

2016

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

Utah Court of Appeals

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Case No. 20150213-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

CHADLEY KEITH CALVERT,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for aggravated assault, a third degree felony, and threatening with or using a dangerous weapon in a fight or quarrel, a class A misdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Mark Kouris presiding

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UTAH APPELLATE COURTS

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Case No. 20150213-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

CHADLEY KEITH CALVERT,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for aggravated assault, a third degree felony, and threatening with or using a dangerous weapon in a fight or quarrel, a class A misdemeanor. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2012).

STATEMENT OF THE ISSUES

Defendant Chadley Calvert pulled a gun on some passing neighborhood children whom he thought had stepped onto his lawn. When three parents arrived to speak to Calvert about it, he pulled a gun on them too, pointing it at one of them. Calvert was convicted of one count of aggravated assault for pointing the gun at one parent and of one count of threatening with or using a dangerous weapon in a fight or quarrel

(brandishing) for taking out his gun during a quarrel with multiple people present.

1. Has Calvert overcome the strong presumption that his counsel reasonably chose not to seek dismissal of either the aggravated assault or brandishing counts before or during trial?

2. Has Calvert overcome the strong presumption that his counsel reasonably chose not to seek merger of the aggravated assault and brandishing counts after trial?

Standard of Review. An ineffective assistance claim raised for the first time on appeal presents a question of law, reviewed for correctness. *State v. Bedell*, 2014 UT 1, ¶20, 322 P.3d 697.

3. Did the trial court properly admit evidence under rule 404(b) of Calvert's prior assault and threat against a neighbor over a trivial matter, for the purpose of rebutting his self-defense and fabrication claims?

Standard of Review. A trial court's decision to admit evidence under rule 404(b) is reviewed for abuse of discretion. *State v. Reece*, 2015 UT 45, ¶17, 349 P.3d 712.

The trial court admitted – without objection – a recording of a 911 call made after Calvert pulled out his gun. When the jury retired to deliberate, the prosecutor offered to leave a laptop so that the jury could listen to the

recording during deliberations if they chose. The laptop contained no case files, email, or other outside case information. Defense counsel did not object at the time, but later moved to arrest judgment because the jury might have been exposed to “outside materials or influences” from the prosecutor’s laptop, which created “the appearance of impropriety.” Defense counsel did not then, and has not now, offered any evidence that the jury used the laptop at all, let alone to access improper material.

4. Has Calvert overcome the strong presumption that counsel performed objectively reasonably when he raised no objection to the jury’s having access to the prosecutor’s laptop to listen to the 911 recording?

Standard of Review. See issues 1 and 2.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:¹

Utah Code Ann. § 76-1-402 (statutory merger);
Utah Code Ann. § 76-5-103 (aggravated assault);
Utah Code Ann. § 76-10-506 (brandishing).

¹ Unless otherwise noted, the State cites to the current versions of the Code.

STATEMENT OF THE CASE

A. Summary of facts.²

One summer evening, a group of about seven neighborhood children walked in front of Calvert's house. R283:92-93, 105, 118-19, 123-24, 161-62. As they passed, Calvert swore and yelled at them for stepping onto his lawn and he threatened to shoot them. *Id.* at 93, 171. When one of the children talked back, Calvert pulled out a gun with a laser sight. *Id.* at 83-84, 243; DE1. Some of the children ran to tell their parents. *Id.* at 136-37, 252-54, 275-76.

Two of the children's fathers—Hugo and his brother Adon Holguin—came immediately to talk to Calvert about what happened. R283:95, 120, 147, 180, 223, 232, 265-66, 277. They were accompanied by three of the children—Ar.H., K.P., and K.H.—and Hugo's wife, Yolanda. *Id.* at 174, 176, 225, 255, 260, 277. While Calvert argued with the two men, he pulled out a gun with a laser sight and pointed it at or near Adon. *Id.* at 147, 158, 180, 197, 202, 235, 245-47. He also pointed it at Hugo's chest "several times." *Id.* at 120, 138, 141, 180, 223, 254, 265-66, 277, 282. This went on for about "eight

² Consistent with appellate standards, the facts are recited in the light most favorable to the jury verdict. *State v. Maestas*, 2012 UT 46, ¶3, 299 P.3d 892.

or nine minutes.” *Id.* at 202. Ar.H. called 911. *Id.* at 149-50, 186; SE2 (911 recording). When Ar.H. told Calvert that he was going to call police, Calvert went into his garage and “put the gun away.” R283:183-84.

When police arrived, Calvert told them that he had been sitting on his steps with a “laser pointer” and that he had it “just pointed at the ground.” *Id.* at 303. Calvert said that he had a gun inside the house, but claimed that he did not have time to grab it during the quarrel. *Id.* at 304. He showed police a gun without a laser sight. *Id.* Police asked if he had another gun in his garage. *Id.* at 305-06. Calvert admitted that he did, but claimed that it was unloaded. *Id.* at 307-08. Police found a loaded gun—with a laser sight—in the garage. *Id.* at 308-09; SE 5, 6, 7. The testifying officer did not see a laser pointer at the house other than the sight on the loaded gun. R208:309.

Defendant’s story. At trial, Calvert admitted, for the first time, to pointing his gun at one of the men—he did not know which—but claimed to have acted in defense of himself and his property. R284:62, 78. He testified that he took “great pride” in his yard and was upset when he saw a “bunch of children just causing all sorts of ruckus” there, such as—according to him—scratching his car with a tree branch and breaking one of his sprinklers. *Id.* at 53-56. Calvert admitted to swearing at the children

before they left. *Id.* at 56-57. Calvert claimed to have then sat down on his porch to eat a burrito when someone “scared the hell out of him” by trying to grab him through his porch railing. *Id.* at 56-62, 78. Calvert ran inside his house to grab one of his guns. *Id.* at 56-62. Hearing his garage alarm go off, Calvert went to his garage to find a man there. *Id.* at 58-61. Calvert pointed his gun at the man and told him to leave. *Id.* at 62.

B. Summary of proceedings.

The State charged Calvert with aggravated assault, a third degree felony, and threatening with or using a dangerous weapon in a fight or quarrel (brandishing), a class A misdemeanor. R1-3. The aggravated assault charge was based on Calvert’s pointing the gun at Hugo Holguin. R196 (aggravated assault elements instruction listing Hugo as victim); R284:130 (prosecutor closing argument specifying Hugo as victim of aggravated assault). The brandishing charge was based on Calvert’s drawing or exhibiting a gun while in a quarrel in the presence of two or more people. *See* R284:131; R199.

Over Calvert’s objection, the trial court allowed the State to present evidence under rule 404(b) and the doctrine of chances that Calvert had previously assaulted and threatened to kill a neighbor during an argument over a trivial matter for the purpose of rebutting Calvert’s self-defense

claim—and by extension, disproving his implicit claim that all of the other witnesses were fabricating their version of events. R93-108 (State’s motion in limine to admit 404(b) evidence); R283:28-30 (trial court ruling admitting 404(b) evidence to rebut “fabrication as well as self-defense”).

The trial court also admitted—without objection—a recording of the 911 call. SE2; R283:150. Before deliberations, the prosecutor offered to let the jury use a laptop from his office to listen to the 911 call during deliberations; Calvert did not object. R284:147.

The jury convicted Calvert as charged. R166-67. Before sentencing, defense counsel moved to arrest judgment, asserting that letting the jury take the laptop into deliberations was error. R209-11. He proffered no evidence that the jurors had even used the computer or that they had accessed anything improper. *Id.* He instead argued that the possibility of access to outside information—whether from files on the computer or the internet—imputed an “appearance of impropriety” that was “impossible to overcome.” R211. The prosecutor explained that his office used the laptop only at jury trials as a tool, that it did not have any case information on it, and he did not know whether it was even internet-capable at the courthouse. R226-27; R282:17-19. He also noted that Calvert had not shown

that the jury viewed anything improper on the laptop. R226-27. The trial court denied the motion to arrest judgment. R282:21.

The court then sentenced Calvert to suspended statutory prison and jail terms, and placed him on probation with conditions including 90 days in jail, 50 hours of community service, a mental health evaluation, and any recommended treatment. *Id.* at 25-26. Calvert timely appealed. R273-75, 276-77.

SUMMARY OF ARGUMENT

Issue I: Calvert first argues that his trial counsel was ineffective for not moving either before or during trial to (1) dismiss either the aggravated assault or the brandishing charge; or (2) make the brandishing charge a lesser-included offense of the assault charge. Calvert's arguments rest on a faulty premise—that he was charged for a single act. The evidence shows separate acts for each charge. It was obvious from the jury instructions and counsel's arguments that the aggravated assault charge related only to Calvert's pointing the gun at Hugo. That left the independent act of exhibiting a weapon in a fight or quarrel in front of two or more people. Defense counsel could have reasonably decided not to move for dismissal of one count or inclusion of a lesser offense because had he done so, the prosecutor would have simply emphasized that the evidence supported not

only the two charged counts, but additional assault and brandishing counts as well. Any motion to dismiss one of the counts or to make brandishing a lesser-included offense would have surely failed.

Issue II: Calvert alternatively argues that his counsel was ineffective for not moving to merge the two counts after conviction. He argues both for *Finlayson* merger and statutory merger. Because this case does not involve any kidnapping or unlawful detention offense, *Finlayson* merger does not apply. Statutory merger does not apply for essentially the same reasons that counsel did not perform deficiently in not moving to dismiss one count: separate conduct supported separate charges. Because there was no valid basis for merger, counsel could not have been ineffective for not seeking it.

Issue III: Calvert next argues that the trial court abused its discretion under rule 404(b) and the doctrine of chances by admitting evidence that he had previously assaulted and threatened a neighbor over a trivial matter for the purpose of rebutting his fabrication and self-defense claims. He argues that the trial court admitted the evidence for the improper purpose of showing his bad character under rule 404(a); that it was not relevant because it was unrelated to this case and factually dissimilar; that rebutting fabrication is not a proper purpose where the defendant admits that an altercation took place; that rebutting self-defense is not a proper purpose

under these facts; that a single prior instance cannot show relevance under the doctrine of chances; that its probative value was substantially outweighed by its danger for unfair prejudice because it only served to show his bad character; and that the trial court did not scrupulously examine the prior assault evidence.

The trial court properly exercised its discretion to admit the prior fight evidence. The prior assault was relevant to the proper, noncharacter purposes of rebutting Calvert's self-defense and fabrication claims. A single prior instance may be relevant under the doctrine of chances due to the low baseline likelihood of being falsely accused by one's neighbors of assaulting and threatening them over trivial matters.

And the evidence's probative value was not substantially outweighed by the danger for unfair prejudice under rule 403 where the other conduct was both similar to and less serious than the charged conduct. The record also shows that the trial court scrupulously examined the evidence.

But even if the evidence were improperly admitted, any error was harmless where Calvert's story was incredible, the evidence of his guilt was overwhelming, the trial court gave a limiting instruction, and the prosecutor did not mention the other conduct in opening statement, closing argument, or at any other time.

Issue IV: Calvert finally argues that his trial counsel was ineffective for not objecting when the prosecutor offered a laptop for the jury to use should they desire to listen to the 911 call recording during deliberations. Calvert argues that this Court should presume that the very presence of the laptop—even without evidence of improper use—violated his rights to counsel and jury trial. But a defendant like Calvert claiming ineffective assistance must show both deficient performance and prejudice. He can show neither because the problem that he posits—that the jury might have accessed information outside the evidence—is based on pure speculation. Proof of ineffective assistance must be a demonstrable reality, not a speculative matter.

ARGUMENT

I.

Because the aggravated assault and brandishing counts were based on different conduct, Calvert cannot overcome *Strickland's* strong presumption that counsel performed effectively by not seeking dismissal of the brandishing count.

Calvert asserts that the brandishing count is a lesser-included offense of the aggravated assault count. Aplt.Br. 15-21. He argues that his trial counsel was thus ineffective either for (1) not moving to dismiss the lesser count at the end of the State's case, or (2) not seeking jury instructions that would have treated the brandishing count as a lesser-included offense of

aggravated assault. *Id.* at 21-22. Calvert asserts that counsel's alleged failure subjected him "to a conviction twice for essentially the same conduct." *Id.* at 22.

Calvert can prove neither deficient performance nor prejudice because it was clear from the evidence before the jury that the two charges were based on different conduct. Failure to bring motions unsupported by the facts or law is never unreasonable, nor can it be prejudicial.

A. To prevail, Calvert must prove that no reasonable attorney would have forgone a motion to dismiss or for a lesser-included-offense instruction.

Ineffective assistance requires proof of both (1) deficient performance and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Establishing deficient performance requires the defendant to prove that no reasonable attorney would have done what counsel did. *Id.* at 687-88; *State v. Clark*, 2004 UT 25, ¶ 6 (defendant must "persuad[e] the court that there was *no conceivable tactical basis* for counsel's actions.") (citation and quotation omitted).

To "eliminate the distorting effects of hindsight," reasonableness is evaluated from "counsel's perspective at the time." *Strickland*, 466 U.S. at 689. It is also viewed under "prevailing professional norms," rather than "best practices" or "common custom." *Harrington v. Richter*, 131 S.Ct. 770,

778 (2011). Review of counsel's performance is highly deferential because, unlike the reviewing court, counsel "observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Id.* at 788. Thus, there are "countless ways to provide effective assistance in any given case"—even "the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

Establishing prejudice requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Harrington*, 131 S.Ct. at 787-88 (quotations and citation omitted). Proof of prejudice must be based on a "demonstrable reality and not a speculative matter." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (citations and quotation omitted).

A defendant can prove neither deficient performance nor prejudice if the motion he argues counsel should have filed would have surely failed.

Menzies v. State, 2014 UT 40, ¶222, 344 P.3d 581 (holding no ineffective assistance for not challenging jury instruction on appeal where challenge would have “surely failed” and “[i]t follows that it would have hardly been obvious to appellate counsel to challenge the instruction”).

B. Counsel reasonably forwent a motion to dismiss or to treat the brandishing count as a lesser-included offense because it was clear that the two charges were based on separate conduct.

Calvert’s argument that counsel should have moved to dismiss the brandishing count—or at least sought to have it treated as a lesser-included offense of aggravated assault—rests entirely on his assumption that the brandishing count is in fact necessarily included in the aggravated assault count. It is not. The evidence, argument, and jury instructions make clear that the aggravated assault and threatening counts were based on completely different acts: the aggravated assault count was based on Calvert’s pointing the gun at Hugo; the brandishing count was based on his exhibiting the gun during a quarrel in the presence of two or more persons—that is, either when he threatened the seven children with the gun, or the adults and children who later confronted him.

A defendant cannot be convicted of both a greater and a necessarily included offense. Utah Code Ann. § 76-1-402(3). An offense is statutorily included under only three circumstances: (1) if it “is established by proof of

the same or less than all the facts required to establish” the greater charge; (2) it “constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included”; or (3) it “is specifically designated by statute as a lesser included offense.” *Id.* Only the first circumstance is at issue here.

This test focuses purely on the language of the statutes at issue, and is the same as the “necessarily included” standard applicable when the prosecution requests a lesser-included-offense instruction at trial: the elements of the lesser offense must be “necessarily included within the statutory elements of the” greater offense. *State v. Carruth*, 1999 UT 107, ¶¶13-18, 993 P.2d 869; *see also State v. Baker*, 671 P.2d 152, 155-57 (Utah 1983).

