2015

State of Utah, Plaintiff/Appellee, v. Travis Roger Tulley, Defendant/Appellant

Utah Court of Appeals

No. 20150241-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

TRAVIS ROGER TULLEY,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Appeal from a conviction for one count of reckless aggravated abuse of a vulnerable adult, a third degree felony, in violation of Utah Code § 76-5-111(2), with conviction being amended to a first degree felony under Utah Code § 76-3-203.5 and entered as a second degree felony pursuant to Utah Code § 76-3-402; failure to register as a sex offender, a third degree felony, in violation of Utah Code § 77-41-107(1)(a); and one count of interference with an arresting officer, a class B misdemeanor, in violation of Utah Code § 76-8-305, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Randall Skanchy presiding.

Defendant/Appellant is incarcerated.

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INTRODUCTION

As required by Utah Rule of Appellate Procedure 24(c), this reply brief is "limited to answering any new matter set forth in the opposing brief." The brief does not restate arguments from the opening brief or address matters that do not merit reply.

ARGUMENT

I. The trial court improperly excluded evidence of Larsen's prior acts of sexual misconduct in violation of Tulley's right to present a complete and believable defense.

In his opening brief, Tulley demonstrated that Larsen's prior acts of sexual misconduct were admissible under rules 404(b), 402, and 403. *See* Aplt. Br. 11-20. Additionally, the court's exclusion of this evidence was prejudicial. *See id.* at 21-25. The State's arguments to the contrary are not persuasive.

A. The misconduct evidence was relevant and admissible for a proper non-character purpose under rules 402 and 404(b).

Contrary to the State's claims, Larsen's prior misconduct was relevant and admissible for the non-character purpose of demonstrating Tulley's state of mind as it relates to the reasonableness of his beliefs regarding self-defense. The misconduct was also relevant and admissible to show Larsen's motive in sexually attacking Tulley.

1. *The evidence was admissible to show Tulley's state of mind vis-à-vis self-defense.*

Tulley argues that the evidence was admissible to show Tulley's state of mind as it relates to the reasonableness of his beliefs regarding the use of force. *See* Aplt. Br. 14-16. The State counters that Larsen's sexual misconduct "was irrelevant to [Tulley's] self-defense claim and the reasonableness of his response" because: (1) it is "[Tulley's] mental state—not the victim's"—that is at issue, and (2) the misconduct evidence "did not [] make it more likely that [Larsen] groped [Tulley's] genitals at knifepoint." Aple. Br. 28. The State's arguments miss the point.

Tulley agrees that the essential component of a self-defense claim is the defendant's—not the alleged victim's—belief that force was necessary for self-protection; it is Tulley's beliefs that are at issue. But to the extent the State suggests that Larsen's misconduct had no bearing on Tulley's mental state, it is incorrect. As argued, an alleged victim's prior acts "may reasonably ... color[] [a] defendant's attitude at the time of the encounter." *State v. Starks*, 627 P.2d 88,

91 (Utah 1981); Aplt. Br. 14-15. That is, a defendant's awareness of an alleged victim's misconduct tends to shed light on his state of mind at the time of the incident, specifically, his reasonable apprehension of the alleged victim. And the degree to which the defendant feared the alleged victim is highly relevant to the jury's assessment of the following: (1) whether the defendant's use of force was reasonable, and (2) whether the amount of force he used was reasonable.

In this case, Tulley's knowledge that Larsen was a convicted rapist many times over was material to Tulley's belief that he needed to use force to stop Larsen's imminent sexual attack. Knowledge of Larsen's prior misconduct also explained the severity of Tulley's response. *See Kelly v. State*, 981 A.2d 547, 551 (Del. 2009) (defendant's knowledge of alleged victim's 17 year old rape conviction was "[t]he critical fact ..., which could explain both the nature and severity of [the defendant's] response"). That is, a jury might find it reasonable for a defendant to use *more* force to halt an attack if the defendant's reasonable apprehension of the alleged victim is great.

Thus, where Tulley was aware of Larsen's history of rape, *see* Aplt. Br. 15, the misconduct was relevant to show the reasonableness of Tulley's beliefs regarding the use and amount of force necessary to curb Larsen's imminent attack. While Larsen's misconduct may not be admissible—as the State characterizes—for purposes of proving "that [Larsen] groped [Tulley's] genitals at knifepoint," Aple. Br. 28, the convictions were admissible to establish Tulley's state of mind vis-à-vis self-defense. Tulley's state of mind is a proper non-

character purpose that does not require a propensity inference. *See Starks*, 627 P.2d at 91; *State v. Howell*, 649 P.2d 91, 96 (Utah 1982); *see also, e.g.*, Jimmie E. Tinsley, 15 Am. Jur. Proof of Facts 2d 167 (2016) (when evidence of an alleged victim's prior violent acts are offered to show the defendant's "state of mind," the evidence is not presented for propensity purposes, "but for the purpose of showing the defendant's reasonable apprehension of danger in light of such ... prior acts"); *United States v. Saenz*, 179 F.3d 686, 689 (9th Cir. 1999) ("extrinsic evidence concerning the victim's past violent acts is admissible under Rule 404(b) to show defendant's state of mind").

2. The evidence was admissible to show Larsen's motive in perpetrating a sexual attack on Tulley.

The State also contends that the trial court erroneously concluded that the misconduct evidence was relevant to show Larsen's "absence of mistake or motive and/or intent" in sexually attacking Tulley. Aple. Br. 22, 26-28. Specifically, it argues that "[u]sing [Larsen's] prior sexual misconduct to explain why [Larsen] would sexually attack [Tulley] is simply a veiled propensity argument" and that Larsen's "intent/motive was never disputed." *Id.* at 27. The State is mistaken.

