used a state supplied laptop to listen to a 911 call does not qualify as “good cause,” as is required to arrest judgment under UT R. Crim. P. 24. R.226. The State asserted that it had made full disclosure to defense counsel that the laptop was being made available, that it offered the laptop to defense counsel to “check the laptop himself.” *Id.* The State further reiterated that, “the mere possibility that a laptop could be abused to retrieve additional evidence if connected to the Internet does not justify abandoning a guilty verdict.” R.227.

At oral argument, defense counsel argued primarily that, sending such an extraneous item to the jury undermines all “notions of fairness,” and “makes it impossible for the public to believe the jury is beyond reproach.” R.283:13–14. Neither the prosecutor nor defense counsel was aware of the wi-fi capabilities of the laptop. R.283:19.

The court, without evidence that any prejudice befell the defendant as a result of the jury using the laptop to play the 911 call, denied the defendant’s Motion to Arrest Judgment. R.238:21.

The question of ineffective assistance of counsel is governed by the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant is required to establish (1) “that counsel’s performance was deficient,” and (2) “that the deficient performance prejudiced the defense.” *State v. Eyre*, 2008 UT 16, ¶ 16, (Utah, February 2008) quoting *Strickland* at 687. As to the first prong of *Strickland*,

The seriousness of those errors is measured by whether  
"counsel's representation fell below an objective standard

of reasonableness." Specifically, "[a] convicted defendant . . . must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. (Footnotes omitted).

*State v. Eyre*, at ¶ 16, quoting *Strickland* at 687, 688. A defendant can be deprived of the right to effective assistance of counsel by a lawyer who simply fails to render 'adequate legal assistance'." *Strickland*, 466 U.S. at 686 (internal quotations omitted).

It is ineffective assistance of counsel to allow an extraneous prejudicial item to be allowed into the jury's deliberations without objection. The Utah Rules of Criminal Procedure prescribe what a jury may consider during the course of deliberations:

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

Utah R. Crim. P. Rule 17(l)(emphasis added).

At least without some guidance from the court, providing an item not admitted in evidence to the jury is error. See *State v. Davis*, 689 P.2d 5, 15 (Utah 1984)[“While we are convinced of the commission of the asserted error (giving a portion of a witness deposition to the jury) . . .” Counsel failed to object and the *Davis* Court held that defendant's failure do so precluded assertion of this error. *Davis*, 689 P.2d at 15. Here counsel allowed extraneous material to be introduced into deliberations which was error amounting to professional negligence. Counsel's performance “fell below an objective

standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668.

The next question which must be satisfied is whether that negligence was subject to harmless error analysis. Some errors affect the criminal justice process so profoundly as to defy such analysis. Such defects constituting a constitutional deprivation “affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Ariz. v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265 (1991).

The deprivation of counsel during trial proceedings is a structural error. *Johnson v. United States*, 520 U.S. 461, 469, 117 S.Ct. 1544, 1549 (1997). In the instant matter, counsel was either absent from the court room or paying so little attention, R.284:146-147, that his failure to object to the prosecutor’s offer of his laptop to the jury constituted a total deprivation of the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963). Again, it is difficult to imagine anything more inherently prejudicial being given to the jury than the State’s laptop computer. It is an error so egregious as to constitute a complete deprivation of the right to counsel during a critical stage of the proceedings. Accordingly, it is a structural error.

It is furthermore a deprivation of the right to an impartial jury. Based upon the Sixth Amendment made applicable to the States via the Fourteenth Amendment, “in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.” *Duncan v. Louisiana*, 391 US 145, 157-58, 88 S. Ct 1444, 1452, 20 L. Ed. 2d 491 [1968]. “An error in the fundamental

design of the jury mechanism “unquestionably qualifies as structural error.” *Lambricht v. Stewart*, 191 F.3d 1181, 1191 (9th Cir. 1999). Denial of the right to a jury is a “structural defec[t] in the constitution of the trial mechanism, which def[ies] analysis by ‘harmless-error’ standards” under *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302.” *Sullivan v. Louisiana*, 508 US 275, 113 S. Ct. 2078, 2079, 124 L. Ed. 2d 182 [1993] (“A reviewing court in such a case can only engage in pure speculation—its view of what a reasonable jury would have done.”). That is the circumstance in the instant matter. Allowing the State’s laptop to be given to the jury was essentially an abdication of the role of both court and counsel in ensuring that an impartial jury would decide the case. It generated a defect in the “the fundamental design of the jury mechanism.” *Lambricht, supra*. It is difficult to imagine any more inherently prejudicial item or material being given to a jury than the opposing party’s laptop computer. It is an error so egregious as to constitute a complete deprivation of the right to trial by jury at a critical stage of the proceedings.