In other words, “[t]he offenses must be such that the greater cannot be committed without necessarily having committed the lesser.” *Carruth*, 1999 UT 107, ¶6 (quoting *Baker*, 67 P.2d at 155-56). This means that as long as the lesser offense does not contain any element not found in the greater charged offense, the lesser offense is necessarily included. *Id.* at ¶17. It also means that if the two charges are based on separate conduct, one cannot be necessarily included in the other. *Cf. State v. Hill*, 674 P.2d 96, 97-98 (Utah 1983) (merging aggravated robbery and theft where “the only evidence before the jury” showed a theft occurring as part of the robbery).

Here, brandishing is not necessarily included in aggravated assault because it has an additional element that aggravated assault does not. Brandishing is also not necessarily included in aggravated assault here because it was based on separate conduct.

To prove aggravated assault, the State needed to show that Calvert (1) threatened another; (2) “accompanied by a show of immediate force or violence, to do bodily injury to another”; and (3) used a “dangerous weapon.” Utah Code Ann. § 76-5-103.

Aggravated assault thus criminalizes each time a person threatens another with a show of immediate force using a dangerous weapon—relevant here, each time he points a gun at “another.” *See, e.g., State v. Syvongsa*, 2012 UT App 277, ¶6, 288 P.3d 43 (holding evidence sufficient for aggravated assault where “Defendant pointed a gun directly at” the victim while “yelling something”); *see also Harris v. State*, 35 S.W.3d 819, 823-24 (Ark. Ct. App. 2000) (pointing gun suffices for aggravated assault); *People v. Raviart*, 93 Cal. App. 4th 258, 263 (2001) (similar); *Watson v. State*, 689 S.E.2d 104, 106 (Ga. Ct. App. 2009) (similar); *State v. Julien*, 34 So.3d 494, 499 (La. Ct. App. 2010) (similar); *Sosa v. State*, 177 S.W.3d 227, 231-32 (Texas Ct. App. 2005) (similar); *cf. State v. Hodson*, 907 P.2d 1155, 1157 (Utah 1995) (“the only possible inference to be made when someone holds a loaded gun to the

head of another and issues an order is that failure to comply will result in use of the gun.”).

To prove brandishing, the State needed to prove that Calvert (1) “in the presence of two or more persons”; (2) drew or exhibited a dangerous weapon; (3) “in an angry and threatening manner”; during (4) “a fight or quarrel.” Utah Code Ann. § 76-10-506. Brandishing thus criminalizes each time a person angrily and threateningly draws or exhibits a dangerous weapon during a fight when two or more people are present. *See, e.g., State v. Phelps*, 2005 UT App 451U, *1 (holding evidence sufficient for brandishing where evidence established that defendant “exhibited his gun to” the victim); *see also State v. Cravens*, 2000 UT App 344, ¶¶2-3, 19-20, 15 P.3d 635 (holding evidence sufficient where defendant brandished a “15 to 18 inch club” during angry confrontation with two women).

Because brandishing requires an additional element that assault does not—the presence of two or more persons—it is not a statutorily lesser-included offense. *See* Utah Code Ann. § 76-1-402(3) (defining lesser-included offense as requiring proof of the “same or less” than the facts of the greater crime, constituting an attempt, solicitation, etc. of greater offense, or designated by statute as lesser offense); *State v. Bradley*, 752 P.2d

874, 878 (Utah 1985) (holding offense lesser-included where “the jury was not required to find any additional elements to convict”).

It is true, as Calvert points out, Aplt.Br. at 17-18, that a broader standard applies when a defendant seeks a lesser-included offense at trial. Under that “evidence-based standard” – which does not require that the lesser offense be necessarily included in the greater offense – a defendant is entitled to a lesser-included offense instruction when some of the elements of the offenses merely “overlap” and the evidence provides a rational basis for acquitting on the greater charge and convicting of the lesser. *Baker*, 671 P.2d at 154-59.

Thus, regardless of whether Calvert might have been able to get a brandishing lesser offense instruction on the aggravated assault charge if he had sought one, *see State v. Oldroyd*, 685 P.2d 551, 554 (Utah 1984) (holding that brandishing and aggravated assault have “overlapping elements” of requiring threats and use of weapon), he would not have been entitled to a dismissal of the brandishing charge because it was not *necessarily* included in the aggravated assault charge. *See* Utah Code Ann. § 76-10-506 (requiring brandishing to be committed in the “presence of two or more persons”).

Calvert also would not have been entitled to dismissal of the brandishing charge because it and the assault charged were based on

separate acts. “[A]cts are separate” –and thus separately chargeable– “if they are not necessary to each other or are sufficiently separated by time and space.” *State v. Chukes*, 2003 UT App 155, ¶21, 71 P.3d 624 (citations omitted); *see also State v. Roth*, 2001 UT 103, ¶8, 37 P.3d 1099 (upholding separate convictions where clear from verdict that convictions based on separate evidence).

The evidence at trial supported two brandishings. A.C. testified that as the group of children initially passed Calvert’s house, Calvert became upset, “pulled out a gun,” and threatened to “to shoot” them.³ R283:93-94, 105. And Adon testified that Calvert threatened him while pointing a gun at the ground between them. R282:235, 246. As many as two other adults and three children would have been present at the time. R283:174, 176, 225, 255, 260, 277.

Calvert’s brandishing a gun while yelling obscenities at seven children –or while later arguing with the three adults– was “not necessary” to Calvert’s pointing the gun at Hugo. *Chukes*, 2003 UT App 155, ¶21. And

³ Though her trial testimony differed on this point, K.P.’s police statement at the time of these events corroborated that Calvert pulled out a red laser—which she thought might have been a flashlight—during his argument with the children. *Id.* at 212-14. And the officer stated that he saw no separate laser pointer either inside or outside Calvert’s home. R283:309.

there was at least one clear break in time between offenses when the children left to tell the adults and the three adults and three children returned. *Id.* Further, it was clear to the jury that the aggravated assault was based on Calvert's pointing the gun at Hugo. R196; R294:130. And no one argued at trial that pointing the gun at Hugo was also the basis for the brandishing charge. R283: 87-88 (State opening); R284:13-15 (defense opening); R284:129-36, 142-44 (State closing and rebuttal); R284:136-41 (defense closing).

Given the evidence of separate acts for each charge, counsel could reasonably decide not to move to dismiss one or the other charge or to make the brandishing a necessarily lesser-included offense of the aggravated assault. Because there were separate bases, any such motion would have surely failed. *See State v. Johnson*, 2015 UT App 312, ¶16, 803 Utah Adv. Rep. 33 (rejecting ineffective assistance claim where defense motion would have been futile). If defense counsel had done so, the prosecutor would have merely emphasized the separate nature of the charges. It could have also prompted the prosecutor to emphasize that the evidence supported two potential brandishings—one against the children, and one against the adults—as well as four aggravated assaults for Calvert pointing his gun at Hugo, Adon, Ar.H., and A.C. R283:107-09 (A.C. testifying that Calvert

pointed gun at A.C. and Ar.H.); *id.* at 180 (Ar.H. testifying that Calvert pointed gun at Adon and Hugo); *id.* at 202 (K.P. testifying that Calvert pointed gun at Adon and Hugo); *id.* at 254, 265-66, 277 (two adults testifying that Calvert pointed gun at Hugo).

Calvert cursorily adds that counsel was ineffective for not moving to dismiss one or the other counts as multiplicitous. *Aplt.Br.* 19-21. This assertion fails for two reasons. First, because the State filed two charges under two different code sections, they could not have been multiplicitous. Multiplicity forbids the State from charging a single offense as multiple offenses—that is, from charging multiple counts of the same offense. *See State v. Rasabout*, 2015 UT 72, ¶¶25-27, 356 P.3d 1258 (holding that defendant was subject to twelve counts of discharge of a firearm for a drive-by shooting in which he shot twelve times); *State v. Hattrich*, 2013 UT App 177, ¶¶33-35, 317 P.3d 433 (holding that defendant was subject to multiple counts of sexual offenses because the legislature criminalized each act, not each course of conduct). As explained, that did not happen here.

Second, even if the multiplicity doctrine could apply to different code sections, that would not aid Calvert. Whether a charge is multiplicitous depends upon the “unit of prosecution” — what the legislature criminalized. *Rasabout*, 2015 UT 72, ¶¶8-9. As explained, aggravated assault criminalizes

each pointing of the gun at a person, and brandishing criminalizes each display of a weapon during a fight in the presence of two or more persons. The evidence supported multiple counts of both brandishing and aggravated assault, but the State only charged one of each. R283:93-94 (A.C. testifying that Calvert “pulled out a gun” during argument with children); R283:107 (A.C. testifying that Calvert pointed gun at Ar.H.); R283:120, 158, 254, 265-66, 277 (multiple witnesses testifying that Calvert pointed gun at Hugo); R283:180, 197, 202 (Ar.H. and K.P. testifying that Calvert pointed gun at both Hugo and Adon); R283:235, 247-47 (Adon testifying that Calvert pointed gun at ground in front of him); *cf. State v. Garrido*, 2013 UT App 245, ¶¶32-33, 314 P.3d 1014 (holding that aggravated burglary, aggravated kidnapping, and aggravated assault did not merge where the State presented “evidence to support multiple variants of each crime”). Thus, counsel could have reasonably decided to forgo a multiplicity challenge.

In this light, counsel also could have reasonably decided not to request—as Calvert argues he was required to, *Aplt.Br. 21*—that the trial court require the State to elect which charge it desired to proceed on. And for the same reasons, counsel could have reasonably decided not to request that the brandishing charge be made a lesser-included offense. *Cf. State v. Smith*, 2003 UT App 52, ¶¶29-30, 65 P.3d 648 (holding no plain error for not

giving lesser-included instruction on brandishing in aggravated assault case where defendant claimed “total innocence”), *overruled in part on other grounds by* 2005 UT 57, 122 P.3d 615.

For similar reasons, counsel could have reasonably decided not to move for a directed verdict before jury deliberations. *Aplt.Br.* 21. A directed verdict is a challenge to the sufficiency of the evidence, and is granted only when, viewing the evidence and inferences in the light most favorable to the verdict, no reasonable juror could have convicted. *State v. Maestas*, 2012 UT 46, ¶177, 299 P.3d 892. And it is the province of the jury – not the appellate court – to determine witness credibility. *State v. Riker*, 2015 UT App 293, ¶2, 801 Utah Adv. Rep. 32. A reasonable juror could have believed the testimony of the State’s witnesses over Calvert’s self-serving, inconsistent tale – and could have relied on at least two separate acts for the

brandishing count. Thus, a directed verdict motion would have “surely failed.”⁴ *Menzies*, 2014 UT 40, ¶222.

C. Because the counts were based on separate conduct, Calvert also cannot prove prejudice.

Calvert also cannot prove prejudice—that is, a reasonable likelihood of a different result absent the alleged error—for essentially the same reasons that he cannot show deficient performance. The charges were based on separate conduct. Because a motion to dismiss or consolidate the counts based on separate would have surely failed, making the motion would not have made a difference. *Menzies*, 2014 UT 40, ¶222.

⁴ Regarding the lesser-included offense, Calvert has not overcome *Strickland*’s strong presumption of effective representation for a second reason: counsel could have reasonably decided not to seek a lesser-included of brandishing because it was not material to his chosen strategy. Counsel’s chosen strategy here was to seek full acquittal by relying on Calvert’s testimony. R284:13-15 (defense opening statement), 136-41 (defense closing statement). Such an “all or nothing” defense, “though risky, is a reasonable trial strategy.” *State v. Carson*, 357 P.3d 1064, 1072 (Wash. 2015); *see also McCrady v. State*, 461 S.W.3d 443, 450 (Mo. Ct. App. 2015) (citing cases). This is particularly true where, as here, that strategy is based on the defendant’s statements. *See Strickland*, 466 U.S. at 691 (holding that reasonableness of counsel’s decisions “depends critically” on “information supplied by the defendant”); *Davis v. State*, 653 S.E.2d 104, 106 (Ga. Ct. App. 2007) (holding “‘all-or-nothing’ defense” reasonable where defendant claimed self-defense). It does not matter that other strategies may have been equally reasonable or even more reasonable. *State v. Lucero*, 2014 UT 15, ¶¶41, 43, 328 P.3d 841; *Carson*, 357 P.3d at 1071-72.

II.

Because the aggravated assault and brandishing convictions were based on different conduct, Calvert cannot overcome *Strickland's* strong presumption that counsel performed effectively by not seeking to merge the two at sentencing.

Calvert alternatively argues that his counsel was ineffective for not moving to merge the two convictions at sentencing. Aplt.Br. 23-27. Though he conflates them into a single test, he actually raises two distinct merger arguments: (1) *Finlayson* merger and (2) statutory merger.

Calvert again cannot prove deficient performance because *Finlayson* merger applies only when one of the convictions involves kidnapping or an unlawful detention, and, as explained, there can be no statutory merger because the two convictions were based on separate conduct.

A. The two convictions do not merge under *Finlayson* because neither offense involved a detention.

Finlayson merger applies only to cases involving both a kidnapping or unlawful detention and a host offense in which some detention is inherent. See *State v. Finlayson*, 2000 UT 10, ¶¶17-19, 994 P.2d 1243 (citing *State v. Couch*, 635 P.2d 89 (Utah 1981)). Because there was no kidnapping offense here, *Finlayson* is inapposite. Counsel could thus have reasonably decided not to seek merger on this basis.

B. The two convictions do not merge statutorily because they were based on separate conduct.

As explained in Point I, statutory merger applies when a defendant is convicted of both an offense and a lesser offense “established by proof of the same or less than all the facts required to establish the commission of the” greater offense. Utah Code Ann. § 76-1-402. Where, as here, the greater offense has multiple variants, the court must “consider the evidence to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial.” *Hill*, 674 P.2d at 97.

As explained, the variant of aggravated assault at trial was a (1) threat accompanied by (2) an immediate show of force using (3) a dangerous weapon. Utah Code Ann. § 76-5-103. Brandishing was not fully subsumed into aggravated assault because it required two elements nowhere in aggravated assault: (1) a “fight or quarrel,” and (2) the presence of “two or more persons.” *Id.* § 76-10-506. These additional elements preclude merger. *State v. Lee*, 2006 UT 5, ¶33, 128 P.3d 1179 (holding no statutory merger where alleged included offense required additional element); *State v. Ross*, 951 P.2d 236, 243 (Utah App. 1997) (explaining that statutory merger inapplicable if jury required to find additional element for lesser offense). And as stated, the convictions also had separate factual bases. *Cf. State v.*

Garrido, 2013 UT App 245, ¶¶30-35, 314 P.3d 1014 (holding no merger of offenses where the “jury had before it evidence to support multiple variants of each crime”). Thus, counsel could reasonably choose not to seek statutory merger.

In sum, Calvert has proven neither deficient performance nor prejudice any motion to merge would have surely failed.

III.

The trial court properly admitted evidence under rule 404(b) that Calvert previously assaulted and threatened a neighbor over a triviality for the purpose of rebutting self-defense and fabrication.