Why Larsen would sexually attack Tulley—i.e. Larsen's motive—was an issue that was disputed by the prosecution. *See* http://www.merriam-webster.com/dictionary/motive (defining "motive," as "something (as a need or desire) that causes a person to act"); *State v. Morris*, 122 P. 380, 382 (Utah 1912) (explaining motive can be defined as "the moving power which impels to action

for a definite result"). For instance, in closing, the State dismissed "[t]he idea that Wendell Larsen, a 71-year old man, [who] was very close with the defendant, who knows him, would try to rape a man of his age and stature. Kind of like trying to pull a porcupine out of a porcupine den, which is not a good idea." R.1035. These statements demonstrate that Larsen's motive was in dispute because they call into question why Larsen would be inclined to sexually attack a male friend. *See* Def. Ex. 1.

Moreover, evidence of Larsen's sexual misconduct answers the "why" question. The misconduct shows that Larsen's sexual attack on Tulley was motivated by deviant sexual desires, which manifested in the form of sexual attacks on males and females as well as sexual interest in his acquaintances. Offering the sexual misconduct evidence to demonstrate Larsen's motive was a proper non-character purpose under rule 404(b). Accordingly, the trial court was within its discretion when it concluded that the evidence was admissible to show motive.

B. The misconduct evidence was admissible under rule 403.

Even though the strong probative value of the misconduct evidence was not substantially outweighed by its potential for prejudice, the State argues that the court properly excluded the evidence under rule 403. First, the State downplays the probative value of the misconduct, pointing out that the prior offenses were "dissimilar" and "remote[]." Aple. Br. 30-31. In doing so, it incorrectly assumes that the probative value of the misconduct evidence is limited to proving that

Larsen was the initial aggressor. *See* Aple. Br. 30 (arguing that "none of the acts ... made it more likely than not" that Larsen would sexually attack Tulley). But the misconduct evidence was probative of much more. For one, its probative strength came from its tendency to show Tulley's state of mind vis-à-vis self-defense.

As argued, Tulley was aware that Larsen was a repeat sexual offender who had a long history that included acts against both sexes and recent acts against his sister. *See* Aplt. Br. 15, 18; *supra* Part I.A. The sexual misconduct evidence was therefore highly probative of the degree to which Tulley reasonably feared Larsen; whether he responded reasonably in using force; and whether the amount of force he used was reasonable. *See* Aplt. Br. 14-16; *supra* Part I.A. When the probative value of the misconduct evidence is considered in this light, "the significance of the ... [time gap] between the incidents is greatly reduced." *State v. Cuttler*, 2015 UT 95, ¶28, 367 P.3d 981; *see also* Aplt. Br. 17-18 (arguing that the probative value of older misconduct varies with the facts of the case and the purpose for which it is offered).

While the probative value of a person's remote act of sexual misconduct may be weaker if it is offered, for example, to prove that the person reoffended at a much later time (i.e. to prove actus reus), the same is not true if it is offered to show the defendant's state of mind as it relates to self-defense. Indeed, when offered to show the defendant's state of mind relative self-defense, the age of the misconduct matters little; what matters is whether the defendant in fact "knew" about the misconduct "at the time" of the incident. *Howell*, 649 P.2d at 97; *see*

also Starks, 627 P.2d at 91. Thus, in this case, what really matters is Tulley's knowledge at the time of the alleged assault—knowledge that Larsen was a repeat sex offender against males and females and had continued that pattern of behavior by making unwanted sexual advances against his sister. Regardless of the age of the acts, the misconduct was highly probative of why Tulley would reasonably apprehend Larsen and therefore, why he acted reasonably in his application of force. That probative value was only made stronger by the fact that Larsen's sexual misconduct was not isolated, but a lifelong pattern. *See* Aplt. Br. 17-18.

The State also claims that Larsen's misconduct had "little probative value concerning [his] dissimilar conduct so many years later." Aple. Br. 31. But again, the pattern of sexual misconduct displayed by Larsen and known by Tulley had strong probative value. The sum of the acts suggested that Larsen was sexually opportunistic and was capable of acting out against a variety of victims including women, underage girls and boys, and even his roommate in sex offender treatment. Additionally, there is nothing to suggest, as the State assumes, that the women and others he offended against "were apparently weaker than Mr. Larsen." Aple. Br. 31. Considered as a whole, the acts were highly probative of Larsen's sexually indiscriminate and deviant behavior, which shed light on why Larsen would attack Tulley. Likewise, Tulley's knowledge of Larsen's sexual ambivalence was strongly probative of the reasonableness of his apprehension of Larsen as well as his use of force. And for the reasons outlined, *see* Aplt. Br. 18-

19, this strong probative value was not "substantially outweighed" by the dangers contemplated under rule 403. Utah R. Evid. 403.

C. Exclusion of Larsen's sexual misconduct prejudiced Tulley.

Tulley has demonstrated that the court's exclusion of the misconduct evidence was prejudicial. *See* Aplt. Br. 21-25. It is reasonably likely that Larsen's prior sexual misconduct could have impacted the jury's assessment of Tulley's self-defense claim by making his story more believable. *See id.* at 22-23. Additionally, Tulley's narrative was largely consistent with the evidence, and the State did not present evidence that convincingly disproved Tulley's self-defense claim. *See id.* at 23-25.