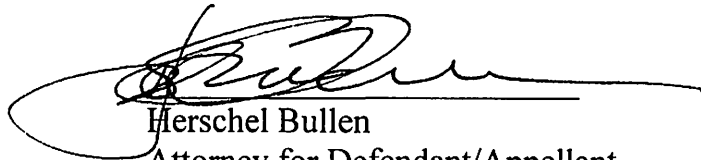
Without belaboring the point, for the reasons set forth, the trial court’s failure to grant Mr. Calvert’s Motion to Arrest Judgement for good cause, simply reinforced the structural error. A structural error is, by definition, not subject to harmless error analysis. A structural error is a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Fulminante*, 499 U.S. at 310.

This was a structural error, for which prejudice must be presumed and reversal granted.

## CONCLUSION


For the foregoing reasons the defendant respectfully requests that this Court reverse his convictions.

SUBMITTED this 12 day of November, 2015.

  
Herschel Bullen  
Attorney for Defendant/Appellant

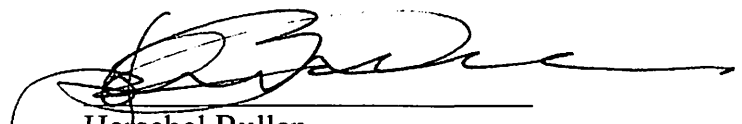
## CERTIFICATE OF RULE 24 COMPLIANCE

Appellant certifies pursuant to Rule 24(f)(1)(C) Utah R. App. P. that the foregoing principal brief of appellant contains 13,291 words.

  
HERSCHEL BULLEN  
Attorney for Defendant/ Appellant

## CERTIFICATE OF SERVICE

I, Herschel Bullen, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals and a searchable pdf CD, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 2 copies along with a searchable pdf CD to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 12 day of November, 2015.

  
Herschel Bullen



Tab A

3RD DIST. COURT - WEST JORDAN  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	AP&P SENTENCING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 121400830 FS
CHADLEY KEITH CALVERT,	:	Judge: MARK KOURIS
Defendant.	:	Date: July 1, 2014

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PRESENT

Clerk: caseyh  
Prosecutor: CARLSON, WILLIAM J  
Defendant  
Defendant's Attorney(s): PHILPOT, JAY M

DEFENDANT INFORMATION

Date of birth: September 4, 1969  
Sheriff Office#: 156710  
Audio  
Tape Number: 31 Tape Count: 1:37-2:03

CHARGES

1. AGGRAVATED ASSAULT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 05/01/2014 Guilty
2. THREAT/USE OF DANGEROUS WEAPON IN FIGHT - Class A Misdemeanor  
Plea: Not Guilty - Disposition: 05/01/2014 Guilty

HEARING

1:37 Counsel for the defendant motion to arrest judgment.  
1:48 Counsel for the state response.  
1:53 Counsel for the defendant response.  
1:56 The court denies the motion.

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.  
The prison term is suspended.

SENTENCE JAIL

Based on the defendant's conviction of THREAT/USE OF DANGEROUS WEAPON IN FIGHT a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 275 day(s).

SENTENCE JAIL SERVICE NOTE

NO GOOD TIME, NO EARLY RELEASE, NO ANKLE MONITOR.

Charge # 1  
Charge # 2      Fine: \$2500.00  
                  Suspended: \$0.00  
                  Surcharge: \$1201.58  
                  Due: \$2500.00  
  
                  Total Fine: \$2500.00  
                  Total Suspended: \$0  
                  Total Surcharge: \$1201.58  
Total Principal Due: \$2500.00  
                  Plus Interest

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).  
Probation is to be supervised by Adult Probation & Parole.  
Defendant to serve 90 day(s) jail.

Defendant is to pay a fine of 2500.00 which includes the surcharge.  
Interest may increase the final amount due.

PROBATION CONDITIONS

No other violations.  
Report to AP&P within 24 hours of release from jail.  
Enter into and complete any treatment recommended by AP&P.  
Notify the court of any address change.  
Not to possess or consume alcohol or non prescribed control substances.  
Random urinalysis and drug testing as requested.  
Submit to search of self or property by probation agent.  
Not to associate with persons or frequent places where drugs or alcohol are sold.  
Submit to a mental health evaluation and complete any recommended treatment.  
No contact directly or indirectly with the victim.  
Complete 50 hours community service at the rate of 10 hours per month. The first 10 hours will be due two months following release.

Case No: 121400830 Date: Jul 01, 2014

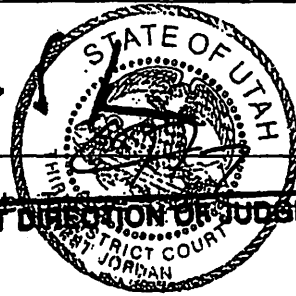
Forfeit firearm to the state.

Date: 7/1/14

MARK KOURYS

~~District Court~~

STAMP USED AT DIRECTION OF JUDGE



Tab B

**Utah R. Crim. P. Rule 17****Copy Citation**

Current through rules effective as of November 1, 2015.