The trial court admitted evidence under rule 404(b), Utah Rules of Evidence, and the doctrine of chances that Calvert had previously assaulted a neighbor and threatened to kill her during an argument over a trivial matter. The trial court admitted the evidence for the purpose of rebutting Calvert’s self-defense claim and his implicit charge that the other witnesses were fabricating their stories. R283:30. Trial courts have broad discretion to admit such evidence, and their decisions are overturned only if they are “beyond the limits of reasonability.” *State v. Cuttler*, 2015 UT 95, ¶12, 802 Utah Adv. Rep. 15 (citation and quotation omitted).

Calvert argues that the trial court abused its discretion because: (1) disproving fabrication was not a proper purpose under rule 404(b) where he

did not deny that the incident took place, only that it took place differently than the State's witnesses testified; (2) the evidence was not relevant under rule 402; (3) the trial court erroneously relied on the doctrine of chances because a single prior incident cannot show intent under that doctrine; (4) the trial court did not scrupulously examine the evidence before admitting it; and (5) the trial court improperly weighed the danger for unfair prejudice under rule 403, Utah Rules of Evidence. Aplt.Br. 29-40.

The trial court was well within its discretion to admit the prior assault. But even if it were not, any error was clearly harmless where the evidence of Calvert's guilt was overwhelming, his own testimony was incredible, the other act testimony was brief, the court gave a limiting instruction, and the prosecutor did not mention the other act in opening statement or closing argument.

A. The trial court admitted the brief testimony and instructed the jury to consider it, if at all, solely to determine Calvert's self-defense and fabrication claims.

Before trial, the State moved to admit evidence of two prior assaults and threats that Calvert had made against neighbors: (1) a 2008 incident in Holladay in which Calvert swore at and threatened to kill Camille Little after she confronted him for taking pictures of her house; and (2) a 1999 incident in West Valley in which Calvert drove his car straight at Pat Wall's

car, swerved at the last moment, and then profanely threatened that he would kill Wall. R93-108. The State sought to use both incidents to rebut any claims of fabrication and self-defense, and argued that they met the four foundational requirements under the doctrine of chances set forth in *State v. Verde*, 2012 UT 60, 296 P.3d 673. *Id.* Both the State and Calvert fully briefed the issue under rules 404(b) and 403, Utah Rules of Evidence. *Id.*; R115-27.

Calvert responded that (1) the real purpose of the proposed evidence was to show a “propensity to commit crime”; (2) that rebutting fabrication was not a proper purpose because fabrication required a claim that the victims concocted the whole altercation, whereas Calvert had agreed that the altercation occurred, but merely disagreed about what happened during it; (3) that rebutting self-defense was not a proper purpose because the State was not seeking to explain the victims’ actions. R115-20. He also argued that the doctrine of chances was inapplicable because, among other things, multiple occurrences were required, the events were dissimilar, and the charges in the prior cases had been dismissed. R120-125. He also argued that both incidents were unfairly prejudicial because they went only to propensity. R124-26.

The trial court heard argument on the motion before trial, which included a discussion of relevant case law and the danger of unfair

prejudice. R283:6-30. The trial court excluded the older West Valley incident as “a little bit far afield,” but admitted the more recent Holladay incident under the four foundational requirements for the doctrine of chances set out in *Verde* and argued by the prosecutor. *Id.* at 30. The trial court found that the evidence was: (1) material to disprove self-defense and fabrication, which was in genuine dispute; (2) roughly similar to the charged offense in that Calvert had argued with and threatened to kill his neighbors both times; (3) the accusations were independent of each other, made by different neighbors in three different cities; and (4) that the threshold frequency of being falsely accused of threatening to kill one’s neighbors was low. R283:28-29; *see also* R98-105. The court further ruled that the danger for unfair prejudice was not “substantially outweighed by the prejudicial effect” under rule 403. R283:30.

Before Ms. Little testified about the Holladay incident, the trial court introduced her to the jury as a “special reasons witness,” and stated that he would instruct them later regarding the purpose of her testimony. R283:288. Ms. Little testified that Calvert had sworn at her, pushed her down, and threatened to kill her when she confronted him about taking pictures of her house. R283:291-94. She did not know any of the victims in this case. *Id.* at 289.

The prosecutor did not reference Ms. Little's testimony in any other testimony or during opening statement or closing argument. R283:87-88; R284:129-36, 142-44. The trial court instructed the jury that it could consider her testimony "if at all, for the limited purposes of: considering defendant's fabrication and self-defense claim[s] in the current case," and that it could not consider the evidence "to prove a character trait of the defendant nor to show that the defendant has a propensity to act in a certain way." R200. The jury was further instructed that "defendant [was] on trial for the crime charged in this case, and for that crime only. You may not convict the defendant simply because you believe that he may have committed some other act at some other time." *Id.*

B. Rule 404(b) permits other acts evidence to disprove self-defense and rebut a charge of fabrication.

Rule 404(b), Utah Rules of Evidence, states that other acts evidence is not admissible to prove a person's character "in order to show action in conformity therewith," but may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Utah R. Evid. 404(b); *see State v. Mead*, 2001 UT 58, ¶59, 27 P.3d 1115; *State v. Burke*, 2011 UT App 168, ¶31, 256 P.3d 1102; *State v. Balfour*, 2008 UT App 410, ¶23, 198 P.3d 471; *State v. Lee*, 831 P.2d 114, 119 (Utah App. 1992). Though 404(b) evidence is often called

“prior bad acts” evidence, the evidence need neither be prior to the charged act nor necessarily bad. See Christopher B. Mueller and Laird C. Kirckpatrick, *Federal Evidence* (3d ed. 2007) § 4:28 at 747, 749. The rule embraces a wide swath of other acts. Rule 404(b) is an “inclusionary rule.” *State v. Decorso*, 1999 UT 57, ¶24, 993 P.2d 837. Evidence is presumptively admissible so long as it is relevant to a proper, noncharacter purpose. *Id.*

Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence,” and is “of consequence in determining the action.” Utah R. Evid. 401. To be “of consequence,” the evidence must go to a contested issue at trial. *Verde*, 2012 UT 60, ¶¶24-26. Relevance is a “very low,” binary standard—evidence with even the “slightest probative value” is relevant and presumptively admissible. *State v. Richardson*, 2013 UT 50, ¶¶24-29, 308 P.3d 526; Utah R. Evid. 402 (relevant evidence presumptively admissible).

Proper, noncharacter purposes include—but are not limited to—those listed in the rule. *State v. Housekeeper*, 2002 UT 118, ¶28, 62 P.3d 444 (“While rule 404(b) lists examples of some of the legitimate purposes for which other bad acts evidence may be admitted, the list is not exhaustive.”). They include rebutting a charge of fabrication and disproving a self-defense claim. *Verde*, 2012 UT 60, ¶47 (rebutting fabrication claim is proper

noncharacter purpose); *State v. Labrum*, 2014 UT App 5, ¶23, 318 P.3d 1151 (rebutting self-defense claim is proper noncharacter purpose).

A purpose is “proper” if it shows something other than only a bad character or propensity. But even if the evidence tends to also show a bad character trait or propensity—as is often the case—that alone does not render it inadmissible. Rather, it “is only excluded where the *sole* reason it is being offered is to prove bad character or to show that a person acted in conformity with that character.” *State v. Olsen*, 869 P.2d 1004, 1010 (Utah App. 1994) (citations and additional quotation marks omitted)⁵; *accord Verde*, 2012 UT 60, ¶24; 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 404.20 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997) (updated 2010) (“Rule 404(b) adopts an inclusionary approach, generally providing for the admission of all evidence of other acts that is relevant to an issue in trial, excepting only evidence offered to prove criminal propensity”).⁶

⁵ *State v. Doporto*, 935 P.2d 484 (Utah 1997) abrogated *Olsen*, but itself was abrogated by a rule change as recognized in *Decorso*, 1999 UT 57, ¶23, which reaffirmed the rule’s inclusionary character.

⁶ Utah courts consider sources interpreting a similar or identical federal rule as persuasive authority of the meaning of Utah’s rule. *See, e.g., Angel Investors, LLC v. Garrity*, 2009 UT 40, ¶25, 216 P.3d 944.

Relevant evidence offered for a proper purpose may be excluded only if the danger for unfair prejudice from the evidence “substantially outweighs” the evidence’s probative value. Utah R. Evid. 403; *Decorso*, 1999 UT 57, ¶20. The “exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly.” *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1408 (10th Cir. 1988) (citation and quotation omitted); *see also United States v. Glover*, 846 F.2d 339, 343 (6th Cir. 1988) (explaining that “if judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal”).

Evidence is unfairly prejudicial only if it creates “an undue tendency to suggest decision on an improper basis.” *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989). “The critical question is whether certain testimony is so prejudicial that the jury will be unable to fairly weigh the evidence.” *State v. Guzman*, 2006 UT 12, ¶27, 133 P.3d 363. This Court “presume[s] that the proffered evidence is admissible unless ‘[it] has an unusual propensity to unfairly prejudice, inflame, or mislead the jury.’” *State v. Jaeger*, 1999 UT 1, ¶18, 973 P.2d 404 (citation omitted). A remote—or even equal—chance of a decision on an improper basis does not render the evidence inadmissible; rather, the danger for unfair prejudice must *substantially* outweigh the evidence’s probative value. *See Decorso*, 1999 UT 57, ¶20; Utah R. Evid. 403.

In evaluating the potential for unfair prejudice from a given piece of evidence, Utah courts in the past have resorted to the “*Shickles* factors,” which include the strength of the evidence, similarity of crimes, time between the crimes, the need for the evidence, the availability and efficacy of alternative proof, and the chance that the evidence will “rouse the jury to overmastering hostility.” *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988). But the Utah Supreme Court has recently made clear that it is the language of rule 403—not the *Shickles* factors—that governs. *Cuttler*, 2015 UT 95, ¶2 (“Thus, the governing legal standard for evaluating whether evidence satisfies rule 403 is the plain language of the rule, nothing more and nothing less.”); *Lucero*, 2014 UT 15, ¶32, 328 P.3d 841 (holding that courts “are bound by the text of rule 403, not the limited list of considerations outlined in *Shickles*.”). And the court specifically disavowed this language in *Cuttler*. 2015 UT 95, ¶20 (“[W]e now make clear that it is inappropriate for a court to consider the overmastering hostility factor in a rule 403 analysis.”). Of course, some *Shickles* factors may be helpful in a given case. *Id.* at ¶¶18-19.⁷

As stated, the trial court here relied on the doctrine of chances to admit the evidence. This doctrine is a “theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one

⁷ *Cuttler* issued after Calvert filed his opening brief.

individual over and over.” *Verde*, 2012 UT 60, ¶47 (citation and quotation omitted). That is, the more often something similar happens to the same person, the less likely it is due to accident, chance, justification, third party action, or the like. *See Verde*, 2012 UT 60, ¶¶47-52 (discussing doctrine of chances in context of 404(b) evidence); *see also United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991) (explaining that if you win the lottery once, you get congratulated; if you win twice, you get investigated); *overruled on other grounds by Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999).

The paradigmatic example of the doctrine of chances is the “brides in the bath” case of *Rex v. Smith*, 11 Crim.App. 229, 84 L.J.K.B. 2153 (1915) (cited in *Verde*, 2012 UT 60, ¶49 n.20). The common axiom for which *Smith* is cited is that the more one’s wives die in bathtub drownings, the less each drowning looks like an accident. *See, e.g., Verde*, 2012 UT 60, ¶49. But the doctrine of chances is not limited to disproving mistake or accident; it may also help to establish other proper purposes. For example, in *Smith*, similar bride drownings did not just show a lack of accident; they also helped establish the killer’s identity (the husband); modus operandi (death by bathtub drowning); plan or motive (marrying women for their money and killing them to get it); and intent (desire to kill). All of these proper purposes under rule 404(b) were supported by the doctrine of chances

because each occurrence decreased the likelihood not only that they occurred by accident, but also that someone else did it, that other persons happened to choose a similar mode of killing, or that the murderer had the requisite intent. See *United States v. Woods*, 484 F.2d 127, 134-35 (4th Cir. 1973).

If evidence is relevant under the doctrine of chances, the State must show four foundational requirements under rule 403: (1) materiality: that the “issue for which the uncharged conduct is offered” is in “bona fide dispute”; (2) similarity: that the other incident(s) have a “rough[]” similarity to the charged crime; (3) independence: that each accusation is “independent of the others”; and (4) frequency: that the defendant was “accused of the crime . . . more frequently than the typical person” is. *Verde*, 2012 UT 60, ¶¶57-61 (citations and quotations omitted).

C. The trial court acted well within its discretion to admit Calvert’s prior assault and threat.

Based on the foregoing standards, the trial court was well within its discretion to admit the prior assault evidence.

As shown, disproving fabrication and self-defense are proper, non-character purposes. *Verde*, 2012 UT 60, ¶47 (rebutting fabrication claim is proper noncharacter purpose); *Labrum*, 2014 UT App 5, ¶23 (rebutting self-defense is proper noncharacter purpose). Ms. Little’s testimony was

relevant to show these purposes. It is not often that one is falsely accused by one's neighbors of assaults and threats over trivial matters. And the fact that such a rare occurrence allegedly befell Calvert twice made it more likely that the neighbors were not fabricating their accounts (and that he was). Calvert's prior assaulting and threats to Ms. Little over a triviality were relevant to disprove self-defense and fabrication because they made it less likely that the neighbors here were fabricating a charge that Calvert assaulted and threatened them over a triviality. By making fabrication less likely, the evidence concomitantly made Calvert's self-defense claim less likely. And its potential for unfair prejudice could not substantially outweigh its probative value where the allegation there was less serious than the charges here because it did not involve a gun. *See Lucero*, 2014 UT 15, ¶35 (holding under rule 403 that evidence of prior abuse was not unfairly prejudicial because it was "tame in comparison to" the evidence of charged conduct).

The evidence also met the requirements for the doctrine of chances. The evidence was (1) material because self-defense and fabrication were in "bona fide dispute" where Calvert's story was completely different from all other witnesses; (2) "roughly similar" in that both incidents involved Calvert flying off the handle at some trivial matter and assaulting and

threatening his neighbor(s); (3) independent where the victim in the prior cases did not know any of the victims here; and (4) the threshold level of being falsely accused of assaulting and threatening one's neighbors is low. *Verde*, 2012 UT 60, ¶¶57-61.

Citing *Verde*, Calvert argues that the trial court improperly relied on disproving fabrication as a proper purpose because Calvert did not completely deny the incident, only how the events unfolded. Apl't.Br. 29. Verde, who was accused of sexual abuse of a child, denied that any sexual contact took place. 2012 UT 60, ¶9. The supreme court held that evidence that Verde had prior sexual contact with young adult men was not relevant to prove intent because intent was not in bona fide dispute, and was thus not relevant. *Id.* at ¶57. But the supreme court also held that the evidence could be relevant to disprove fabrication if the State sought to admit it for that purpose, and remanded for the trial court to evaluate that claim in the first instance. *Id.* at ¶¶20, 47, 56.