Nevertheless, the State first argues that the misconduct evidence "said nothing about whether [Tulley] responded with reasonable force." Aple. Br. 34. But as argued, Tulley's knowledge that Larsen was a convicted rapist explained why Tulley would be fearful of Larsen notwithstanding the fact that he was a weaker, elder adult. *See Kelly*, 981 A.2d at 551 (exclusion of the alleged victim's 17 year old rape conviction required reversal where the defendant claimed he acted in self-defense and the defendant was "a significantly larger man than [the victim]"). That fear informed the reasonableness of Tulley's use of force as well as the "nature and severity of [his] response." *Id.* For instance, the jury could have concluded that it would have been reasonable for Tulley to use *greater* force to halt the attack if his reasonable apprehension of Larsen was likewise great. In short, it is reasonably likely that the jury would have found it easier to accept

Tulley's self-defense claim had the misconduct evidence been available for their consideration.

Additionally, the State unconvincingly argues that the trial evidence "made it unlikely" that the jury would have found that Tulley "acted in self-defense even if [Larsen's] sexual history w[as] admitted." Aple. Br. 34. First, while the State emphasizes the commotion heard by Larsen's neighbor, evidence of a commotion and "thumping" noises was not inconsistent with Tulley's defense. *Id.* After observing Boren at Larsen's front door, the neighbor subsequently closed her own door. R.639-40. It was not until the neighbor closed her own door that she heard the consistent thumping coming from the bathroom area. *Id*. And given the evidence that Boren entered Larsen's apartment at some point, the jury could have concluded that at least some of the thumping was attributable to Boren's activities—for instance, he perhaps made a commotion while trying to clean up the bathroom.[1] Moreover, Tulley's own testimony accounted for the sounds that the neighbor heard. Tulley testified: that he "pound[ed] [his] fists" in distress on the bedroom floor; that a bathroom area door twice went "boom"; and that he accidently dropped Larsen on the floor at least one time. R.959-61. Given this

[1] Moreover, the neighbor testified that she ultimately retreated to her bedroom after confirming that an apartment complex employee had reported to Larsen's door. R.640-41. She then heard more "loud" consistent "thumping." *Id*. Because the neighbor did not witness who subsequently entered Larsen's apartment, it is possible that some of the "loud" "thumping" was associated with Tulley's apprehension or the tendering of aid to Larsen.

evidence, the jury could have concluded that the source of the thumping was something other than Tulley "beating" Larsen. *See* Aple. Br. 34-35.

Additionally, contrary to the State's suggestion, Larsen's "injuries themselves" do not defeat Tulley's self-defense claim. *See* Aple. Br. 35. Indeed, the defense's medical expert testified that Larsen's injuries were consistent with multiple punches to the face. R.862-63. The State's medical expert likewise testified that Larsen's injuries could be consistent with a couple of fist blows. R.630-31. The jury also heard evidence that as individuals age, their skin "becomes less resistant to various kinds of trauma." R.863; *see also* R.629 (State's medical expert testifying that a younger patient would suffer less severe injuries). This supported an inference that because of Larsen's age, Tulley's 4-5 punches caused him to suffer more acute injuries and more significant bleeding than a younger individual would suffer in a similar situation.

Nor did the condition of the apartment undermine Tulley's testimony that he punched Larsen 4-5 times in self-defense. The blood spatter in the bathroom can be explained by Tulley's attempts to "flick[]" Larsen's blood off of his hands. R.962. And the State did not refute this testimony by calling a bloodstain pattern expert. Moreover, the smeared blood is consistent with Boren's testimony regarding his efforts to clean up the blood with a towel that he kept rinsing and wringing out. R.749-50, 761-62, 795-96, 799-800. Finally, Tulley—who was bloodied from attempting to help Larsen up—moved throughout the kitchen,

bedroom, and bathroom. R.961-65. Accordingly, it is likely that in his wake, he deposited blood in these places.

II. Tulley should be granted a new trial because the jury was not instructed on the definition of forcible felony.

In his opening brief, Tulley argues that the court committed error by failing to provide an "instruction identifying the sexual felonies that justified the use of deadly force." Aplt. Br. 27. To be clear, Tulley does not allege that the error was the court's failure to give defense counsel's proposed self-defense instruction. *See* Aple. Br. 39; *cf.* Aplt. Br. 26-29. Rather, Tulley argues that the proposed instruction was sufficient to preserve the issue. *See* Aplt. Br. 31. But if not, Tulley maintains that this Court should review the issue for plain error. *See* Aplt. Br. 31-32. The court's failure to define "forcible felony" to include sexual felonies constituted error that should have been obvious. *See* Aplt. Br. 31-32. Additionally, that error was prejudicial.

Nevertheless, the State argues that the error did not prejudice Tulley because his "self-defense theory rested entirely on having a knife held to his head, not a hand on his genitals." Aple Br. 40. The State is incorrect.

First, the State argues that through his testimony, Tulley "made it clear that he was defending himself against the knife and not the sexual abuse." Aple. Br. 41. In doing so, it relies on the following testimony:

> And I remember waking up to that sensation. I looked over and I kind of started and I seen the knife right here in my head and I just started—started throwing my fists. I would probably say about four or five strokes. And as he backed out, his hand had removed from my phallus and my scrotum.

R.958.

The State's reading of this testimony ignores the context and requires a parsing of the statement that the jury was unlikely to have engaged in. Tulley refers to waking up to a "sensation," which the jury readily could have understood as a reference to the sensation resulting from Larsen's hand on his "phallus and scrotum." *See id*. Tulley then realized that Larsen also had a knife to his head and he punched Larsen, which caused Larsen's hand to "remov[e] from [his] phallus and [his] scrotum." *Id*. Based on this testimony, it is reasonably likely that the jury understood that Tulley threw the punches to defend himself not only against the knife, but also to prevent Larsen's sexual advances.