[Utah Court Rules](#)[STATE RULES](#)[UTAH RULES OF CRIMINAL PROCEDURE](#)**Rule 17. The trial**

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

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

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

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

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

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

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least 14 days prior to trial or the court orders otherwise. No jury shall be allowed in the trial of an





## Document Utah R. Crim. P. Rule Actions ▾

53.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Document Utah R. Crim. P. Rule Actions ▾

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

(k) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

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

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

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

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

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





Document Utah R. Crim. P. Rule Actions ▾

## History

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Amended effective November 1, 2001; November 1, 2002; November 1, 2015

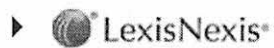
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**Utah R. Crim. P. Rule 23****Copy Citation**

Current through rules effective as of November 1, 2015.

[Utah Court Rules](#)[STATE RULES](#)[UTAH RULES OF CRIMINAL PROCEDURE](#)**Rule 23. Arrest of judgment**

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

## ▶ Annotations

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## Utah R. Evid. Rule 404

### Copy Citation

Current through **rules** effective as of November 1, 2015.

[Utah Court Rules](#)   [STATE RULES](#)   [UTAH RULES OF EVIDENCE](#)   [ARTICLE IV.](#)  
[RELEVANCE AND ITS LIMITS](#)

### **Rule 404.** Character **evidence**; Crimes or other acts

#### **(a)** *Character **evidence**.*

**(1)** *Prohibited uses.* -- **Evidence** of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

**(2)** *Exceptions for a defendant or victim in a criminal case.* -- The following exceptions apply in a criminal case:

**(A)** a defendant may offer **evidence** of the defendant's pertinent trait, and if the **evidence** is admitted, the prosecutor may offer **evidence** to rebut it;

**(B)** subject to the limitations in **Rule 412**, a defendant may offer **evidence** of an alleged victim's pertinent trait, and if the **evidence** is admitted, the prosecutor may:

**(i)** offer **evidence** to rebut it; and

**(ii)** offer **evidence** of the defendant's same trait; and

**(C)** in a homicide case, the prosecutor may offer **evidence** of the alleged victim's trait of peacefulness to rebut **evidence** that the victim was the first aggressor.

**(3)** *Exceptions for a witness.* -- **Evidence** of a witness's character may be admitted under **Rules 607, 608, and 609**.

#### **(b)** *Crimes, wrongs, or other acts.*

**(1)** *Prohibited uses.* -- **Evidence** of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

**(2)** *Permitted uses; notice in a criminal case.* -- This **evidence** may be admissible for another



## Document Utah R. Evid. Rule 4 Actions ▾

or must:

(A) provide reasonable notice of the general nature of any such **evidence** that the prosecutor intends to offer at trial; and

(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(c) **Evidence of similar crimes in child-molestation cases.**

(1) *Permitted uses.* -- In a criminal case in which a defendant is accused of child molestation, the court may admit **evidence** that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(2) *Disclosure.* -- If the prosecution intends to offer this **evidence** it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(3) For purposes of this **rule** "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(4) **Rule 404(c)** does not limit the admissibility of **evidence** otherwise admissible under **Rule 404(a)**, **404(b)**, or any other **rule of evidence**.

## History

Amended effective October 1, 1992; February 11, 1998; November 1, 2001; April 1, 2008;  
December 1, 2011

### ► Annotations

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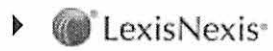
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## Utah R. Evid. Rule 606

### Copy Citation

Current through rules effective as of September 1, 2015.

**UTAH COURT RULES ANNOTATED   STATE RULES   UTAH RULES OF  
EVIDENCE   ARTICLE VI. WITNESSES**

### Rule 606. Juror's competency as a witness

---

**(a)** *At the trial.* -- A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

**(b)** *During an inquiry into the validity of a verdict or indictment.*

**(1)** *Prohibited testimony or other evidence.* -- During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

**(2)** *Exceptions.* -- A juror may testify about whether:

**(A)** extraneous prejudicial information was improperly brought to the jury's attention; or

**(B)** an outside influence was improperly brought to bear on any juror.

### History

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Amended effective October 1, 1992; December 1, 2011

#### ▼ Annotations

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**Utah Code Ann. § 76-2-101**

Statutes current through the 2015 General Session

**Utah Code Annotated** > **Title 76 Utah Criminal Code** > **Chapter 2 Principles of Criminal Responsibility**  
> **Part 1 Culpability Generally**

**76-2-101. Requirements of criminal conduct and criminal responsibility.**

---

(1)

(a) A person is not guilty of an offense unless the person's conduct is prohibited by law; and

(b)

(i) the person acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or

(ii) the person's acts constitute an offense involving strict liability.

(2) These standards of criminal responsibility do not apply to the violations set forth in Title 41, Chapter 6a, Traffic Code, unless specifically provided by law.