Calvert reasons that because Verde denied that the alleged incident (sexual abuse) between himself and the victim ever took place, rebutting fabrication is in bona fide dispute only where a defendant denies that the incident forming the basis for the charges ever took place. Apl't.Br. 29. Because Calvert did not deny that he had a confrontation with his

neighbors, but he only disagreed with what happened, Calvert asserts that rebutting fabrication was not in bona fide dispute here. *Id.*

But *Verde* does not limit rule 404(b) evidence to rebut total—as opposed to partial—fabrication. Indeed, *Verde* itself relied on a rape case—*Nelson-Waggoner*, 2000 UT 59—where the defendant did not deny having sex, but rather claimed that she had consented to sexual acts other than those alleged. *Verde*, 2012 UT 60, ¶53; *Nelson-Waggoner*, 2000 UT 59, ¶12. Thus, admitting 404(b) evidence to rebut a charge of partial fabrication is just as proper to rebut a charge of total fabrication.

Calvert similarly asserts that rebutting self-defense was not a proper purpose because his case differs from *Labrum*, 2014 UT App 5, ¶23, where this court held that rebutting self-defense was a proper purpose. *Labrum* was charged with assaulting his wife. *Id.* at ¶2. During the altercation, his wife was holding a set of keys, which *Labrum* landed on during the assault. *Id.* at ¶3. *Labrum* claimed self-defense, testifying that his wife used the keys to attack him. *Id.* at ¶4. This court held that the State properly introduced 404(b) evidence of prior abuse to show that the wife took the keys to bed to defend herself against *Labrum* and to rebut *Labrum*’s self-defense claim. *Id.* at ¶23. Calvert acknowledges *Labrum*, but baldly asserts

that rebutting self-defense is not a proper purpose here because *Labrum* “is not analogous to the incident involving Ms. Little.” Aplt.Br. 29-30.

As with *Verde*, Calvert misunderstands *Labrum*. *Labrum* did not limit the applicability of a given 404(b) purpose to the facts of that case. If anything, *Labrum* supports the State’s argument that rebutting self-defense is a proper purpose. *Labrum*, 2014 UT App 5, ¶23; see also *State v. High*, 2012 UT App 180, ¶48, 282 P.3d 1046 (explaining that gang affiliation evidence “may be probative to rebut a self-defense claim in some instances”).

As explained, the doctrine of chances requires four foundational elements: materiality, similarity, independence, and frequency. *Verde*, 2012 UT 60, ¶¶57-61. Calvert argues that it is “patently obvious” that a single incident cannot show the doctrine of chances’ frequency requirement, because the same misfortune must befall an individual “over and over.” Aplt.Br. 31 (citing *State v. Lowther*, 2015 UT App 180, 356 P.3d 173, cert. granted, 364 P.3d 48 (Utah 2015)). But while more than one instance may increase the strength of a given inference, it is not logically required under the doctrine of chances. See, e.g., *State v. Lomu*, 2014 UT App 41, ¶¶22-34, 321 P.3d 243 (robbery case admitting evidence of one subsequent robbery under doctrine of chances). Even a single unlikely instance—such as a prior lottery win or one prior wife drowning in a bathtub—tends to show that the

second unlikely instance was not merely a fluke, but the result of the defendant's conscious actions.

Calvert next argues that the trial court abused its discretion under rule 403 because the Holladay incident evidence merely showed his "reprehensible character," and had an "unusual propensity to unfairly prejudice" the jury against him. Aplt.Br. 32-33 (citation omitted). "[T]he exclusion of relevant evidence under Rule 403 is an extraordinary remedy" that should be used only "sparingly." *Wheeler*, 862 F.2d at 1408 (citation and quotation omitted).

As explained, the existence of dual inferences—one proper, one improper—does not alone render other acts evidence inadmissible under rule 403. Rather, the evidence is excluded only where "the *sole* reason it is being offered is to prove bad character or to show that a person acted in conformity with that character." *Olsen*, 869 P.2d at 1010 (citation and quotation omitted). As shown, the evidence here had the proper, noncharacter purposes of rebutting Calvert's claim of self-defense and implicit charge of fabrication.

More importantly, the Holladay incident was not the sort of evidence that would have an "unusual propensity" to unfairly prejudice the jury against Calvert. Aplt.Br. 33. That kind of evidence includes "gruesome

crime scene photos, rape victims' sexual histories, and pseudoscientific methodologies." *State v. McCullar*, 2014 UT App 215, ¶46, 335 P.3d 900. Compared to the charged acts, the Holladay incident was fairly tame because Calvert there did not draw and point a gun like he did here. That the other acts evidence was less shocking than the evidence of the charged acts shows that its tendency to unfairly prejudice Calvert was low. *Lucero*, 2014 UT 15, ¶35 (holding under rule 403 that evidence of prior abuse not unfairly prejudicial because it was "tame in comparison to" evidence of charged conduct); cf. *State v. Reed*, 2000 UT 68, ¶31, 8 P.3d 1025 ("evidence of multiple acts of similar or identical abuse is unlikely to prejudice a jury").

Calvert also asserts that because the legal proceedings regarding the Holladay incident were dismissed, it is "impossible to conclude" that it was not itself a false accusation. Aplt.Br. 35. But charging is no prerequisite, and acquittal is no bar, to the admission of 404(b) evidence. See *Dowling v. United States*, 493 U.S. 342, 348-49 (1990); *State v. Killpack*, 2008 UT 49, ¶46, 191 P.3d 17; *State v. Widdison*, 2001 UT 60, ¶43 n.9, 28 P.3d 1278; *Nelson-Waggoner*, 2000 UT 59, ¶31.

Calvert finally argues on this point that the trial court abused its discretion because it did not "scrupulously examine" the evidence. Aplt.Br. 38. He asserts—without citation—that the trial court was "hard pressed to

make such a scrupulous examination if the evidence without an evidentiary hearing.” Apl’t.Br. 38. But Calvert never requested an evidentiary hearing below, and Utah appellate courts have never required one. *Cf. Cuttler*, 2015 UT 95, ¶¶8, 14 (relying on the State’s “proffered evidence” to reverse trial court ruling excluding child sex abuse evidence under rule 403).

The Utah Supreme Court has held that a trial court must “scrupulously” examine 404(b) evidence “in the proper exercise” of its discretion. *State v. Widdison*, 2001 UT 60, ¶42, 28 P.3d 1278. There is no set procedure for trial courts to show a scrupulous examination. In the past, Utah courts have looked to the whole record to see if the trial court considered all the necessary factors. *See State v. Nelson-Waggoner* 2000 UT 59, ¶16, 6 P.3d 1120 (“We review the record to determine whether the admission of [404(b)] evidence was scrupulously examined by the trial judge.”) (citation and quotations omitted). Evidence of scrupulous examination—as contained in the parties’ briefing and arguments, and the trial court’s ruling—need not be overwhelming; it need show only that the trial court understood and applied the correct standard. *See Widdison*, 2001 UT 60, ¶44 (holding trial court conducted scrupulous examination where “the parties extensively briefed and argued the issue” of 404(b) evidence); *State v. Nielsen*, 2012 UT App 2, ¶16 n.3, 271 P.3d 817 (holding trial court

made “sufficiently scrupulous examination” where the “parties presented arguments at various times,” and the trial court made “sufficient inquiry” into *Shickles* factors, even though it did “not expressly” identify them); *Burke*, 2011 UT App 168, ¶27 n.10 (“We acknowledge that . . . the trial court simply ruled from the bench . . . and did not enter any specific findings or conclusions. However, based on the evidence and argument before the trial court on this issue, it can be inferred that the trial court ‘scrupulously examined’ the relevant evidence.”); *State v. Bradley*, 2002 UT App 348, ¶38, 57 P.3d 1139 (holding trial court scrupulously examined evidence due to parties’ briefing and arguments, even though it did not make “specific, detailed findings” on each point).

Thus, scrupulous examination is not a high bar to clear. *See, e.g., See Widdison*, 2001 UT 60, ¶44 (holding trial court conducted scrupulous examination because “the parties extensively briefed and argued the issue” of 404(b) evidence); *Lomu*, 2014 UT App 41, ¶34 (holding that scrupulous examination “can be inferred when the trial court has heard arguments on the relevant issues and has made ‘sufficient inquiry’” into issues); *Nielsen*, 2012 UT App 2, ¶16 n.3 (holding trial court made “sufficiently scrupulous examination” because the “parties presented arguments at various times” and the trial court made “sufficient inquiry” into rule 403, even though it

did “not expressly” identify factors; *Burke*, 2011 UT App 168, ¶27 n.10 (“We acknowledge that . . . the trial court simply ruled from the bench . . . and did not enter any specific findings or conclusions. However, based on the evidence and argument before the trial court on this issue, it can be inferred that the trial court ‘scrupulously examined’ the relevant evidence.”); *Bradley*, 2002 UT App 348, ¶38 (holding trial court scrupulously examined evidence based on parties’ briefing and arguments, even though it did not make “specific, detailed findings” on each point); *but see State v. Lowther*, 2015 UT App 180, ¶35, 356 P.3d 173 (reversing where “the trial court failed to scrupulously examine the proposed rule 404(b) evidence”), *cert. granted*, 365 P.3d 48 (Utah 2015); *State v. Thornton*, 2014 UT App 265, ¶47, 339 P.3d 112 (reversing where trial court “did not engage in the scrupulous examination required” under rule 404(b)), *cert. granted*, 352 P.3d 106 (Utah 2015).

The trial court’s examination more than sufficed here. It received briefing and argument from both sides on the relevant facts and law, including the proper non-character purposes of disproving fabrication and self-defense. R93-108; R115-27; R283:7-29. It noted the *Verde* factors and adopted the State’s characterization of them. R283:30. It explicitly found that the evidence’s probative value was not outweighed “by the prejudicial

effect.” *Id.* And the defense arguments were partially successful in that the court excluded one of the State’s two proposed incidents as “a little bit too far afield.” *Id.*; cf. *State v. Marchet*, 2009 UT App 262, ¶¶4, 40, 219 P.3d 75 (holding scrupulous examination where trial court evaluated multiple other acts, admitting some and excluding another). All these facts show scrupulous examination. See *Lomu*, 2014 UT App 41, ¶34.

In sum, the trial court properly exercised its discretion to admit the Holladay incident to rebut his self-defense claim and argument that the other witnesses fabricated their testimony.

Any error was harmless in any event because there was “no reasonable likelihood that the error affected the outcome of the proceedings.” *State v. Davis*, 2013 UT App 228, ¶73, 311 P.3d 538 (citation and quotation omitted). The State’s case against Calvert was overwhelming, the prosecutor did not use the prior assault in arguing Calvert’s guilt here, and the trial court gave a curative instruction. *State v. Ferguson*, 2011 UT App 77, ¶¶19-20, 250 P.3d 89 (holding erroneous admission of 404(b) evidence harmless where evidence of guilt “overwhelming”); cf. *State v. Bond*, 2015 UT 88, ¶29 n.8, 361 P.3d 104 (holding no prejudice from co-defendant’s invocation of Fifth Amendment privilege where “prosecutor did not rely on or refer to” it afterwards);

Labrum, 2014 UT App 5, ¶37 (holding no misuse of 404(b) evidence where trial court gave limiting instruction).

First, the evidence of Calvert's guilt was overwhelming: seven eyewitnesses testified that Calvert threatened several children and adults with a gun and that he pointed the gun at Hugo. While Calvert's self-serving testimony was inconsistent and incredible, the witnesses' testimony was consistent and corroborated. For example, Calvert told police that he did not have a loaded gun with a laser sight on it, but police found one in the garage just as witnesses said they would. R283:183-84, 303-09. Second, the prosecutor did not mention the Holladay incident in opening statement, closing arguments, or any other time. *See* R283:87-88; R284:129-36, 142-44. Third, Ms. Little's testimony of the Holladay incident was brief, spanning merely 10 pages of nearly 500 pages of trial transcript. R283:289-99. Its impact, therefore, was minimal. Finally, the trial court gave a limiting instruction. R200. Thus, there is "no reasonable likelihood that" admitting the Holladay incident "affected the outcome of the proceedings." *Davis*, 2013 UT App 228, ¶¶73, 76.

IV.

Calvert's ineffective assistance claim that the jury might have been exposed to improper material during deliberations because they had access to a prosecution laptop to listen to a 911 call is entirely speculative.⁸

Calvert argues that his trial counsel was ineffective for not objecting to the jury's taking the prosecution's laptop into deliberations so that they could listen to the 911 call. Aplt.Br. 40. He asserts that counsel was required to object because the laptop was not evidence, and violated his rights to counsel and jury trial. Aplt.Br. 43-45. As explained, to prevail, Calvert must prove both (1) deficient performance and (2) prejudice. *Strickland*, 466 U.S. at 689-92. And, again, proof of prejudice must be based on a "demonstrable reality and not a speculative matter." *Chacon*, 962 P.2d at 50.

A. Counsel did not object when the prosecutor offered a laptop for the jury to listen to the 911 call, and the prosecutor explained that the laptop contained no case files.

After the jury retired to deliberate, the court wanted to ensure that all of the exhibits "g[o]t back to the jury." R284:146. The prosecutor noted that one of the exhibits—the 911 recording—was a CD, and offered a laptop for the jury to use if they wanted to listen to it. *Id.* at 146-47. The trial court

⁸ Calvert has also filed a motion for remand under rule 23B, Utah Rules of Appellate Procedure, to supplement the record on this claim. The State responds to that motion separately.

accepted the prosecutor's offer, and defense counsel did not object. R284:147. The jury was instructed that their verdict must be based "only on the evidence," which included "the testimony and exhibits presented at trial." R174.

Before sentencing, defense counsel moved to arrest judgment based on, among other things, the jury's having potentially accessed something improper on the laptop. R204-13. Though counsel was present when the prosecutor offered the laptop to the court, R284:147, he now alleged that he had learned about it only "[s]everal days" after trial from some trial attendees. R209. Counsel argued that having the laptop accessible to the jury constituted "other good cause" under rule 23, Utah Rules of Criminal Procedure, to arrest judgment because it might have injected "outside materials or influences" into the deliberations and created an "appearance of impropriety." R210. He proffered no evidence that the jury had used the laptop, let alone that it contained anything improper for the jury to view. R204-13. The prosecutor proffered that the laptop was just a tool to use during jury trials, and that it did not have any of his files, email, or case information on it. R219, 226-27. The prosecutor added that he had discussed the laptop with defense counsel at the time he made the offer, and that when defense counsel "expressed concern" about it, the prosecutor

“assured him the laptop contained no case files” and offered to let defense counsel “check the laptop himself.” R226. Both parties then “left the room.” *Id.*

The trial court heard argument on the motion to arrest at sentencing. R282:13-14, 16-18. It denied the motion because “the laptop was controlled, it was only for the playing of the 9-1-1 call,” and the court did not “see that it caused any taint at all.” R282:21.

B. Counsel reasonably decided not to object to the use of the prosecutor’s laptop because there was—and is—no evidence that the jury used the laptop improperly.

Calvert argues that the mere presence of the prosecutor’s laptop during deliberations violated his right to counsel and right to jury trial, and that this Court should presume prejudice. *Aplt.Br.* 44-45. It is true that the complete denial of counsel is structural error, for which prejudice is presumed. *See Johnson v. United States*, 520 U.S. 461, 469 (1997). But Calvert was not denied counsel—he has been represented throughout both trial and appeal.

It is also true that denial of the right to jury trial is structural error. *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968). But Calvert also was not denied a jury trial—he got one. He cites no case—and the State is aware of none—holding that a defendant was deprived of the rights to counsel and

jury trial merely because the jury had access to a laptop supplied by the prosecution.