The State also argues that Tulley's testimony "suggests he did not realize [Larsen's] hand was on his genitals until *after* [Tulley] had thrown his punches." Aple. Br. 41 (emphasis in original). This is a strained reading. Tulley testified that after he threw the punches, Larsen *removed* his hand from Tulley's genitals. R.958. It does not make sense that Tulley would describe a sudden realization that Larsen's hand was on his genitals in terms of Larsen "remov[ing]" his hand. Implicit in the word "remove" is a recognition that something once existed in a place (i.e. a hand on a person's genitals), but then that something was "take[n] [] away from [that] place" or "no longer exist[s]" there. *See* http://www.merriam-webster.com/remove. Accordingly, by using the word "remove," Tulley implied an awareness that Larsen's hand was already on his genitals. Thus, it is

reasonably likely that the jury understood that Tulley was aware of Larsen's sexual advances prior to throwing the punches.

In short, Tulley's prevention of a sexual felony was critical to his self-defense claim, particularly where police never located the knife that Tulley testified Larsen used. *See* Aplt. Br. 30-31. Therefore, the court's failure to define forcible felony to include sexual felonies prejudiced Tulley.

Finally, the State argues that the error was "harmless" because "even if [Larsen] sexually abused [Tulley] at knifepoint," "the overwhelming physical evidence and witness testimony" suggest that Tulley's "use of force went well beyond that needed to defend himself." Aple. Br. 42-43. But as explained, *supra* Part I.C, Larsen's injuries, the condition of the apartment, and the evidence of "thumping" do not defeat Tulley's self-defense claim.

III. The aggravated abuse of a vulnerable adult statute contains unconstitutionally vague provisions.

On appeal, Tulley argues that subsections 76-5-111(1)(q)(i), (iii), and (iv) of Utah's aggravated vulnerable adult abuse statute violate due process guarantees against vague criminal laws. *See* Aplt. Br. 32-43. Contrary to the State's arguments, reversal is required because the provisions are void-for-vagueness as applied and on their face. *See id.* at 36-42; *infra* Parts III.A-C.

Moreover, the State appears to agree that Tulley adequately preserved his challenge to subsection 76-5-111(1)(q)(i) of the statute, but argues that his "vagueness challenge to subsections (1)(q)(iii) and (iv) is unpreserved and should be reviewed for plain error." Aple. Br. 46. Either way, reversal is warranted

under subsections 76-5-111(1)(q)(iii) and (iv) because the vagueness of subsections (iii) and (iv) was obvious and prejudicial. *See infra* Part D.

A. The provisions are void-for-vagueness as applied.

As applied in this case, an ordinary person like Tulley would not only be uncertain of what "serious physical injury" entails, but also whether the circumstances were "likely" to produce such an injury. Moreover, the police, prosecutor, and jury were left to subjectively decide whether Larsen's injuries constituted "serious physical injuries" and whether the circumstances were likely to produce those injuries.

Nevertheless, the State argues that Tulley was on notice regarding what constitutes "serious physical injury." *See* Aple. Br. 52-53. It contends: "the statutes [] make plain that bruising, pain, bleeding, bone fractures, or soft tissue swelling that either collectively or individually (i) seriously impair a vulnerable adult's health; (iii) involved physical torture or caused serious emotional harm to a vulnerable adult; or (iv) created a reasonable risk of death amounts to 'serious physical injury.'" *Id.* at 52. According to the State, "[t]his definition put[] [Tulley] on notice that repeatedly punching an elder adult in the face, with or without an object, is likely to produce bruising, bleeding, swelling, bone fractures, and physical pain." *Id*.

Essentially, the State suggests that because Tulley was provided with notice regarding the injuries that qualified as "physical injury," he likewise had notice of the injuries amounting to "serious physical injury." *See id*. The problem with the

State's argument is this: the statute does not provide guidance regarding the type of injury that elevates mere "physical injury" to the level of "serious physical injury." The statute's use of the word "serious" fails to cure any of the uncertainties. "Serious" is used not only in the phrase being defined—"*serious* physical injury"—but also in the definitional provisions "*serious*[] impair[ment]" and "*serious* emotional harm." Utah Code § 76-5-111(1)(q)(i) & (iii) (emphasis added). A statute provides little guidance when the very word subject to definition is included in the definition itself. But the real problem is that the definition does not tether the word "serious" to anything concrete or objective. *See id.* It is one thing to link the word "serious" to something objective and specific like "permanent disfigurement," *see* Utah Code § 76-1-601(11), but it is quite another to link the word "serious" to some ambiguous phrase like "impair[ment] [to] ... health" or "emotional harm." Utah Code § 76-5-111(1)(q)(i) & (iii).

Moreover, the definition does not provide any "narrowing context." *United States v. Williams*, 553 U.S. 285, 306 (2008). Nowhere does it include words like "permanent" or "protracted," which would notify Tulley that impairment is serious when the harm is long-term and not temporary. *Cf.* Utah Code §§ 76-1-601(11); 76-5-109(f)(ii)(H). Moreover, there are no illustrative examples, as in the child abuse statute, that provides guidance. *See* Utah Code § 76-5-109(f)(ii). And contrary to the State's claim, "the illustrative examples in the definition of 'physical injury'" provide no answers. Aple. Br. 54. For instance, there is nothing

to explain to would-be defendants that "physical injury" is "serious" when, *inter alia*, it: "creates a permanent disfigurement or protracted loss or impairment of the function of a bodily member, limb, or organ" or "causes [a person] to cease breathing." Utah Code § 76-5-109(f)(ii)(H)-(I).