**History**

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C. 1953, 76-2-101, enacted by L. 1973, ch. 196, § 76-2-101; 1983, ch. 90, § 1; 1983, ch. 98, § 1; 2005, ch. 2, § 300.

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Document: Utah Code Ann. § 76-1-402



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**Utah Code Ann. § 76-1-402****Copy Citation**

Statutes current through the 2015 First Special Session

[Utah Code Annotated](#)   [Title 76 Utah Criminal Code](#)   [Chapter 1 General Provisions](#)  
[Part 4 Multiple Prosecutions and Double Jeopardy](#)

**76-1-402. Separate offenses arising out of single criminal episode — Included offenses.**

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or



**Jump To ▼** court shall not be obligated to charge the jury with respect to an included offense unless rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

**(5)** If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

## History

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C. 1953, **76-1-402**, enacted by L. 1973, ch. 196, § 76-1-402; 1974, ch. 32, § 2.

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Document: Utah Code Ann. § 76-1-402



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**Utah Code Ann. § 76-1-402**[Copy Citation](#)

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[Utah Code Annotated](#)   [Title 76 Utah Criminal Code](#)   [Chapter 1 General Provisions](#)  
[Part 4 Multiple Prosecutions and Double Jeopardy](#)

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(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

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(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or



**Jump To ▼** court shall not be obligated to charge the jury with respect to an included offense unless rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

**(5)** If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

## History

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C. 1953, **76-1-402**, enacted by L. 1973, ch. 196, § **76-1-402**; 1974, ch. 32, § 2.

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Document: 2012 Utah Code Ann. § 76-10-506 Actions ▾

**2012 Utah Code Ann. § 76-10-506**[Copy Citation](#)

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**UTAH CODE ANNOTATED    TITLE 76. UTAH CRIMINAL CODE    CHAPTER 10. OFFENSES  
AGAINST PUBLIC HEALTH, SAFETY, WELFARE, AND MORALS    PART 5. WEAPONS**

**§ 76-10-506. Threatening with or using dangerous weapon in fight or quarrel**

(1) As used in this section, "threatening manner" does not include:

- (a) the possession of a dangerous weapon, whether visible or concealed, without additional behavior which is threatening; or
- (b) informing another of the actor's possession of a deadly weapon in order to prevent what the actor reasonably perceives as a possible use of unlawful force by the other and the actor is not engaged in any activity described in [Subsection 76-2-402\(2\)\(a\)](#).

(2) Except as otherwise provided in [Section 76-2-402](#) and for those persons described in [Section 76-10-503](#), a person who, in the presence of two or more persons, draws or exhibits a dangerous weapon in an angry and threatening manner or unlawfully uses a dangerous weapon in a fight or quarrel is guilty of a class A misdemeanor.

(3) This section does not apply to a person who, reasonably believing the action to be necessary in compliance with [Section 76-2-402](#), with purpose to prevent another's use of unlawful force:

- (a) threatens the use of a dangerous weapon; or
- (b) draws or exhibits a dangerous weapon.

**History**

Jump To ▼

76-10-506, enacted by L. 1973, ch. 196, § 76-10-506; 1992, ch. 101, § 3; 2010, ch. 361,

§ 2.

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## 2012 Utah Code Ann. § 76-5-103

### Copy Citation

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**UTAH CODE ANNOTATED   TITLE 76. UTAH CRIMINAL CODE   CHAPTER 5. OFFENSES  
AGAINST THE PERSON   PART 1. ASSAULT AND RELATED OFFENSES**

### § 76-5-103. Aggravated assault

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

- (a) a dangerous weapon as defined in Section 76-1-601; or
  - (b) other means or force likely to produce death or serious bodily injury.
- (2) (a) A violation of Subsection (1) is a third degree felony, except under Subsection (2)(b).  
(b) A violation of Subsection (1) that results in serious bodily injury is a second degree felony.

### History

C. 1953, 76-5-103, enacted by L. 1973, ch. 196, § 76-5-103; 1974, ch. 32, § 10; 1989, ch. 170, § 2; 1995, ch. 291, § 5; 2010, ch. 193, § 4.

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Tab C





Document: 2012 Utah Code Ann. § 76-10-506 Actions ▾

**2012 Utah Code Ann. § 76-10-506**[Copy Citation](#)

2012 Utah Code Archive

**UTAH CODE ANNOTATED    TITLE 76. UTAH CRIMINAL CODE    CHAPTER 10. OFFENSES  
AGAINST PUBLIC HEALTH, SAFETY, WELFARE, AND MORALS    PART 5. WEAPONS**

**§ 76-10-506. Threatening with or using dangerous weapon in fight or quarrel**

**(1)** As used in this section, "threatening manner" does not include:

**(a)** the possession of a dangerous weapon, whether visible or concealed, without additional behavior which is threatening; or

**(b)** informing another of the actor's possession of a deadly weapon in order to prevent what the actor reasonably perceives as a possible use of unlawful force by the other and the actor is not engaged in any activity described in Subsection 76-2-402(2)(a).