Indeed, cases from other jurisdictions involving jury access to prosecution laptops appear overwhelmingly to find harmless error—assuming they find any error at all. *See People v. Foreman*, case no. D055887, 2010 WL 3705174, *8 (Cal. App., Sep. 23, 2010) (holding that trial court “could reasonably infer that jurors would have reported any improper use of the prosecutor’s laptop”); *Wright*, 467 S.W.3d at 244 (rejecting claim where “Wright has not provided any proof that there was any prejudicial information on the Commonwealth’s laptop” and “Wright has not produced any evidence that the jury impermissibly used the laptop to access the internet”); *Crews v. Commonwealth*, case no. 2012-SC-000596-MR, 2013 WL 6730041, *6-7 (Ky., Dec. 19, 2013) (“The mere fact that jurors had limited access to the laptop does not create the presumption that they used it for an improper purpose.”); *State v. Mayle*, case no. 11-0562, 2012 WL 2914271, *3 (W.V., Feb. 13, 2012) (“Although the jury reviewed the audio on the prosecutor’s laptop, there are no specific allegations of information gleaned from said laptop that was improper.”); *cf. Weber v. State*, 971 A.2d 135, 154 (Del. 2009) (holding no error where prosecutor proffered that laptop contained no material related to case); *State v. Jack*, case no. 07-02-

0309, 2013 WL 375538 (N.J. App., Feb. 1, 2013) (“The jurors can be seen intently watching the laptop screen, and there is no indication that they could have even seen” papers on the prosecution table, “or how any information otherwise visible on the papers may have affected their deliberations.”).

Not that there was any error here. Calvert cannot show deficient performance because, given the prosecutor’s proffer, defense counsel could have reasonably decided that the laptop was nothing more than a tool to listen to evidence. And given the court’s instruction to consider only the evidence in the case in reaching a verdict—that is, testimony and exhibits, R174—counsel could have reasonably decided that the jurors, if they chose to use the laptop, would use it only to listen to the 911 call.

Calvert also cites no case that a jury cannot access prosecution tools like a laptop to review evidence during deliberations. And a number of cases hold to the contrary. *See, e.g., People v. Watson*, case no. D056651, 2011 WL 5117723, *18 (Cal. App., Oct. 27, 2011) (holding that prosecution laptop provided to jury was “not evidence, but only a device to allow viewing of the evidence”); *Commonwealth v. Wright*, 467 S.W.3d 238, 244 (Ky. 2015) (holding that prosecution laptop was equipment “used to play a recording in the jury deliberation room” and “need not be introduced into evidence”).

Thus, reasonable counsel could have reasonably concluded, under these circumstances, that there was nothing to object to.

Nor can Calvert show prejudice where any harm is speculative. There is no evidence in the record that the jury accessed the prosecutor's laptop at all, let alone that they used it for purposes other than to listen to the 911 call admitted at trial. *See State v. Ashby*, 2015 UT App 169, ¶47, 357 P.3d 554 (holding no prejudice from sending DVD of victim interview into deliberations where the "record does not suggest that the jury actually played the DVD . . . during its deliberations"); *see also State v. Maestas*, 2012 UT 46, ¶54, 299 P.3d 892 (holding no prejudice from failure to admonish jury where "there is nothing in the record to indicate that the failures to admonish played any role in the juror's conduct"); *State v. Bossert*, 2015 UT App 275, ¶¶41-42, 362 P.3d 1258 (upholding denial of mistrial motion based on allegedly improper jury contact where no evidence that the "theorized improper contact with the jury occurred").

In sum, Calvert has not shown that counsel was ineffective, nor shown a violation of his rights to counsel and jury trial, given that Calvert has presented no evidence that the jury used the laptop at all, let alone improperly.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on March ⁽¹⁵⁾14, 2016.

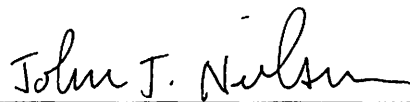
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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 12,059 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



JOHN J. NIELSEN
Assistant Attorney General

CERTIFICATE OF SERVICE

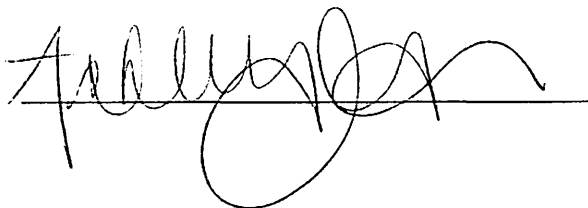
I certify that on March 14th, 2016, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

Herschel Bullen
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Salt Lake City, UT 84111

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

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

A handwritten signature in black ink, appearing to read "Herschel Bullen", is written over a horizontal line.

Addenda

Addendum A

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 1. General Provisions (Refs & Annos)
Part 4. Multiple Prosecutions and Double Jeopardy

U.C.A. 1953 § 76-1-402

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

Currentness

(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.

Credits

Laws 1973, c. 196, § 76-1-402; Laws 1974, c. 32, § 2.

U.C.A. 1953 § 76-1-402, UT ST § 76-1-402

Current through 2015 First Special Session

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

U.C.A. 1953 § 76-5-103

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

Currentness

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

(a) that is:

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

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

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

(b) that includes the use of:

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

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

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

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

Credits

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

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

West's Utah Code Annotated

Title 76. Utah Criminal Code

Chapter 10. Offenses Against Public Health, Safety, Welfare, and Morals

Part 5. Weapons (Refs & Annos)

U.C.A. 1953 § 76-10-506

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

Currentness

(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.

Credits

Laws 1973, c. 196, § 76-10-506; Laws 1992, c. 101, § 3; Laws 2010, c. 361, § 2, eff. May 11, 2010; Laws 2014, c. 248, § 1, eff. May 13, 2014.

U.C.A. 1953 § 76-10-506, UT ST § 76-10-506

Current through 2015 First Special Session

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Addendum B

IN THE THIRD JUDICIAL DISTRICT COURT, WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

-o0o-

STATE OF UTAH,)	
)	
Plaintiff,)	Case No. 121400830
vs.)	
)	<u>JURY TRIAL</u>
CHADLEY KEITH CALVERT,)	
)	<u>(Volume One)</u>
Defendant.)	

-o0o-

BE IT REMEMBERED that on the 30th day of April,
2014 , commencing at the hour of 8:11 a.m., the above-entitled
matter came on for hearing before the HONORABLE MARK KOURIS,
sitting as Judge in the above-named Court for the purpose of
this cause and that the following proceedings were had.

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APRIL 30, 2014

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P R O C E E D I N G S

(Transcriber's Note: Speaker identification
may not be accurate with audio recordings.)

April 30, 2014

THE COURT: Please be seated. Good morning.
We're here in the matter of State of Utah vs.
Calvert.

MR. CARLSON: Yes, your Honor. I believe
defendant's counsel stepped out to use the restroom.

THE COURT: Oh, I apologize. Okay. We'll wait for
one second for him.

Good morning, Counsel.

MR. PHILPOT: Good morning, your Honor. I
apologize.

THE COURT; No worries.

We're--We are on the record in the matter of State
of Utah vs. Calvert. We have a jury trial that's going to
begin shortly, but prior to that, we've got a motion in limine
that was filed by the State and we indicated that we could
visit this before we engaged in the trial.

So with that, Mr. Carlson, you may proceed.

MR. CARLSON: Thank you, your Honor.

1 Your Honor, evidence of past acts is not admissible
2 to show conformity, but as long as it's admitted for another
3 purpose, it's okay, as long as it fits certain requirements.
4 The State's proposal to introduce past acts evidence is for
5 three purposes; first, to rebut a claim of fabrication which,
6 according to State vs. Verde is allowed; second, to report--
7 rebut any claims of accident or mistake which is explicitly
8 allowed under Rule 404(b)(2); and third, to rebut any claims
9 of self-defense, which in State v. Labrum, the Court of
10 Appeals also allowed.

11 Under any of those rebuttal venues, the doctrine of
12 chances is the best formula under 404(b) to evaluate that and
13 there are four factors under the doctrine of chances. The
14 State has to show materiality, that there's a bona fide
15 dispute, similarity, that the past acts in the--occurring in
16 the alleged allegation are similar, independence, that there's
17 collaboration but that each event is independent of each other
18 and frequency, that the events have occurred more frequently
19 than a typical person would be exposed to those situations.

20 On materiality--mater--fabrication, accident,
21 mistake and self-defense are all in bona fide dispute. Now,
22 under some of the theoretical and even--well, some of the
23 scholarly papers that Verde cites, it suggests that the court
24 wait to decide materiality until mid-trial, at the moment
25 where the State wants to introduce it. That's not feasible.

1 And under State v. Wittison, the court made it
2 explicitly clear that when a defendant makes a claim at the
3 time of the alleged offense, that claim can bring an issue
4 into dispute. In this case, the defendant claimed that the
5 alleged victim was lying, so fabrication has been brought into
6 dispute by that.

7 Similarly, he indicates that he was pointing the gun
8 at the ground which is in direct contradiction of the victim
9 that it was pointed directly at him, suggesting that if it did
10 get directed at him, it would have been accidental or by
11 mistake.

12 Finally, he indicates that he called his neighbor,
13 Mr. Majors, because he needed help and didn't have time to get
14 his gun, suggesting that there's--there's some sort of desire
15 for self-defense. On--materiality has been met under any of
16 the three claims.

17 Similarly similarity has been met. The defendant's
18 past threats to kill his other neighbors in 1999 and in 2008
19 are roughly similar to the charged crime.

20 Third, his independence. Once of these events is
21 alleged to occur--have occurred in West Jordan. That's the--
22 the case being tried today. The previous event occurred in
23 Holladay. And to the State's knowledge, the--Ms. Little in
24 Holladay, doesn't know the Holguins in West Jordan. And the
25 third event occurred in '99 in West Valley City and again,

1 Patrick Wall, to the State's knowledge, doesn't know Camille
2 or the--or the Holguins.

3 Finally, frequency. The defendant has threatened to
4 kill and claimed self-defense more frequently than the typical
5 personal would have been placed in that situation. To the
6 extent that I was able, I cited statistics and numbers in the
7 filed motion but it--it's theoretically possible that someone
8 would have to claim self-defense and threaten to kill a
9 neighbor, unlikely, but the idea that that had to happen three
10 separate times, it--it strains chance. I mean, under the
11 doctrine of chances, it doesn't fit chance.

12 Finally, even if the Court decides that, well, it's
13 admissible for a proper under 404(b) and under the doctrine of
14 chances, it's admissible, the Court's supposed to do an
15 evaluation under 403 to weigh whether it's outweighed
16 substantially by other--unfair prejudice, confusing the
17 issues, misleading the jury or undue delay.

18 Now, a lot of these Shickles-type factors are over-
19 lapped with the doctrine of chances but there are some that
20 are not, specifically the strength of the evidence of other
21 act. Now, the strength of the evidence of the other acts is
22 strong. In this case, there are witness statements from the
23 alleged victims. In each of the previous cases, there are
24 written statements from the alleged victims as well.

25 The needs for the other acts evidence is high and

1 the efficacy of alternative evidence is--is low. This case
2 ultimately comes down to--to who the jury is going to believe
3 and in a--in a claim of credibility, the doctrine of chances
4 is extraordinarily useful to the jury in determining what are
5 the chances that this actually occurred so many times.

6 And finally, other acts, these specific other acts
7 would not rouse the jury to over-mastering hostility against
8 the defendant. These are extraordinarily similar and so
9 they're not something that they can say, well, he's--he's a
10 bad person and therefore, we must convict. It's--it's almost
11 identical as far as the--the past acts.

12 And accordingly, we would ask this Court to admit
13 the past acts evidence.

14 THE COURT: All right. Very good.
15 Response?

16 MR. PHILPOT: Yes, your Honor.

17 Your Honor, my comments may be fairly lengthy, I
18 apologize in advance for that and for that purpose, I have
19 filed an opposition motion if only for the convenience of the
20 Court to follow along.

21 THE COURT: Okay.

22 MR. PHILPOT: By its motion in limine, the
23 government asks the Court to allow the introduction of
24 irrelevant and impermissibly prejudicial evidence pertaining
25 to two past incidents involving the defendant, the first from

1 approximately 15 years ago, 1999, when defendant was charged
2 with four traffic-related violations, the second from six
3 years ago, 2008, when defendant and his co-resident were each
4 charged with simple assault. In both instances, the charges
5 were dismissed at the instigation of government prosecutors,
6 not upon motion by defendant. In neither instance were there
7 any court proceedings that produced sworn testimony and in
8 large part, the government is here relying upon distant third-
9 party hearsay to even argue that the evidence should be
10 introduced.

11 Worse, the government makes gratuitous and enormous
12 leaps in logic and further exaggerates wholly irrelevant and
13 dissimilar circumstances to try and make these circumstances
14 applicable under Rule 404(b) in the doctrine of chances
15 theory.

16 The truth, as ultimately admitted by the government
17 by implication, is that it knows it cannot meet its
18 evidentiary burden at trial and therefore seeks to paint
19 defendant's reputation and credibility by showing he has a
20 propensity to commit assault because of his allegedly bad
21 character. Specifically, the government seeks to secure the
22 Court's endorsement of its real argument that, because the
23 defendant has shown the propensity and pattern of making
24 verbal threats that in these two past instances amounted to
25 nothing more than hyperbole, the jury should disbelieve any

1 claim that his conduct in the present circumstance is lawful.

2 This strategy is impermissible and shocking.

3 THE COURT: Counsel, if you wouldn't mind, I've got
4 the brief sitting here in front of me.

5 MR. PHILPOT: Yes.

6 THE COURT: Instead of just reading the brief, why
7 don't you summarize and tell me what the arguments are.

8 MR. PHILPOT: Okay. Thank you, your Honor.

9 I've got a couple extra pages in here to get rid of.

10 First of all, number one, the government's motion to
11 admit defendant's past act is really aimed at establishing the
12 propensity to commit a crime. They--they go to great lengths
13 to basically say they're rebutting four things; they're
14 rebutting his claims of fabrication; two, they're rebutting
15 the defendant's lack of mens rea; three, rebutting defendant's
16 claim of self defense--excuse me, number two, accident or
17 mistake.

18 If such evidence is really aimed at establishing his
19 propensity to commit a crime, it should be excluded despite a
20 proper but unpersuasive legitimate purpose. The--

21 THE COURT: I--I'd agree you with 404(b) evidence if
22 it, in fact, is brought in for propensity reasons, it's not
23 admissible, but there--there are reasons that 404 can come in.
24 And it seems like the reasons that Mr. Carlson have laid out
25 are all--one of them is specifically excepted by 404(b) and

1 the other twos are--both--the other two are certainly allowed
2 under the Verde case. What would be your response to that?

3 MR. PHILPOT: I think the Verde case is very
4 different and if you look at our motion, we spell out how
5 they're different. Let me see if I can find it, there's one
6 very--that I think is very poignant, your Honor, in Verde.

7 THE COURT: Yeah. I understand that Verde is a sex
8 case and it doesn't have anything to do with the subject
9 matter here, but nonetheless, it talks about ways to get
10 404(b) evidence in, specifically under the doctrine of chances
11 and it lays kind of a guideline for us in terms of how that
12 works.