In its discussion of arbitrary enforcement, the State also argues that Tulley's reliance on *Johnson v. United States*, 135 S. Ct. 2551, is misplaced. Aple. Br. 55-57. But, many of the vagueness problems at issue in *Johnson* are likewise present here. First, like *Johnson*, the statute in this case does not provide any narrowing context by way of example. *See* 135 S. Ct. at 2557, 2561. The only non-vague example of "serious physical injury" is injury "caused by use of a dangerous weapon." Utah Code § 76-5-111(1)(q)(ii). But like the enumerated list of non-vague examples in *Johnson*, 135 S. Ct. 2555-56, 2561 (describing burglary, arson, extortion, and crimes involving explosives as the "confusing" list of examples), the inclusion of injury "caused by use of a dangerous weapon" does not provide a useful baseline by which to measure the types of injuries amounting to "serious physical injury." *See* Utah Code § 76-5-111(1)(q). This is because injury "caused by use of a dangerous weapon" only speaks to the *means* by which an injury is inflicted. *Id.* And if anything, its inclusion suggests that a reader's task, goes beyond evaluating whether certain injuries are sufficiently serious, but also entails an examination of the means used. *Johnson*, 135 S. Ct. at 2557 ("the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause" contributed to its vagueness because their presence suggested

the need for a "wide-ranging inquiry" that went "beyond evaluating the chances that the physical acts that make up the crime will injure someone").

Second, as in *Johnson*, the statute ties the assessment of risk to an indeterminate and abstract standard. *See id.* at 2557-58. Regardless of the fact that the vagueness challenge in *Johnson* arose in the context of the ACCA's "categorical approach," *see* Aple. Br. 55-56, at the core of the Supreme Court's vagueness concerns was the way in which the statute tied the assessment of risk to a "judge-imagined abstraction." *Johnson*, 135 S. Ct. at 2558. That is, it tied the assessment of risk to the "ordinary case of the crime," which was an "'imaginary ideal'" that involved elements that were "'uncertain both in nature and degree of effect.'" *Id.* at 2561.

Like the residual clause in *Johnson*, the statute in this case requires an assessment of risk—whether the defendant acted under "circumstances *likely* to produce ... serious physical injury"—and ties that assessment of risk to an indeterminate and abstract ideal—"serious physical injury." *Compare* Utah Code § 76-5-111(2), *with Johnson*, 135 S. Ct. at 2557-58, 2561. Because "serious physical injury" (like *Johnson*'s "judicially-imagined," "'ordinary case of the crime'") is "'uncertain both in nature and degree of effect,'" the statute leaves defendants, law enforcement, courts, and juries without a way to measure whether the circumstances are "'likely'" to produce such an injury. *See id.*

B. The provisions are void-for-vagueness on their face.

Tulley argues that the challenged provisions are also facially vague because they create similar uncertainties for all would-be defendants. *See* Aplt. Br. 39-40. The State counters that Tulley may not challenge the statute on its face. Aple. Br. 49-51. Alternatively, it argues that Tulley's facial challenge fails on the merits. *Id.* 57-59. The State's arguments are unpersuasive.

1. *Tulley can mount a facial challenge.*

The State's claim that "Tulley may not challenge that statute as ... facially invalid" is incorrect. Aple. Br. 51. While it does not appear that a Utah appellate court has addressed a post- *Johnson* vagueness challenge, Tulley's facial challenge is permissible under both Utah case law and *Johnson*.

Prior to *Johnson*, facial challenges for overbreadth and vagueness were treated as follows: First, the court would "'determine whether the enactment reache[d] a substantial amount of constitutionally protected conduct.'" *State v. Norris*, 2007 UT 6, ¶13, 152 P.3d 293 (emphasis omitted). "'If it d[id] not, then the overbreadth challenge [would] fail.'" *Id.* Next, the court would "'examine the facial vagueness challenge and, assuming the enactment implicate[d] no constitutionally protected conduct, [the court would] uphold the challenge only if the enactment [wa]s impermissibly vague in all of its applications.'" *Id.* In other words, if the statute was "clear as applied to a particular complainant," it "c[ould] [not] be considered impermissibly vague in all of its applications and thus w[ould] necessarily survive a facial vagueness challenge." *State v. MacGuire*,

2004 UT 4, ¶12, 84 P.3d 1171. Accordingly, courts would "'examine the complainant's conduct before analyzing other hypothetical applications of the law.'" *Norris*, 2007 UT 6, ¶13. Thus, even prior to *Johnson*, a defendant could succeed on a facial challenge for vagueness if he demonstrated that the statute (1) was vague as applied to him and (2) it was vague in all of its applications. *See id.*

But in *Johnson*, the United States Supreme Court backed away from the notion that to succeed on a facial challenge, a defendant must demonstrate a statute's vagueness "in all of its applications." *See id.*; *Johnson*, 135 S. Ct. at 2560-61. The Court explained that "although statements in some of [its] opinions could be read to suggest otherwise, [its] *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* The Supreme Court also demonstrated a willingness to entertain facial challenges. Without conducting a threshold as-applied analysis, the Court concluded that the ACCA's residual clause suffered from "hopeless indeterminacy" and struck the provision as facially vague. *Id.* at 2558, 2563.