**(2)** Except as otherwise provided in Section 76-2-402 and for those persons described in Section 76-10-503, a person who, in the presence of two or more persons, draws or exhibits a dangerous weapon in an angry and threatening manner or unlawfully uses a dangerous weapon in a fight or quarrel is guilty of a class A misdemeanor.

**(3)** This section does not apply to a person who, reasonably believing the action to be necessary in compliance with Section 76-2-402, with purpose to prevent another's use of unlawful force:

**(a)** threatens the use of a dangerous weapon; or

**(b)** draws or exhibits a dangerous weapon.

**History**

Jump To ▼

76-10-506, enacted by L. 1973, ch. 196, § 76-10-506; 1992, ch. 101, § 3; 2010, ch. 361, § 2.

UTAH CODE ANNOTATED

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## Utah Code Ann. § 76-10-506

Statutes current through the 2015 General Session

Utah Code Annotated > Title 76 Utah Criminal Code > Chapter 10 Offenses Against Public Health, Safety, Welfare, and Morals > Part 5 Weapons

### 76-10-506. Threatening with or using dangerous weapon in fight or quarrel.

---

(1) As used in this section:

(a) “Dangerous weapon” means an item that in the manner of its use or intended use is capable of causing death or serious bodily injury. The following factors shall be used in determining whether an item, object, or thing is a dangerous weapon:

- (i) the character of the instrument, object, or thing;
- (ii) the character of the wound produced, if any; and
- (iii) the manner in which the instrument, object, or thing was exhibited or used.

(b) “Threatening manner” does not include:

- (i) the possession of a dangerous weapon, whether visible or concealed, without additional behavior which is threatening; or
- (ii) informing another of the actor’s possession of a deadly weapon in order to prevent what the actor reasonably perceives as a possible use of unlawful force by the other and the actor is not engaged in any activity described in Subsection 76-2-402(2)(a).

(2) Except as otherwise provided in Section 76-2-402 and for those persons described in Section 76-10-503, a person who, in the presence of two or more persons, and not amounting to a violation of Section 76-5-103, draws or exhibits a dangerous weapon in an angry and threatening manner or unlawfully uses a dangerous weapon in a fight or quarrel is guilty of a class A misdemeanor.

(3) This section does not apply to a person who, reasonably believing the action to be necessary in compliance with Section 76-2-402, with purpose to prevent another’s use of unlawful force:

- (a) threatens the use of a dangerous weapon; or
- (b) draws or exhibits a dangerous weapon.

(4) This section does not apply to a person listed in Subsections 76-10-523(1)(a) through (e) in performance of the person’s duties.

### History

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C. 1953, 76-10-506, enacted by L. 1973, ch. 196, § 76-10-506; 1992, ch. 101, § 3; 2010, ch. 361, § 2; L. 2014, ch. 248, § 1.

## Annotations

## Notes

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### Amendment Notes. —

The 2010 amendment, effective May 11, 2010, rewrote the section, which formerly read: “Every person, except those persons described in Section 76-10-503, who, not in necessary self defense in the presence of two or more persons, draws or exhibits any dangerous weapon in an angry and threatening manner or unlawfully uses the same in any fight or quarrel is guilty of a class A misdemeanor.”

The 2014 amendment, effective May 13, 2014, added (1)(a) and (4); added “and not amounting to a violation of Section 76-5-103” in (2); and made related changes.

## NOTES TO DECISIONS

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### Aggravated assault.

### Evidence sufficient.

### Lesser included offenses.

### Aggravated assault.

Aggravated assault, § 76-5-103, committed by use of a deadly weapon is not the same crime proscribed by this section, and a person convicted of aggravated assault is not entitled to receive the misdemeanor penalty provided by this section, but is to be sentenced under § 76-5-103. State v. Verdin, 595 P.2d 862 (Utah 1979) See also Green v. Turner, 409 F.2d 215 (10th Cir. 1969) (same conclusion under former law).

Defendant charged with aggravated assault committed by use of a deadly weapon, § 76-5-103, was entitled to a jury instruction regarding offense of threatening with a dangerous weapon as a lesser included offense where two offenses had overlapping elements, facts of case tended to prove both offenses, and evidence was subject to an interpretation which provided both a rational basis for a verdict acquitting defendant of aggravated assault charge and convicting him of threatening with a dangerous weapon. State v. Oldroyd, 685 P.2d 551, 1984 Utah LEXIS 892 (Utah 1984).

Defendant, who was not a party to any fight or quarrel and did not merely draw or exhibit his gun but admitted firing it, was properly charged with aggravated assault under § 76-5-103 rather than under this section. State v. Quada, 291 Utah Adv. 26, 918 P.2d 883, 1996 Utah App. LEXIS 61 (Utah Ct. App.), cert. denied, 925 P.2d 963, 1996 Utah LEXIS 284 (Utah 1996).