13 What is your response with regard to the doctrine of
14 chances?

15 MR. PHILPOT: Your Honor, that's point number two in
16 my brief and I can, again, you've asked me not to read through
17 and so, rather, I would say--I would attack, first of all,
18 their materiality. They attempt this to place fabrication,
19 accident, mistake and self-defense at issue, but claiming that
20 someone is lying is not the same as a sole eye witness
21 fabricating elements of testimony.

22 So the Verde decision--

23 THE COURT: Wait, wait, wait. Say that one more
24 time?

25 MR. PHILPOT: Claiming that someone is lying--

1 THE COURT: Right.

2 MR. PHILPOT: --is not the same as saying that a
3 sole eye witness has fabricated elements of his testimony.

4 THE COURT: Okay.

5 MR. PHILPOT: And Verde admitted only to the
6 theoretical possibility.

7 THE COURT: Theoretical possibility of what?

8 MR. PHILPOT: That evidence of prior misconduct
9 could be admitted under Rule 404(b) to establish commission of
10 criminal acts of reas by rebutting the charge of fabrication.

11 THE COURT: Well, we're talking about--the
12 fabrication is not by a third party, the fabrication is
13 alleged by your own--by your client, so that's not a third
14 party, that's the first party; right?

15 MR. PHILPOT: Well, they're saying also that Mr.
16 Majors--they've actually admitted in their brief that a lot of
17 people contradict themselves. And so I think they're not just
18 saying that my client--they're not just alleging that my
19 client may be fabricating inform--or lying, they're alleging
20 other people may be lying as well.

21 THE COURT: Well, it wouldn't make any difference
22 what other people are saying. 404(b) only applies to your
23 client. So the question then is not if some other witness
24 comes over and says they saw something completely different,
25 that would not allow 404(b) evidence to come in. The only

1 thing 404(b) would allow would be what your client is claiming
2 and in this case, your--the State's claiming that your client
3 is saying he was acting in self-defense, it was an accident
4 and that the person that--that is making the allegations have
5 actually fabricated those things.

6 MR. PHILPOT: And your Honor--okay. Let's go--let's
7 go to mistake. They--we're not actually claiming that, we
8 make that clear in our motion.

9 THE COURT: Well, I think what--what the claim is
10 that in fact your client is indicating that the laser he was
11 pointing was pointed at the ground and so the State's asking
12 me to make a leap to say the victim or the alleged victim in
13 this matter is claiming no, the laser was actually pointed at
14 me. So if you get from the ground, from your client saying to
15 get from the ground up to the person, the State's saying that
16 your client is saying, well, there was obviously some mistake
17 because that was not my intent, I didn't plan to put the laser
18 on him, I was pointing at the ground and somehow it ended up
19 on top of him. And that's the State's premise with regard to
20 mistake.

21 MR. PHILPOT: Yeah. And we just disagree with that.

22 THE COURT: Okay. And--

23 MR. PHILPOT: I mean, we're not saying that his
24 actions were a mistake, we're not going to claim that today.

25 THE COURT: Right. Then how did the laser get from

1 the ground to--to--onto the--

2 MR. PHILPOT: Lawful acts by my client.

3 THE COURT: Lawful acts?

4 MR. PHILPOT: Yes, your Honor. Lawful and
5 defensible.

6 THE COURT: So you're talking self-defense?

7 MR. PHILPOT: Yes, your Honor. Affirmative defense.

8 THE COURT: Okay. Let's talk about self-defense
9 then.

10 Self-defense is also another reason that 404(b)
11 evidence can come in. If your client is claiming the reason
12 he did this was under self-defense, then how is it under the
13 doctrine of chances that this exact same scenario happened on
14 two other occasions?

15 MR. PHILPOT: It did not, they're not similar and
16 that's what we argue, your Honor. I--I'm happy to continue
17 going through each element if you'd like--

18 THE COURT: Well, I just want to have a discussion,
19 I don't want you to read your brief to me, I can read my--

20 MR. PHILPOT: Okay.

21 THE COURT: --your brief myself. So tell me--tell
22 me what--why it is it doesn't apply to a self-defense motion.

23 MR. PHILPOT: Why the doctrine of chances doesn't
24 apply?

25 THE COURT: Right. Exactly. I mean, there are

1 specific requirements the Supreme Court put down with regard
2 to Verde as far as the doctrine of chances, where the party's
3 independent. Well, the alleged victims in this case and the
4 two cases that Mr. Carlson is talking about, they don't know
5 each other, they were actually distant in terms of geography
6 as well, they didn't live in the same area. So the doctrine
7 of chances says, what are the odds that these same people
8 could bring very similar charges or allegations against your
9 client and all be completely independent? And the doctrine of
10 chances says, the chances of, okay, in this case somebody
11 brings a false claim allegedly against your client that he
12 pointed a gun with a laser on top of it at them. Okay. That--
13 -that's the claim here, but we have another person that's
14 making a very similar claim and those two cases are very
15 independent. Then we've got a third case where they're making
16 a very similar claim. Again, all three making--

17 MR. PHILPOT: I don't think they are making a very
18 similar claim.

19 THE COURT: Tell me why they aren't.

20 MR. PHILPOT: That's why I'm getting a little
21 confused--

22 THE COURT: All right.

23 MR. PHILPOT: --by what you're saying because
24 they're not similar at all.

25 THE COURT: Tell me why they're not similar.

1 MR. PHILPOT: First of all, the claim that my client
2 is--has a gun with a laser pointer, there was no--there was no
3 gun or assault with a deadly weapon in either of the past
4 instances.

5 THE COURT: But I think--but I think what he's
6 talking about, not--is not necessarily the gun, but the
7 threats themselves. Weren't the threats similar in all three
8 situations?

9 MR. PHILPOT: Well, no--no, your Honor.

10 THE COURT: Why weren't they?

11 MR. PHILPOT: First of all, we're not even sure the
12 threats existed. The prosecution dropped them at their own
13 accord.

14 THE COURT: Well, that's a strain to the evidence
15 that you'll be able to test but--but tell me why it is you
16 don't think the threats were similar.

17 MR. PHILPOT: In the current situation--

18 THE COURT: Right.

19 MR. PHILPOT: --there is no claim that the--that
20 the--that our client threatened somebody's life. So the--you
21 have the claim by prosecution that in the--in the immediate
22 case--

23 THE COURT: Right.

24 MR. PHILPOT: --you have a weapon--

25 THE COURT: Right.

1 MR. PHILPOT: --involved.

2 THE COURT: Right.

3 MR. PHILPOT: With a laser pointer. And our--my
4 client telling people to get off his property. In the other
5 cases, supposedly my client is making threats against life
6 without weapons, in instances where one is a traffic accident,
7 in another where my client is assaulted by someone who the
8 police charged. In this case, my client is at his home, he is
9 approached by other people at his own property.

10 The factual circumstances and the ability to get to
11 the truth of the circumstances of the present situation are
12 completely different from fifteen years ago and six years ago
13 where the circumstances giving rise to actions by my client
14 thereafter are completely different. And what the State is
15 saying is that we're supposed to look at these three instances
16 arising from completely different circumstances where weapons
17 are not involved in the other two and suppose that, for some
18 reason, because of hearsay, we now assume that those things
19 are telling of my client's current situation or his current
20 representation.

21 THE COURT: Did he claim self-defense in those other
22 two instances?

23 MR. PHILPOT: Your Honor, he claimed, again, if
24 we're to believe the allegations of the State, that he was, in
25 one instance, reacting to the attack of another person.

1 THE COURT: Self-defense?

2 MR. PHILPOT: Yes.

3 THE COURT: Okay. How about the other one?

4 MR. PHILPOT: The other one was a traffic accident.

5 THE COURT: Okay.

6 MR. PHILPOT: Where two vehicles--where his vehicle
7 crashed into another.

8 THE COURT: Yeah. I know what a traffic accident
9 is. I'm wondering--but something escalated beyond a traffic
10 accident, did it not? It says--he said the defendant--the
11 defendant said he was going to kill me so that's the reason he
12 did what he did was for self-defense reasons, was it not? It
13 did--you're right, there was a traffic accident involved, but
14 the traffic accident was precipitated, Wall reported to the
15 police officer, drove his car directly at Wall's car, swerving
16 out of the way at the last minute, crashing into another
17 vehicle. The defendant then called me a mother fucker and
18 said he was going to kill me, reached for the glove box, I
19 said, Go ahead and pull your gun out.

20 MR. PHILPOT: I'm not sure how that qualified, I'm--
21 I guess by some stretch of the imagination that qualifies as
22 self-defense, he swerved--again, this--this goes back to where
23 I--I think that they're--that the State is really stretching
24 the elements of the different cases separated by great time--
25 great amounts of time to try and show similarity; two vehicles

1 approaching each other, one swerves, a man gets mad at the
2 other person because his car crashes into another object is
3 similar to a man at his home at night, arguably with a weapon
4 where other hostile individuals have come.

5 THE COURT: Well, I mean, those are the only facts I
6 know. We'll ask Mr. Carlson to elaborate. Actually, why
7 don't I do it right now.

8 Mr. Carlson, you can stay right there, Mr. Philpot,
9 'cause I'm going to ask more questions. Would you elaborate
10 on that situation and tell me why it is, where the self-
11 defense element is in that situation?

12 MR. CARLSON: In the West Valley situation--

13 THE COURT: Yes.

14 MR. CARLSON: --your Honor?

15 THE COURT: Yes.

16 MR. CARLSON: And this--I'm referencing Page 10 of
17 17 on my motion.

18 THE COURT: Okay.

19 MR. CARLSON: Specifically No. 5. In each incident,
20 the defendant suggested he was not the aggressor.

21 In West Valley, the defendant allegedly told Capwell
22 to get out of his way and then drove away and that--that
23 admittedly is a weaker--a weaker self-defense situation than
24 the Holladay situation where he explicitly said that he was
25 just trying to protect himself from Camilla Little.

1 THE COURT: Okay. All right.

2 Anything else, Mr. Philpot?

3 MR. PHILPOT: Your Honor, just perhaps the Supreme--
4 a court case that I think is--that we've quoted, United States
5 v. Romero.

6 THE COURT: Right.

7 MR. PHILPOT: I think this is very telling. One
8 cannot present evidence, the relevance of which is based on
9 the forbidden inference, the person did "X" in the past,
10 therefore, he probably has a propensity for doing "X" and
11 therefore, he probably did "X" this time, too.

12 THE COURT: Right.

13 MR. PHILPOT: That's exactly what they're saying
14 he's doing. They're also--

15 THE COURT: Well, that's the definition of 404(b)
16 evidence; right? That there are exceptions to that and it's
17 built right in the rule.

18 MR. PHILPOT: Yeah. And we would--yes. And we
19 would say this is an impermissible application. If--if this
20 is allowed, it is an impermissible allowance.

21 The--the government has admitted right in their
22 brief that if they don't have this, the jury will not be able
23 to make heads or tails of the multiple claims that seem to
24 contradict each other and--and so it's significantly
25 prejudicial. They're basically saying that without--we don't

1 have the ability to prosecute the defendant at this time
2 unless you give us this to--to demean his character so that we
3 can convince the jury that he is a bad character. In other
4 words, they're saying the credibility of our wit--of our
5 witnesses is at issue and because the credibility of our
6 witnesses is at issue, you've got to show these instances of
7 my client to--to convince the jury that their witnesses are
8 credible.

9 THE COURT: But I think you just--

10 MR. PHILPOT: It's extremely prejudicial.

11 THE COURT: Well, you just made the perfect argument
12 for probability of chances, though; right? I mean, under the
13 Verde case, there was one little boy that was claiming this
14 guy had done something to him sexually and the point of the
15 case is that that little boy's credibility might be undermined
16 on some level, so what we're going to do is we're going to
17 bring other little boys that are completely independent of
18 this little boy to say the same thing happened to them.

19 MR. PHILPOT: Against a defendant who lied
20 specifically about the act itself for which he was accused.

21 THE COURT: Well, how did he lie?

22 MR. PHILPOT: He lied about the act, said he did not
23 do the act.

24 THE COURT: Okay.

25 MR. PHILPOT: In this case,--

1 THE COURT: If he were claiming--do you're saying--a
2 say--a claim of self-defense if it's not true, would that be a
3 lie?

4 MR. PHILPOT: If a claim of--yes, that would be a
5 lie.

6 THE COURT: Okay. So that's what we're talking
7 about here; right? The government's claiming that your--your
8 client's claim of self-defense is not truthful and that's the
9 point for--that's--

10 MR. PHILPOT: I don't think that's the application
11 of Verde. I think the application of the doctrine of chances
12 is that you have an act which is--which is illegal which has
13 been committed, for example, by my--let's say by my client and
14 that is assault--

15 THE COURT: Right.

16 MR. PHILPOT: --with a deadly weapon.

17 THE COURT: Right.

18 MR. PHILPOT: That's not what they're saying here.
19 They're not saying that because he assaulted people with a
20 deadly weapon in the past, he assaulted people with a deadly
21 weapon now. They're saying because of these things, amorphous
22 things surrounding totally different, whereas in Verde, you've
23 got a--a defendant who says I didn't do that act, I didn't
24 sexually assault, in this case, the--the prosecution is saying
25 my client committed assault with a deadly weapon. And then

1 they're saying in--in these other instances, it's not assault
2 with a deadly weapon.

3 THE COURT: Right.

4 MR. PHILPOT: It's not even close.

5 THE COURT: I'm not sure that's a requirement. The-
6 -I think the claim of the State is that your client had a run-
7 in with someone else where he claimed that he made the same
8 self-defense claim, so they're saying what are the odds that
9 one person who have self-defense claimed in two separate
10 occasions? I guess that's what they're asking.

11 MR. PHILPOT: Even if that were the appropriate
12 question to ask, in Verde, I'd say it's highly likely, so I
13 don't think the doctrine of chances--there's a very high
14 chance that--that would not occur. But I don't think that is
15 what they're saying. I think that what they're saying,
16 inappropriately, is that the--the instances, which are not at
17 all like the allegation in the current instance, have things
18 floating around them, which we're going to piece together to
19 apply, unlike Verde like Verde. And I know that's--sounds a
20 little odd. But Verde was very specifically getting at the
21 lying about the act for which the person was accused.

22 THE COURT: But the Verde lists a number of reasons
23 that that also would apply and if they're saying here that
24 your client made unlawful threats against someone and then
25 claimed self-defense, as they're claiming happened in this

1 case, they're saying--I agree with you with regard to the
2 traffic offense, I don't think that there's much on line
3 there, but with regard to the other instance, I think they're
4 claiming he made--again made unlawful threats against someone
5 and then was called on it, he claimed self-defense; right?

6 MR. PHILPOT: The--that's actually, theoretically,
7 that's a good question because the prosecution decided not to
8 pursue whether or not he was telling the truth and so we don't
9 know, we don't know why the prosecution decided to not--I
10 mean, it may be that he was absolutely justified, it may be
11 that self-defense didn't matter, I mean, allegedly he claimed
12 it is what they're saying. So I--and as I look--if I were to
13 argue on those cases, I would say that I'm not sure self-
14 defense is really--well, they allege he said self-defense.
15 I'm--I'm not sure that the prosecution felt that was really
16 what's at issue in this cases, which is why I think it's an
17 atrocity to take their theories which do not appear to be
18 based in reality and allow them to dictate the opinions of the
19 jury today relative to my client.