Johnson suggests that when presented with a "hopeless[ly] indetermina[te]" statute, courts may strike the statute as facially vague without an initial showing that the statute is vague as-applied. *See id.* And for the reasons discussed, *see* Aplt. Br. 32-40; *supra* Part III.A; *infra* Part III.B.2, the definition of "serious physical injury" likewise suffers from "hopeless indeterminacy." *Johnson*, 135 S. Ct. at 2558. But in any event, this Court may reach Tulley's facial

challenge because Tulley demonstrated that the statute is vague as applied to him. Aplt. Br. 36-39; *supra* Part III.A. Moreover, in considering Tulley's facial challenge, this Court need not require a showing that the statute is vague in all of its applications. *See Johnson*, 135 S. Ct. at 2560-61. It should instead follow *Johnson* and strike the challenged definitions as facially vague even if the Court can imagine "some conduct that clearly falls within the provision's grasp." *Id.*

2. *The provisions are facially vague.*

Contrary to the State's contentions, the provisions are also vague on their face because they suffer from an absence of "minimal guidelines" and "standard[s]". *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The "indeterminacy of precisely what" amounts to an impairment to a vulnerable adult's health, serious emotional harm, a reasonable risk of death, or physical torture leaves too much to subjective judgment. *Williams*, 553 U.S. at 306 ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."). Where the meaning of these provisions depend on subjective judgment, the statute promotes arbitrary and discriminatory enforcement. *See Kolender*, 461 U.S. at 358; *Johnson*, 135 S. Ct. at 2557-63. Accordingly, the provisions are facially vague. *See id.; see also Morales*, 527 U.S. at 52 (a statute may be found facially invalid where "it fails to establish standards

for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interest").

In its brief, the State itself demonstrates the subjectivity inherent in determining what constitutes "serious physical injury" and whether the defendant acts under circumstances likely to cause such an injury. Responding to Tulley's hypothetical regarding a person who enables an elder adult's cigarette smoking habit, the State asserts that "[t]his situation is outside the statute's scope." Aple. Br. 58. To support its argument, the State does not rely on the plain language of the statute; it relies on subjective considerations, including the fact that a cigarette provider "is simply engaging in his caretaking responsibilities," and responsibility for the continuation and risks of smoking "lie[] with the elder adult." *Id.* at 58-59. While one person might agree with these statements, another person—for some arbitrary reason—may be inclined to hold a caretaker culpable for enabling an injurious habit that creates a "reasonable risk of death." The State also argues that "[n]othing in the statute's plain language s*eeks to prosecute* as elder abuse a caregiver's failure to prevent an elder adult from making unhealthy decisions for himself." Aple. Br. 58-59 (emphasis added). But at the same time, the plain language is not sufficiently narrow such that the cigarette-provider would be *excluded from prosecution* either. It is this type of "'standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender*, 461 U.S. at 358 (alterations is original).

While the State points out that Tulley only offers "a single hypothetical to demonstrate the statute's vagueness," there are many other scenarios where the innocent could be trapped. Aple. Br. 58. For instance, what about an elderly woman who leaves her adoring husband of 50-years for another man? Under the vague terms of the statute, leaving the husband would be a circumstance likely to cause him "serious emotional harm," and her act of leaving would cause him to suffer "serious emotional harm."

Beyond the hypotheticals, the point is that the statute fails to provide minimal guidelines and standards. Words like "serious" and "reasonable"—without any narrowing context and when tethered to nothing specific—leave too much room for subjectivity. The statute, therefore, is "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity" the level of risk and harm that subjects a defendant to criminal liability. *Kolender*, 461 U.S. at 361.

C. Instructing the jury on the vague provisions was prejudicial.

The court included the unconstitutionally vague provisions in its instructions to the jury; inclusion of the vague provisions prejudiced Tulley. The State disagrees, arguing that "[b]ecause unanimity is not required for each variation of 'serious physical injury,' [Tulley] cannot demonstrate prejudice by showing that any one variations is unconstitutionally vague." Aple. Br. 62. While the State is correct in asserting that "unanimity was not required for any one of the variations" of "serious physical injury," its arguments miss the point. *See*

Aple. Br. 59-61. Regardless of the fact that "unanimity is not required for each variation of 'serious physical injury,'" *id.* at 62, this Court must reverse if it is not confident that the jury unanimously found "serious physical injury" based on a constitutional variation (i.e. the dangerous weapon variation). [2]

The unanimity discussions in *State v. Johnson* and *State v. Bair* arose in the context of assessing whether the respective errors required reversal. *State v. Johnson*, 821 P.2d 1150, 1158–60 (Utah 1991); *State v. Bair*, 2012 UT App 106, ¶¶62-64, 275 P.3d 1050. These cases require reversal when there is an error in one of the means that may satisfy a critical element, and the court (due to a general verdict) cannot be sure that no juror relied on that means to find the element. *See id.* Under these circumstances, reversal is warranted because the court cannot be confident that, but for the error, the jury would have unanimously found that critical element. Stated differently, a general verdict should only be upheld when the court is convinced that the "jury agreed unanimously on ... a valid and evidentially supported theory of the elements." *Johnson*, 821 P.2d at 1159.

This is consistent with decisions of the United States Supreme Court, which have held that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict

[2] Because the jury did not need to be unanimous on any one of the four means that constituted "serious physical injury," Tulley had no obligation to submit a special verdict form asking the jury to specify which of the four means it unanimously agreed upon. *Cf.* Aple. Br. 62-64.

that may have rested on that ground." *Griffin v. United States*, 502 U.S. 46, 53 (1991); *see also, e.g.*, *Bachellar v. Maryland*, 397 U.S. 564, 570-71 (1970); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Street v. New York*, 394 U.S. 576, 585-588 (1969); *Williams v. State of N. Carolina*, 317 U.S. 287, 292 (1942); *Stromberg v. California*, 283 U.S. 359, 368 (1931). The constitutional nature of the error—as opposed to the insufficiency of the evidence—is likewise important in assessing prejudice under these circumstances. For one,

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution . . . . When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence

Griffin, 502 U.S. at 59 (emphasis in original); *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991).