A defendant convicted of aggravated assault for firing a pistol from a moving vehicle into another moving vehicle was not entitled to a jury instruction on the lesser included offense of threatening or using a dangerous weapon in a fight or quarrel, as at the time of the shooting there was no quarrel and the defendant did more than merely “draw and exhibit” his weapon. State v. Parra, 359 Utah Adv. 22, 972 P.2d 924, 1998 Utah App. LEXIS 124 (Utah Ct. App. 1998).

**Evidence sufficient.**

Ample evidence existed to support defendant's convictions. See State v. Cravens, 2000 UT App 344, 410 Utah Adv. 22, 15 P.3d 635, 2000 Utah App. LEXIS 102 (Utah Ct. App. 2000).

**Lesser included offenses.**

It was not plain error for the trial court to fail to instruct the jury on the lesser included crime of threatening with a dangerous weapon when there was no request to do so by either party; defendant could have made a reasonable strategic decision not to instruct the jury on the crime of threatening with a dangerous weapon for fear that the jury might convict defendant of that crime if it was not able to agree that he was guilty of aggravated assault. State v. Smith, 2003 UT App 52, 467 Utah Adv. 25, 65 P.3d 648, 2003 Utah App. LEXIS 11 (Utah Ct. App. 2003), aff'd in part and rev'd in part, 2005 UT 57, 533 Utah Adv. 57, 122 P.3d 615, 2005 Utah LEXIS 99 (Utah 2005).

**Research References & Practice Aids**

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**Cross-References. —**

Aggravated assault, § 76-5-103.

**Am. Jur. 2d. —**

79 Am. Jur. 2d Weapons and Firearms § 29.

**C.J.S. —**

94 C.J.S. Weapons § 16.

**A.L.R. —**

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 8 A.L.R.5th 775.

**Hierarchy Notes:**

Utah Code Ann. Title 76

Utah Code Annotated

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## 2012 Utah Code Ann. § 76-5-103

### Copy Citation

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**UTAH CODE ANNOTATED   TITLE 76. UTAH CRIMINAL CODE   CHAPTER 5. OFFENSES  
AGAINST THE PERSON   PART 1. ASSAULT AND RELATED OFFENSES**

### § 76-5-103. Aggravated assault

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

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

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

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

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

### History

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C. 1953, 76-5-103, enacted by L. 1973, ch. 196, § 76-5-103; 1974, ch. 32, § 10; 1989, ch. 170, § 2; 1995, ch. 291, § 5; 2010, ch. 193, § 4.

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Statutes current through the 2015 First Special Session

[Utah Code Annotated](#)   [Title 76 Utah Criminal Code](#)   [Chapter 5 Offenses Against the Person](#)   [Part 1 Assault and Related Offenses](#)

**76-5-103. Aggravated assault — Penalties.**

(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.

**History**

**Jump To ▼**

**3**, enacted by L. 1973, ch. 196, § 76-5-103; 1974, ch. 32, § 10; 1989, ch. 170, § 2;  
1995, ch. 291, § 5; 2010, ch. 193, § 4; L. 2015, ch. 430, § 2.

**► Annotations**

Utah Code Annotated

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Tab D

INSTRUCTION NO. \_\_\_\_\_

A person commits Aggravated Assault if that person commits assault and uses a dangerous weapon.

0000067

INSTRUCTION NO. \_\_\_\_\_

"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.

"Unlawful or unlawfully" means that which is contrary to law or unauthorized by law, or, without legal justification, or, illegal.

INSTRUCTION NO. \_\_\_\_\_

"Dangerous weapon" means any item capable of causing death or serious bodily injury.

0000070

INSTRUCTION NO. \_\_\_\_\_

You are instructed that a handgun is a dangerous weapon.

0000071

INSTRUCTION NO. \_\_\_\_\_

Before you can convict the defendant, Chadley Keith Calvert, of the crime of Aggravated Assault, 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 before the 16<sup>th</sup> day of July, 2012, in Salt Lake County, State of Utah;

1. That the defendant, Chadley Keith Calvert committed an act of assault upon Hugo Holguin; and
2. That such attempt or act was committed intentionally or knowingly; and
3. That the defendant used a dangerous weapon.

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.

0000074

INSTRUCTION NO. \_\_\_\_\_

Under the law of the State of Utah a person is guilty of threatening or using a dangerous weapon in a fight or quarrel if, in the presence of two or more persons, he/she draws or exhibits any dangerous weapon in an angry and threatening manner or unlawfully uses the same in any fight or quarrel.

0000075

INSTRUCTION NO. \_\_\_\_\_

You are instructed that the State is not required to prove that the weapon was loaded or capable of firing in order to establish that the defendant is guilty of threatening with a dangerous weapon.