20 THE COURT: The theories that aren't related--
21 aren't--tell me what that means, the theories that aren't
22 based on reality. What's that?

23 MR. PHILPOT: They have had--they have--and I
24 apologize if I'm not making sense, your Honor, but they have
25 taken a standard--

1 THE COURT: What standard?

2 MR. PHILPOT: --of the--

3 THE COURT: The Verde?

4 MR. PHILPOT: --Verde standard--

5 THE COURT: Okay.

6 MR. PHILPOT: --of the doctrine of chances, which is
7 a completely different case than what's at issue today. They
8 have taken today's case and tried to measure it against two
9 other completely different cases and picked little things out
10 of the air that never came to a head or came to issue in those
11 cases, but instead--

12 THE COURT: Came--when you say "came to a head,"
13 what do you mean?

14 MR. PHILPOT: The prosecution did not--he was not
15 guilty, the prosecution did not prosecute my client in those
16 cases.

17 THE COURT: Well, the other little boy in the--in
18 the Verde case, he wasn't even--that person--that defendant
19 was not even charged with those cases.

20 MR. PHILPOT: He was not even charged. I thought
21 he--I understand that, your Honor but he was charged with the
22 same act in each instance, so when--when he came to--

23 THE COURT: No. No. No. No, he wasn't. He wasn't
24 charged with the--the--

25 MR. PHILPOT: Excuse me, your Honor. I--I'm sorry.

1 THE COURT: --the other victims in--before--before--

2 MR. PHILPOT: Right.

3 THE COURT: There were little boys in the
4 neighborhood, he wasn't charged with any of those cases.

5 MR. PHILPOT: He was alleg--excuse me, I misspoke.
6 He was alleged to have committed the same act.

7 THE COURT: Right. But you just said that--

8 MR. PHILPOT: The same criminal act.

9 THE COURT: Right. But--

10 MR. PHILPOT: In this case, my client is not alleged
11 to have committed the same criminal act.

12 THE COURT: Okay. All right. All right. Thank
13 you, Mr. Philpot.

14 Mr. Carlson, response?

15 MR. CARLSON: Very briefly, your Honor.

16 On materiality, the State acknowledges that if, as
17 defense counsel asserts, that if there's not any claim of
18 mistake or accident, that that's not on the table, then
19 there's no materiality for that and that purpose is out the
20 window at the beginning.

21 What remains are the claims of fabrication and the
22 claims of self-defense. Verde is extraordinarily similar to
23 this situation in that in Verde, the defendant said little boy
24 is lying. Here, the defendant said, they're laying. At the
25 date--the difference being the defendant said it at the date

1 of the defense, Verde said it at trial and the court had the
2 chance to review everything.

3 Additionally, on that specific claim of fabrication,
4 the West Valley City case is very relevant because in the West
5 Valley City case, the defendant said he's going to kill him
6 and reaches in his glove box to the point where Patrick Wall
7 believes he's going for a gun to the point where he says, Go
8 ahead and grab your gun, which as happens is exactly what--
9 what occurred in the instant case.

10 As far as the similarity, the State is not alleging
11 that these instances are identical, as if the defendant's
12 establish a modus operandi. We're not trying to establish
13 identity where--where almost identical situations would be
14 necessary, but for claims of fabrication, claims of self-
15 defense, which are permissible purposes under State v. Labrum,
16 the defendant's actions and claimed justifications are
17 relevant for the jury, not to--not to establish a propensity
18 that he's a bad neighbor, but to allow the jury to say, well,
19 what are the chances that someone has to defend themselves
20 against two or three separate neighbors? What are the chances
21 that three different neighbors have said this guy has
22 threatened to kill me and this--and this neighbor is lying?

23 And for those reasons, we would ask that the
24 evidence be admitted.

25 THE COURT: And tell me and I'm sure it says in your

1 brief and I apologize, I don't remember, how will you
2 introduce that evidence?

3 MR. CARLSON: It would be specifically with--with
4 leave of the Court, it would be through three witnesses. It
5 would be through Patrick Wall, Camilla Little and Officer
6 Imidge in West Valley City.

7 THE COURT: Okay. Well, I find that based upon the
8 standards set out in Verde, I believe the State has met all of
9 their goals--all of the--the requirements from Verde as argued
10 by Mr. Carlson.

11 The traffic incident, I think, is a little bit far
12 afield and for that reason, I'm not going to allow that one
13 in, but the other incident, however, I believe that's the
14 Holladay matter, I do believe fits under all of those. I
15 don't think that it's a--I don't think it's being brought in
16 for propensity under 404(b), I believe it's coming in to rebut
17 one of the noted factors, that being fabrication as well as
18 self-defense.

19 Then I look under the doctrine of chances and all of
20 the elements as explained by Mr. Carlson have been laid out.

21 Lastly, I weigh the 403 balancing and I find that
22 the probative value, in fact, outweighs being substantially--
23 is not substantially outweighed by the prejudicial effect. So
24 for that reason, that--the evidence concerning that instance
25 will be admitted.

Addendum C

IN THE THIRD JUDICIAL DISTRICT COURT, WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

-o0o-

STATE OF UTAH,)	
)	
Plaintiff,)	Case No. 121400830
vs.)	
)	<u>JURY TRIAL</u>
CHADLEY KEITH CALVERT,)	
)	<u>(Volume Two)</u>
Defendant.)	

-o0o-

BE IT REMEMBERED that on the 1st day of May,
2014, commencing at the hour of 8:35 a.m., the above-entitled
matter came on for hearing before the HONORABLE MARK KOURIS,
sitting as Judge in the above-named Court for the purpose of
this cause and that the following proceedings were had.

-o0o-

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1 MR. CARLSON: I've got a laptop if they--if they
2 need it.

3 THE COURT: Very good. We'll let them listen to
4 that if they--

5 THE BAILIFF: We have 12 exhibits.

6 THE COURT: We shouldn't, what--what was the
7 twelfth?

8 MR. PHILPOT: The State's Exhibit No. 7.

9 THE COURT: 7. I have 7, I have 7 plus 4. Is that--
10 -that's eleven; right?

11 So I've got--No. 1 I have is a large picture of a
12 house.

13 No. 2 of the 9-1-1 telephone call.

14 No. 3 is the large picture of Hugo's house again.

15 No. 4 is another large picture of the house.

16 5 is a picture of the gun.

17 6 is a picture of the gun.

18 And 7 is a picture of the garage that came in this
19 morning.

20 Then for the defense, we've got the Canales witness
21 statement, the Andrew Holguin witness statement, the Araht
22 Holguin witness statement--I guess I shouldn't say Holguin--
23 Holguin witness statement, and 4 is Kelsey Pitts' witness
24 statement. And those are everything I have.

25 Is that what you show as well?

IN THE THIRD JUDICIAL DISTRICT COURT, WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

-o0o-

STATE OF UTAH,)	
)	
Plaintiff,)	Case No. 121400830
.vs.)	
)	<u>SENTENCING</u>
CHADLEY KEITH CALVERT,)	
)	
Defendant.)	

-o0o-

BE IT REMEMBERED that on the 1st day of July,
2014, commencing at the hour of 1:37 p.m., the above-entitled
matter came on for hearing before the HONORABLE MARK KOURIS,
sitting as Judge in the above-named Court for the purpose of
this cause and that the following proceedings were had.

-o0o-

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* * *

1 P R O C E E D I N G S

2

3 (Transcriber's Note: Speaker identification
4 may not be accurate with audio recordings.)

5

6 July 1, 2014

7

8 THE COURT: Please be seated.

9 Good afternoon. We're here today for the Tuesday
10 afternoon criminal calendar. Who is ready to start us out?

11 MR. CARLSON: Your Honor, we're ready to handle the
12 Calvert matter.

13 THE COURT: Very good. Come on forward.

14 All right. Let's call the case of the State of Utah
15 vs. Calvert.

16 Good afternoon, Mr. Calvert.

17 MR. CALVERT: Good afternoon, your Honor.

18 THE COURT: There were two things in front of me
19 today with regard to this case. The first--let me pull it up
20 here--the first is Mr. Philpot's motion to arrest judgment on
21 the jury verdict and the second then, based on how this one
22 turns out will be on the pre-sentence report or the sentencing
23 of Mr. Calvert.

24 So with that, Mr. Philpot, you may proceed.

25 MR. PHILPOT: Thank you, your Honor.

1 I would like to begin by quoting from the State's
2 opposition to my motion to arrest.

3 THE COURT: All right.

4 MR. PHILPOT: Quote: The State did not introduce
5 evidence that the defendant intended to harm Hugo Holguin
6 because the law does not require it. That is determinative
7 and irreconcilable.

8 There are cases very clear in the State of Utah, one
9 of which is Loffel which requires intent, says where
10 circumstances like this, where the statute does not specify
11 what the mens rea is, the default is intent, where the State
12 says we didn't argue intent, then--

13 THE COURT: I think the default, if I--if I--if I'm
14 correct in that and maybe--I think the statute actually says
15 if it's not--if the mens rea is not particularly described in
16 the statute, then it defaults to intentionally, knowingly or
17 reckless, does it not?

18 MR. PHILPOT: That is correct, your Honor.

19 THE COURT: Okay.

20 MR. PHILPOT: And the State did not present any
21 evidence on knowingly, they did not present anything on
22 recklessness, they--and they admit now that they did not
23 present anything on intent. And Loffel makes very clear that
24 they need to have one of those; in fact, there's--

25 THE COURT: Well, wait a minute. So if--if a person

1 points a gun at another person, you don't think that's
2 recklessly assaulting that person?

3 MR. PHILPOT: Well, I would imagine that there's
4 some circumstance out there where it could be but that's not
5 applicable in this case.

6 THE COURT: Tell me why it's not.

7 MR. PHILPOT: It was not argued, there was no
8 evidence presented.

9 THE COURT: You mean there's no evidence that your
10 client pointed the gun with the laser at one of these people?

11 MR. PHILPOT: Well, then I would say Oldroyd
12 clarifies that it's not enough just to show or display a gun.

13 THE COURT: Tell me what would have to happen.

14 MR. PHILPOT: They would have to prove that he had
15 the intent to do or the intent to cause bodily harm.

16 THE COURT: Okay. Tell me how you do that.

17 MR. PHILPOT: Well, they have to show--I don't--I
18 mean, I think there's a multitude of ways that they could do
19 that. I--

20 THE COURT: Give me an example.

21 MR. PHILPOT: Some indication that he was--

22 THE COURT: Could he point a gun at you?

23 MR. PHILPOT: No--

24 THE COURT: If I point a gun at you right now, am I
25 showing any intent that I want to hurt you?

1 MR. PHILPOT: Not if it's conditioned, your Honor.

2 THE COURT: Conditioned on what?

3 MR. PHILPOT: If it's conditioned upon statements
4 continuously admitted to by everybody who testified that it
5 was qualified by get off my property. Because this isn't a--
6 this isn't a barroom brawl or a parking lot brawl where
7 somebody comes out and they're fighting in a parking lot and
8 he whips out a gun, he's angry, points the gun or he's hood
9 on, invading a home; this is a man in his own home who comes
10 out, is approached by somebody else, conditions--every
11 statement, every witness that testified said that he said get
12 off my property.

13 THE COURT: Well, the only--

14 MR. PHILPOT: And so the intent is--

15 THE COURT: --the only problem was, though, there
16 was a lot of credible evidence indicating that he never really
17 was on the property.

18 MR. PHILPOT: He admits--

19 THE COURT: So where did that put us--

20 MR. PHILPOT: He admitted that he came off the prop-
21 -on the property. He admitted that there were witnesses who
22 admitted he came over, inebriated, that he came over, angry.
23 And so--and so let's move to the next step, the presumption
24 where--where in defense of habitation, if the State says we've
25 presented no evidence of intent, then there's a presumption

1 that he has--that he's acting reasonably, that his intent is
2 reasonable. And if they again say we've presented no evidence
3 of intent, the law does not require us to, then how do you
4 overcome the presumption that he acted reasonably in defense
5 of habitation?

6 THE COURT: Wait a minute. I--

7 MR. PHILPOT: There's no evidence--

8 THE COURT: --I'm still having a hard time
9 understanding how it is you could point a gun at somebody and
10 under a reckless standard would not be threatening that
11 person. If that were to go--if that gun were to go off and
12 kill that person, under a reckless standard--under a--that
13 might be manslaughter or something less than that,
14 nonetheless, by pointing an item at another person that
15 potentially could cause death, why wouldn't that be reckless?

16 MR. PHILPOT: The jury was instructed that he had to
17 have the intent to have bodily harm, to do--to do bodily harm,
18 or the threat--or a threat to do bodily injury. And they--

19 THE COURT: You mean just as far as the--are we just
20 talking about the assault?

21 MR. PHILPOT: Yes. The intent to commit the
22 assault.

23 THE COURT: So you think pointing a gun at a person
24 is not a threat; is that what you're telling me?

25 MR. PHILPOT: It depends, your Honor. And if the

1 State had--

2 THE COURT: Whoa. Whoa. Whoa. Tell me how that
3 depends. If I point a gun at you, give me the instance that
4 would not be a threat.

5 MR. PHILPOT: When we're playing capture the flag
6 with fake guns, we're--you're--

7 THE COURT: Okay. All right. Fair enough. Let--
8 okay. Let me--let me change the facts. If I have a real gun
9 with a laser on it--

10 MR. PHILPOT: Uh-huh (affirmative).

11 THE COURT: --and I point it at you, tell me when
12 that would not be a threat?

13 MR. PHILPOT: Defense of habitation.

14 THE COURT: Okay. That's a whole different issue,
15 though. We aren't talking about defense of habitation, we're
16 talking about now the intent required for aggravated assault,
17 so help--

18 MR. PHILPOT: It's not just the threat, it's--

19 THE COURT: --tell me how that wouldn't be a threat.

20 MR. PHILPOT: It's not just a threat, it's a threat
21 to do bodily injury. And the--the appeals court has clarified
22 unlawful, that it has to be--the intent can't just--excuse me,
23 not Loffel, Oldroyd, it can't just be somebody displays a
24 weapon, waves it around, they have to prove that there's an
25 intent to do bodily injury.

1 And what we heard in evidence is there was--so I--I
2 could maybe grant you that there's a threat, a threat to get
3 off my property--

4 THE COURT: Or a threat to do bodily injury because
5 if I pull the trigger I'm going to kill you.

6 MR. PHILPOT: That's correct.

7 THE COURT: Okay. So that would be a threat then.

8 MR. PHILPOT: That would be an attempt and that's
9 another--

10 THE COURT: No, that wouldn't be an attempt. It
11 says and a threat accompanied by a show of immediate force or
12 violence to do bodily harm to another.

13 If I point a gun at you, tell me why that would not
14 be a threat to cause you harm

15 MR. PHILPOT: Because--it could be a threat, but it--
16 --that's not the--that's not the statute, the statute is a
17 threat to do bodily injury. And so--

18 THE COURT: What else would it be a threat to do?

19 MR. PHILPOT: To--to get off my property.

20 THE COURT: No. No. No. No. A threat--if I point
21 a gun at you, why wouldn't that threaten bodily injury? The
22 only reason it would threaten bodi--the only reason it's a
23 threat is 'cause if I--if I pointed a pen at you, this isn't a
24 threat; right?