For this reason, the sufficiency of the evidence cases the State relies on are not applicable to cases like this one that involve constitutional errors. *See* Aple. Br. 62. But more importantly, because of the constitutional nature of the error, the burden falls on the State to demonstrate that instructing the jury on the vague provisions was harmless beyond a reasonable doubt; Tulley does not bear the burden of demonstrating, as the State argues, "that all four variations of 'serious physical injury' are unconstitutionally vague." Aple. Br. 63.

To meet this high burden, the State was required to show beyond a reasonable doubt that none of the jurors found "serious physical injury" based on one of the unconstitutionally vague provisions. The State failed to make such a showing in its brief. Nor could it. As argued, the broad inclusiveness of subsections (1)(q)(i), (iii), and (iv) allowed the jury to find serious physical injury under one or all of the vague provisions. Aplt. Br. 41. Moreover, the prosecutor argued that serious physical injury could be found under each of these subsections. R.1029-32. This only increased the likelihood that at least one juror found serious physical injury based on an unconstitutionally vague ground. Additionally, given the lack of evidence showing that the golf club, spoon, and towel rack were used as dangerous weapons, it is unlikely that the jury unanimously found serious physical injury based on the dangerous weapon variation alone.[3] *See* Aplt. Br. 41-42. The possibility that one juror's finding of the elements rested upon one of the vague alternatives warrants reversal. *E.g.*, *Bachellar*, 397 U.S. at 570-71; *Leary*, 395 U.S. at 32; *Street*, 394 U.S. at 585-588; *Williams*, 317 U.S. at 292; *Stromberg*, 283 U.S. 359, 368; *see also State v. Ice*, 997 P.2d 737, 740-41 (Kan. App. 2000).

[3] To clarify, Tulley does not make a stand-alone argument that the evidence was "insufficient" to show that he used a dangerous weapon. *See* Aple. Br. 63-64. Thus, he was under no obligation to "marshal the evidence [] supporting the [dangerous weapon] variation," and this Court need not address the State's argument that the "challenge is unpreserved." *Id.* Tulley instead argued that instruction on the vague provisions was prejudicial because it was unlikely that the jury unanimously found serious physical injury based on the dangerous weapon variation—the only constitutionally valid variation.

D. Tulley preserved his challenge to subsections (1)(q)(iii) and (iv); alternatively, he has demonstrated plain error.

Tulley argues he preserved his vagueness challenge to all of the variations. Aplt. Br. 42. Alternatively, this Court may review his challenges for plain error. *Id.* at 42-43. The State does not contend that Tulley's challenge to subsection (1)(q)(i) is unpreserved, however, it argues that Tulley did not preserve his challenges to subsections (iii) and (iv). *See* Aple. Br. 45-49. It maintains that his vagueness challenges to these subsections should be reviewed for plain error. *Id.* at 48-49. However, according to the State, Tulley "cannot show plain error because the vagueness of the statutes was not 'obvious.'" *Id.* at 48. The State's argument is unconvincing.

First, the vagueness of subsections (1)(q) (iii) and (iv) should have been obvious because counsel's objection to subsection (i) placed the court on notice that other portions of the statute were similarly vague. *See State v. Eldredge*, 773 P.2d 29, 35 n.8 (Utah 1989) (noting "obviousness requirement poses no rigid and insurmountable barrier to review"). Additionally, there were clear indications before the trial court that should have rendered the deficiencies in subsections (iii) and (iv) apparent. For instance, the definition of "serious physical injury" was contained in the same jury instruction (Instruction 35) as the definition of "serious bodily injury," which was defined *inter alia* as injury that "creates a *substantial risk* of death." R.384 (emphasis added). Where the definition of "serious bodily injury" provided an objective way to quantify the risk of death, it

should have been obvious that the adjacent phrase—"creates a *reasonable* risk of death"—did not provide proper guidance. *Id.* (emphasis added).

Instruction 35's definition of "serious bodily injury" also contained "permanent" and "protracted" language. R.384. This likewise made it obvious that the definition of "serious physical injury" failed to provide guidance as to whether the harm (including emotional harm) must be permanent or whether temporary harm was sufficient. And the vagueness of "physical torture" should have been plain given the prosecutor's reliance on clearly arbitrary considerations—including the fact that Larsen and Tulley were "very close"—to support his argument that Larsen's injuries involved "physical torture." R.1029-30. For these reasons, the unconstitutional vagueness of subsections (iii) and (iv) should have been obvious.

Moreover, instructing the jury on subsections (iii) and (iv) was prejudicial in light of the previously-described reasons, which include the broad language of these subsections, the prosecutor's reliance on them, and the lack of evidence showing that Tulley used a dangerous weapon. *See infra* Part III.C. Thus, Tulley has established plain error with respect to subsections (iii) and (iv).[4]

[4] Should this Court conclude that Tulley did not establish plain error, reversal is warranted based on subsection (i) alone. The State did not satisfy its burden of showing, beyond a reasonable doubt, that not one juror found "serious physical injury" based on the "serious[] impair[ment] to a vulnerable adult's health" variation. *See infra* Part III.C. Nor could the State meet this burden given subsection (i)'s inclusive language and the prosecutor's reliance on it during closing argument. *Id.* Thus, reversal is required based on the unconstitutional vagueness of subsection (i) alone. *E.g.*, *Bachellar*, 397 U.S. at 570-71; *Leary*, 395

IV. The habitual offender statute violates the Utah Constitution's cruel and unusual punishment and double jeopardy clauses.