0000076



INSTRUCTION NO. \_\_\_\_\_

Before you can convict the defendant, Chadley Keith Calvert, of the offense of Threatening With or Using a Dangerous Weapon in a Fight or Quarrel, as charged in Count II 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 16<sup>th</sup> day of July, 2012, in Salt Lake County, State of Utah;

1. That the defendant, Chadley Keith Calvert was in the presence of two or more people; and
2. Drew or exhibited any dangerous weapon, to wit: a handgun; and
3. (a) Did so in an angry or threatening manner, or (b) unlawfully used the same in any fight or quarrel.

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 Threatening With or Using a Dangerous Weapon in a Fight or Quarrel, as charged in Count II 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 II.

Tab E

INSTRUCTION NO. 16

A person commits Aggravated Assault if that person commits assault and uses a dangerous weapon.

INSTRUCTION NO. 17

"Dangerous weapon" means any item capable of causing death or serious bodily injury.

0000189

INSTRUCTION NO. 18

~~You are instructed that a handgun is a dangerous weapon.~~

0000190

Instruction No. 19

If the evidence supports an affirmative defense, the State has the burden to prove beyond a reasonable doubt that the defense does not apply.

0000191

INSTRUCTION NO. 10

A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself or a third person, or prevent the commission of a forcible felony.

A person is not justified in using force under the circumstances specified above if that person:

- a) initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant; or
- b) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or
- c) was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force.

In determining the imminence or reasonableness of use of force, you may consider, but are not limited to, any of the following factors:

- a) The nature of the danger;
- b) The immediacy of the danger;
- c) The probability that the unlawful force would result in death or serious bodily injury;
- d) The other's prior violent acts or violent propensities;
- e) Any patterns of abuse or violence in the parties' relationship.

Instruction No. 21

(1) A person is justified in using force against another when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation; however, he is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:

(a) the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence; or

(b) he reasonably believes that the entry is made or attempted for the purpose of committing a felony in the habitation and that the force is necessary to prevent the commission of the felony.

(2) The person using force or deadly force in defense of habitation is presumed for the purpose of both civil and criminal cases to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry is unlawful and is made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony.



INSTRUCTION NO. 22

The reasonableness of a belief that a person is justified in using force that would cause death or serious bodily injury against another shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

0000194

INSTRUCTION NO. 25

"Assault" is:

- (a) an attempt, with unlawful force or violence, to do bodily injury to another;
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
- (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

"Unlawful or unlawfully" means that which is contrary to law or unauthorized by law, or without legal justification, or illegal.

INSTRUCTION NO. 24

Before you can convict the defendant, Chadley Keith Calvert, of the crime of Aggravated Assault, 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 before the 16<sup>th</sup> day of July, 2012, in Salt Lake County, State of Utah;

1. That the defendant, Chadley Keith Calvert committed an act of assault upon Hugo Holguin; and
2. That such attempt or act was committed intentionally or knowingly; and
3. That the defendant used a dangerous weapon.

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. 25

Under the law of the State of Utah a person is guilty of threatening or using a dangerous weapon in a fight or quarrel if, in the presence of two or more persons, he/she draws or exhibits any dangerous weapon in an angry and threatening manner or unlawfully uses the same in any fight or quarrel.

INSTRUCTION NO. 26

You are instructed that the State is not required to prove that the weapon was loaded or capable of firing in order to establish that the defendant is guilty of threatening with a dangerous weapon.

INSTRUCTION NO. 27

Before you can convict the defendant, Chadley Keith Calvert, of the offense of Threatening With or Using a Dangerous Weapon in a Fight or Quarrel, as charged in Count II 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 16<sup>th</sup> day of July, 2012, in Salt Lake County, State of Utah;

1. That the defendant, Chadley Keith Calvert was in the presence of two or more people; and
2. Drew or exhibited any dangerous weapon, to wit: a handgun; and
3. (a) Did so in an angry or threatening manner, or (b) unlawfully used the same in any fight or quarrel.

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 Threatening With or Using a Dangerous Weapon in a Fight or Quarrel, as charged in Count II 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 II.

Tab F

Another neighbor, Keith Majors, completed a written statement which indicates on the date in question he heard people shouting outside and when he looked out of his window he saw "a red lazer pointer moving around on the ground." After Majors saw the laser, Defendant "...called me and said please come out I have a situation and I am going to go get my gun..." When Majors went outside, he told Holguin and his relatives to go home. At that point, police arrived.

### **Holladay**

According to Unified Police Report #2008-95235 in 2008 Defendant and Camille Little were neighbors on Fieldcrest Lane in Holladay. On October 28, 2008 Defendant called police to report that he approached Little and told her to move. Little tried to push and punch him, but that she was drunk and had fallen on the ground. Officer Michael Child of Unified Police reported to the scene and spoke to Little, who stated she had just come home when Defendant "made threats at my life like always." Little went inside her home, but when she noticed Defendant outside taking pictures, she went back outside. At that point Defendant was "yelling at her 'you stupid bitch.'" According to Little, he then attacked her, pushing her and hitting her twice in the head.