25 MR. PHILPOT: Well, I--

1 THE COURT: Because I can't do anything wrong with
2 it. But if I point at you, the reason it's a threat is
3 because I pull the trigger and I'll--and you're dead.

4 MR. PHILPOT: I--I disagree, your Honor. I think
5 there can be moments where a person points a pen at somebody
6 and--

7 THE COURT: Okay. Right now, I'm--right now, I'm
8 pointing this pen at you--

9 MR. PHILPOT: Right.

10 THE COURT: --am I threatening you right now?

11 MR. PHILPOT: No, your Honor.

12 THE COURT: Okay. If I put a loaded gun right now
13 and pointed it at you, would I--would I be threatening you?

14 MR. PHILPOT: Possibly--possibly, but--

15 THE COURT: Possibly?

16 MR. PHILPOT: Yeah, I--your--your Honor--

17 THE COURT: How is it that pointing a loaded gun at
18 another person would not be a threat?

19 MR. PHILPOT: Because the--the courts have
20 clarified, the appeals courts in particular and the Supreme
21 Court in particular, that it's not enough to threaten--

22 THE COURT: Under what case?

23 MR. PHILPOT: Oldroyd and Loffel, L-o-f-f-e-l. That
24 it's not enough--

25 THE COURT: Not enough to point a gun at another

1 person to threaten them? That's what you're telling me?

2 MR. PHILPOT: Specifically Oldroyd makes it clear
3 that simply displaying and waving it around--

4 THE COURT: We're not talking about displaying and
5 waving it. We're talking about pointing the gun at another
6 person, that's what we're talking about.

7 MR. PHILPOT: Okay.

8 THE COURT: That's not displaying or--if I show you
9 it in my waistband, I agree, I haven't threatened you. If I
10 wave it around over here, I haven't threatened you. When I
11 put that laser beam on your body, now you're being threatened.
12 Do you agree?

13 MR. PHILPOT: Possi--no, I won't, because my--

14 THE COURT: Okay. All--

15 MR. PHILPOT: It's against my defendant's interests.
16 And your Honor, the State has also--

17 THE COURT: So whether it's true or not, it doesn't
18 matter.

19 MR. PHILPOT: No, that's not--

20 THE COURT: But that's what you just said, you said
21 I can't do it 'cause it's against his interest. I'm asking
22 you whether or not that's the truth or not.

23 MR. PHILPOT: No, you're asking--you're asking me to
24 hypothesize on what may be and I don't want to do that when
25 the state's already admitted--

1 THE COURT: No, I'm not--I'm--I'm asking you to
2 consider the facts that I saw in this trial and the facts in
3 the trial were there were people that saw him put this laser
4 beam on people--on people's chests.

5 MR. PHILPOT: And if he did--

6 THE COURT: Right.

7 MR. PHILPOT: --point the gun--

8 THE COURT: Right.

9 MR. PHILPOT: --and if his intent was to remove from
10 his property, then that is not aggravated assault.

11 THE COURT: Okay. I--

12 MR. PHILPOT: If his intent--

13 THE COURT: --I understand your argument.

14 MR. PHILPOT: Okay.

15 THE COURT: Do you have anything else?

16 MR. PHILPOT: I--I've already mentioned to you the
17 presumption of reasonableness which comes with the self-
18 defense of habitation.

19 THE COURT: Okay.

20 MR. PHILPOT: And if there's an admission that there
21 is no evidence presented on intent, then--and--and also, my
22 understanding, no evidence presented on recklessness or
23 knowledge, and if there was--

24 THE COURT: No evidence--okay, when you say no
25 evidence, you're not saying--

1 MR. PHILPOT: It was not part of the State's--

2 THE COURT: --you're not saying that--as long as
3 we're clear, there was evidence that he lifted the gun and put
4 the laser beam on the person's body, but your contention would
5 be that that would not be evidence.

6 MR. PHILPOT: My contention is the State
7 acknowledges that they did not introduce evidence, they say
8 that affirmatively in their opposition.

9 THE COURT: All right. What else?

10 MR. PHILPOT: Finally, your Honor, the laptop.
11 Allowing the laptop to go back in any case is unreasonable.
12 There was a Supreme Court case--

13 THE COURT: In any case is unreasonable?

14 MR. PHILPOT: Yes. Yes. Unless it's the laptop of
15 the Court. But when it's the prosecution's laptop, that is
16 unreasonable.

17 There was a Supreme Court case last week on a
18 different facts but similar principle, it was Riley vs.
19 California where the State argued that if somebody has a
20 wallet and a cell phone, the cell phone should be treated as a
21 wallet. And the Supreme Court said a wallet--or a--a cell
22 phone is not like a wallet because it's a multitude of
23 information and opportunities that a person has to do all
24 sorts of things and to gather all sorts of information.

25 A laptop? I mean, there are cases where if a

1 magazine goes back--

2 THE COURT: Right, but let's say in this--

3 MR. PHILPOT: --it's been--

4 THE COURT: --in this case that when the jury wanted
5 to hear the 9-1-1 call, the bailiff would take the laptop in,
6 play the call for them and bring the laptop back out. Has
7 that infected the jury?

8 MR. PHILPOT: Hypothetically, if that happened, yes,
9 it still taints the jury, it destroys the--

10 THE COURT: How does that--tell me how it taints the
11 jury.

12 MR. PHILPOT: It destroys the notions of fairness.
13 It makes it impossible for the public to believe that the jury
14 is beyond reproach. Can I send my laptop every time? Can I
15 come with a laptop and send it back with the jury without
16 rifting--beyond reproach?

17 THE COURT: Okay. Anything else?

18 MR. PHILPOT: I don't think so. No, your Honor.

19 THE COURT: Okay. Very good.

20 Mr. Carlson?

21 MR. CARLSON: I'm going to address these in the
22 order that we addressed in the motion--

23 THE COURT: Thank you.

24 MR. CARLSON: --specifically. We're going to talk
25 about mens rea first. The State agrees, we did not establish

1 intent to cause injury. There weren't injuries in this case
2 and under the old version, pre-2010 of the Code, to get a
3 second-degree felony, the State had to prove that the
4 defendant intended to cause bodily harm. And so the mens rea
5 was about, not the action but the result of that action.

6 Now, that wasn't the law in this case and we weren't
7 asserting injury, we weren't asserting a second-degree felony
8 but a third-degree felony. We were saying that with the
9 defendant engaged in the assaultive conduct, he did so
10 intentionally or knowingly. Loffel says we also could have
11 instructed the jury on recklessly, but we didn't do that here.

12 The State's position is that even under the
13 defendant's version of events, he pointed that loaded gun at
14 Hugo Holguin. It wasn't an accident that it came up, he
15 intentionally pointed the loaded gun at Hugo Holguin and he
16 told Adon Holguin, if you don't get out of here, there's going
17 to be a mess up, as he did so.

18 All of this indicates that his actions were
19 intentional or at the very least, knowing, when he engaged in
20 that behavior. Again, the mens rea is not about the result of
21 the conduct but the conduct itself.

22 As far as the defense of self and defense of
23 habitation, this is where the jury came down to credibility.
24 The defendant's version of events was so drastically different
25 from the version of every other witness who testified, the

1 jury had no choice but to weigh the credibility. And they
2 considered the factors that are appropriate and that they were
3 instructed to do so. Accordingly, they decided that the
4 testimony of all nine other witnesses that saw what happened
5 that day was more credible than the defendant's version and
6 that he was not acting in defense of habitation or defense of
7 self.

8 Finally, as far as the laptop, the State pays part
9 of the light bills in this building and--and the jury used the
10 light to look at the evidence that day. But the fact that
11 they used something that the State provided to consider the
12 evidence doesn't taint that evidence. The only case that
13 defense counsel cites is a Supreme Court of Florida case where
14 the jury was given an article that says defense attorneys
15 attack prosecutors and victims. That clearly invites the jury
16 to look at the evidence through a certain lens. That's in
17 direct contrast to the laptop, which is a tool to present the
18 information that was admitted into evidence. The fact that it
19 theoretically could have been abused--and I want to be clear,
20 there is no indication from anyone that it was abused, this is
21 just a hypothesis that it could have been abused, should not
22 disqualify because as Riley vs. California makes clear, most
23 of us carry around our lives in our pockets now with a smart
24 phone. And this Court acknowledged that when it instructed th
25 jury not to look at outside evidence and not to use their

1 smart phones but simply to focus on the evidence in this case.

2 We gave the jury the tool to listen to the CD that
3 was admitted into evidence, without objection. The fact that
4 they used that tool, maybe, again, we don't know that they
5 even listened to the call, the fact that they may have used
6 that tool should not taint--would not taint the verdict. What
7 it does do, your Honor, is it--it shows a repeated pattern on
8 the part of defense counsel to suggest prosecutorial
9 misconduct. Now, I'm not asking for a Rule 11 sanction today
10 but the first day of trial, he accuses of--of pursuing a win
11 at all cost strategy. The second day of trial when his
12 witnesses are late, he says that I tampered with the
13 witnesses, even though he sent a subpoena telling the to go to
14 the second floor. And then 47 days after the verdict comes in
15 he says, oh, well, the laptop went back. And same surprise,
16 when we discussed this explicitly that I was leaving the
17 laptop in the courtroom before we went out, he did not raise
18 an objection before the Court at the time the verdict came in,
19 he waits 47 days.

20 And there is appellate case law that suggests
21 there's a certain time restraint so that the Court can
22 promptly address any improprieties. This laptop was not
23 improper, it was a tool--the whole purpose of that laptop is
24 to present information. It's not any prosecutor's laptop
25 specifically, it's--it's a State laptop. And just like the

1 State's tripod doesn't taint a verdict or the State lights
2 don't taint a verdict, the State laptop should not either.

3 THE COURT: Thank you.

4 Mr. Philpot, would you like to respond to that?

5 MR. PHILPOT: Yes, your Honor. I noticed that the
6 State offers no explanation as to whether or not there was
7 present any effort to introduce evidence about recklessness or
8 knowledge, let alone intent, which they clearly deny in their
9 opposition.

10 Loffel still makes clear that there is a default
11 standard for the statute and whether or not the State did in
12 fact, agree with that or not, it's there, Loffel makes that
13 clear, that the default is intent.

14 There's also a presumption of reasonableness for the
15 defendant in defense of habitation. And if they did not
16 present evidence on his intent, how can they overcome a
17 presumption? Again, I--I've said this before and I'll not
18 belabor that point. It--it evades reason that the jury is
19 able to find intent when there's an admission that there was
20 no evidence presented.

21 The laptop, I don't think we can possibly compare
22 lights or tripods to laptops. Laptops are capable of allowing
23 the prosecution, if they wanted to--I'm not saying they did--
24 to listen in on the proceedings. They would allow a juror to
25 access outside influences. They couldn't just read one

1 magazine, they could read a number of magazines, only
2 restrained in that number by the time that they have in the
3 jury room. If a magazine can taint a jury, how can a laptop,
4 wi-fi capable, owned by the prosecution not taint the jury.
5 As to what they did with it, we have--

6 THE COURT: Do you know the--do you know the
7 laptop's wi-fi capable?

8 MR. CARLSON: I'm not a hundred percent sure it is,
9 your Honor.

10 THE COURT: Do you know that it is?

11 MR. PHILPOT: I have no idea.

12 THE COURT: Okay.

13 MR. PHILPOT: But it still taints the perception of
14 the public that they are beyond reproach, more so than a
15 magazine possibly could.

16 Again, I would say if it's okay to send the
17 prosecution's laptop back, then I will bring mine, ready to go
18 to every trial I ever come to and that's just unreasonable on
19 its face, as is sending the prosecution's laptop.

20 Now, the prosecution tries to say that we believe
21 there is prosecutorial misconduct, which we did not say. We
22 simply claimed that there could be a problem; however, if we
23 did say there was prosecutorial misconduct, we wouldn't be in
24 error in the fact--because due to the fact that there is facts
25 that exist which call into question whether or not it should

1 have gone. The fact that it went back is enough for us to say
2 that shouldn't have gone back.

3 THE COURT: What should have happened for those
4 folks to listen to that 9-1-1 call?

5 MR. PHILPOT: The--with all due respect, your Honor,
6 the Court needed to be prepared to allow them to listen to
7 that. It is not the obligation of the defense to insure that
8 the jury--

9 THE COURT: I'm not asking that question. I'm
10 asking what would be allowable to allow them to listen to the
11 9-1-1 call,--

12 MR. PHILPOT: Some sort of--

13 THE COURT: -in your opinion?

14 MR. PHILPOT: Some sort of CD player in the back, in
15 the jury room.

16 THE COURT: Okay.

17 MR. PHILPOT: All right.

18 THE COURT: All right. Thank you.

19 For the reasons stated, I'm going to deny the--for
20 the reasons stated by Mr. Carlson, I'm going to deny the
21 motion of the--of the defense. I believe the intent, the
22 proper mens rea was demonstrated. I believe the self-defense
23 claim was negated based purely on--on credibility of the
24 witnesses, when nine said one thing and the defendant's story
25 was so much different.

1 And last of all, the--the laptop was controlled, it
2 was only for the playing of the 9-1-1 call and I don't see
3 that it caused any taint at all.

4 So based upon that then, let's move to sentencing.
5 You can bring your client up.

6 Have you had a chance to review the pre-sentence
7 report with your client?

8 MR. PHILPOT: Yes, your Honor.

9 THE COURT: Okay. Are there any factual
10 inadequacies that need to be addressed?

11 MR. PHILPOT: I--I do not believe so, your Honor.

12 THE COURT: All right. If that's the case, go ahead
13 and proceed.

14 MR. PHILPOT: Your Honor, we would ask primarily
15 that the Court show mercy in sentencing for prison time. My
16 client is a--

17 THE COURT: Did you say for prison time?

18 MR. PHILPOT: Yes, your Honor.

19 THE COURT: I don't think there was any
20 recommendation here for prison.

21 MR. PHILPOT: I'm sorry. I thought there was a
22 recommendation for a minimum.

23 THE COURT: Oh, that's jail.

24 MR. PHILPOT: Jail, excuse me. Jail time, your
25 Honor.

1 THE COURT: Oh, that's okay.

2 MR. PHILPOT: I apologize.

3 THE COURT: That's all right.

4 MR. PHILPOT: We would ask that you commute jail
5 time. My client has a good job, he has a home, he has animals
6 which are dependent upon him. This case is old, he has
7 represented no threat in that neighborhood, he's got neighbors
8 who has reported that he is a productive and kind and helpful
9 neighbor. He's pre--he's presented no threat to the victims
10 in this case.

11 And to put him in jail, your Honor, would not allow-
12 -would sever his ability to have a job, it would take away his
13 home, it would destroy his ability to raise his animals and it
14 just does not serve the public nor the interests of justice to
15 do that to this man.

16 THE COURT: Okay. Thank you.

17 Anything, Mr Carlson?

18 MR. CARLSON: Yes, your Honor. There's four points
19 that I'd ask the Court to consider.

20 THE COURT: Okay.

21 MR. CARLSON: First, the defendant refuses to take
22 any accountability for his actions whatsoever. He claims his
23 civil rights were violated on Page 3, when he talks about how
24 he may appeal the case. He continues to brush off his own
25 statements and the statements of his supporting friends, that