Defendant was charged by an information with Assault in Holladay Justice Court case 081000542. Defendant pled not guilty and the case was dismissed on February 6, 2009 on the Holladay prosecutors' motion.

### **West Valley City**

According to West Valley Police Report 99-41265, in 1999 Defendant and Pat Wall were neighbors on Oxford Way in West Valley City. On or about August 1, 1999 Wall reported to police that Defendant drove his car directly toward Wall's stopped car and swerved out of the



Tab G

**From:** ru4eton <ru4eton@gmail.com>  
**Subject:** Fwd: statement  
**Date:** May 15, 2014 6:34:40 PM MDT  
**To:** crf@jmphilpot.com

---

----- Forwarded message -----

**From:** "shaun harris" <shaun.harris102@gmail.com>  
**Date:** May 15, 2014 6:02 PM  
**Subject:** statement  
**To:** <ru4eton@gmail.com>  
**Cc:**

I was in attendance during the trial of Chad Calvert. This is my statement of the events that took place with the Prosecutor's laptop that I witnessed.

It was the end of the trial and the judge had already dismissed the jurors for deliberation. The prosecutor asked the court clerk if the 911 CD audio had been submitted into evidence. The court clerk said that it was. Mr Philpot, the defense attorney, had asked the prosecutor to confirm that the 911 audio was the only thing on that disk. The prosecutor confirmed that the 911 audio was all that was on the CD. The prosecutor then asked the bailiff if the jurors had a way to play the audio as they deliberated. The bailiff told the prosecutor he would find out and at that point the prosecutor offered his laptop to the jurors. After the verdict was read the bailiff was standing in front of the galley waiting for everybody to leave. The prosecutor was sitting at his table also waiting and he asked the bailiff if he could have his laptop back. The bailiff told him that he had to wait until we all left the courtroom before he could go back to the jury room to get the laptop.

Best regards,

--

Shaun Harris  
A 1 Industrial Supply  
801.652.8785

0000216

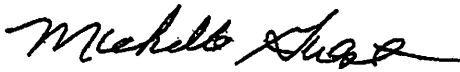
5/7/2014

To whom it may concern,

My wife Michelle Guest, and myself, Denny P. Guest Jr. attended the trial and verdict hearing of my cousin Chad K. Calvert on April 30, 2014 and May 1, 2014 in West Jordan, UT. We were in attendance when the verdict was read. Right after the verdict was read we both witnessed that the court bailiff walked over to the prosecuting attorney and asked if he needed anything else as he was not exiting the courtroom. The prosecuting attorney stated he needed his computer. The bailiff said he would get it for him and exited through the door that the jury went into. We then exited the courtroom. This is our recollection and statement.



Denny P. Guest Jr



Michelle C. Guest

0000217

Tab H

**From:** Morgan Philpot [mailto:[imorganphilpot@gmail.com](mailto:imorganphilpot@gmail.com)]  
**Sent:** Tuesday, May 13, 2014 12:25 PM  
**To:** William Carlson  
**Subject:** Calvert Case

Will,

I have had some conversations and need to clarify a few things. Specifically, I need to know that only the 911 call went back to the jury room and that your laptop did not go back to the jury room?

Thanks,

Morgan Philpot

Attorney for Chad Calvert

(801) 891-4499 mobile.

0000220

**From:** Morgan Philpot <jmorganphilpot@gmail.com>  
**Subject:** Fwd: Calvert Case  
**Date:** May 13, 2014 12:31:56 PM MDT  
**To:** Rick Franklin <crf@jmphilpot.com>

---

----- Forwarded message -----

**From:** William Carlson <WCarlson@slco.org>  
**Date:** Tue, May 13, 2014 at 12:30 PM  
**Subject:** RE: Calvert Case  
**To:** Morgan Philpot <jmorganphilpot@gmail.com>

Morgan,

Only the one 911 call from Araht went back, not the other two 911 calls. I left the office laptop (it is not my laptop and does not have any of my files or email on it) in the courtroom while the jury deliberated in case it was needed, which we had discussed doing before we left the courtroom. When we were called back for the verdict, the laptop had been taken into the back. I do not know whether the jury used it to listen to the cd or the bailiff had just taken it in back in case they needed it.

*William J. Carlson*  
Deputy District Attorney

Justice Division

West Jordan Courthouse

8080 South Redwood Road, Suite 1100 Tel (385) 468-7546

West Jordan, Utah 84088 Fax (385) 468-7549

[www.districtattorney.slco.org](http://www.districtattorney.slco.org)

[WCarlson@slco.org](mailto:WCarlson@slco.org)

0000219