Tulley argues that Utah's habitual offender statute violates the Utah Constitution's cruel and unusual punishment and double jeopardy clauses as applied to third degree felony offenders like Tulley. *See* Aplt. Br. 43-53. The State counters that Tulley did not preserve these claims, and consequently, this Court should reject them. *See* Aple. Br. 67-69. While the State reaches the merits of Tulley's cruel and unusual punishment clause claim, it does not address the merits of his double jeopardy claim. *Id.* at 69-73. For the reasons below, the State's preservation challenges fail.

First, the State argues—without analysis—that Tulley's "double jeopardy argument fails because it was not raised below." *Id.* at 68. The State is mistaken. In his Motion Objecting to the Habitual Violent Offender Statute as Unconstitutional, Tulley "'raised [the state double jeopardy issue] to a level of consciousness'" such that he gave the "'trial court an adequate opportunity to address it.'" *State in Interest of M.J.*, 2013 UT App 122, ¶23, 302 P.3d 485. In fact, Tulley devoted an entire section of his motion to his double jeopardy argument, which he asserted under both the federal and state constitutions. *See* R.425-27. For instance, Tulley's motion included argument that:

- "Utah's Habitual Offender Statute impermissibly exposes [Tulley] to duplicative sentences in violation of his rights against double jeopardy"

U.S. at 32; *Street*, 394 U.S. at 585-588; *Williams*, 317 U.S. at 292; *Stromberg*, 283 U.S. 359, 368.

- the statute "twice expos[es] a defendant to jeopardy for the same offense"
- "as a matter of state constitutional law, this court may find that Utah's Habitual Violent Offender[] statute violates state double jeopardy principles."

Id.

Although it appears that trial counsel inadvertently cited Article I, section 7 (due process) instead of Article I, section 12 of the Utah Constitution (double jeopardy), "[w]hether a party has properly preserved an argument ... [does not] turn on the use of magic words or phrases." *In re Baby Girl T.*, 2012 UT 78, ¶38, 298 P.3d 1251. Indeed, counsel made double jeopardy arguments and repeatedly referenced "double jeopardy," "state double jeopardy principles," and even incorporated double jeopardy clause language into his motion. *See id.* at ¶36 (due process claim preserved where "[t]he briefing in the district court was infused with due process implications, arguments, and cases"). Accordingly, this issue is preserved because the "record clearly demonstrates [Tulley's] argument was founded in the" state double jeopardy clause. *Id.* at ¶33.

The State next argues that Tulley's Motion Objecting to the Habitual Violent Offender Statute as Unconstitutional did not preserve his state constitutional arguments because it was filed "too late to preserve" the issues. Aple Br. 68-69. In doing so, the State relies on the briefing deadline set by the

trial court with respect to a separate ex post facto argument.[5] *See id.* at 67-69. But the January 30, 2015 briefing deadline the State claims that Tulley "missed" did not pertain to all sentencing related-motions. Nor did the trial court indicate that all state constitutional objections "*must* be made" prior to this deadline. Utah R. Crim. P. 12. Rather, the briefing deadline related narrowly to the discrete issues counsel raised at the end of trial. *See* R.1067 (trial judge explaining that that the court and "justice would be better served if [he] had the opportunity to be briefed by ... [counsel] on that *particular issue*" (emphasis added)).

It is also important to note that the court considered and on the day of sentencing, granted Tulley's Motion to Reduce Punishment, which Tulley filed after the January 30, 2015 date. R.398-401, 439-40, 1095-1102. This dispels any notion that the January 30th date was a hard-and-fast briefing deadline for all sentencing-related motions or that the court required resolution of all sentencing-related issues prior to AP&P's completion of the presentence investigation report. *Cf.* Aple. Br. 67-69.

But the real problem with the State's argument is that deadline or no deadline, the trial judge "chose not to treat" defense counsel's failure to submit a brief prior to the deadline as a waiver of Tulley's state constitutional claims. *State v. Matsamas,* 808 P.2d 1048, 1053 (Utah 1991) (concluding that issue was preserved and Utah R. Crim. Proc. Rule 12 timing requirements were waived

[5] At this time, counsel also verbally argued that Tulley's prior offenses should not be used to enhance Tulley's sentence because "he was not advised that the could be used to enhance is penalty in the future." R.1065-66.

where trial court "chose not to treat" untimeliness as a waiver and considered the issue); *State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1991). The trial court did not express concerns about the timeliness of the motion nor did the judge indicate that the timing influenced its preparedness. *Cf. State ex rel. E.G.*, 2008 UT App 308, *2–3 (trial court did not waive timing requirements where the court acknowledged the untimeliness of counsel's objections).

Rather, the judge stated on the record that he received the motion. R.1091. He indicated that the statutory "enhancements [we]re proper and appropriate." R.1094-95. And then the judge denied the motion, indicating: "Under the defendant's motion objecting to the habitual offenders statute as unconstitutional, the Court hereby denies that." R.1094-95. Based on this record, it is evident that the trial considered Tulley's constitutional claims and denied his motion based on the merits—not based on the timeliness of the motion. *Johnson*, 821 P.2d at 1161 ("Because the trial court addressed the ... issue fully and did not rely on waiver, we consider the issue on appeal"); *State v. Parker*, 872 P.2d 1041, 1044 (Utah Ct. App. 1994) (holding that "trial court acted on the merits of motion and thus de facto considered it timely").

Recently, in *Fort Pierce Indus. Park v. Shakespeare*, our supreme court rejected a claim that an issue was unpreserved where the "'court not only had an opportunity to rule on the issue ... but in fact "did rule on it."'" 2016 UT 28, ¶13. Accordingly, as in *Shakespeare*, "'the court's decision to take up'" Tulley's

constitutional claims and deny them on their merits "'conclusively overc[o]me[s]'" the State's objection that the issue was not preserved. *Id.*

CONCLUSION

For the reasons above and in the opening brief, Tulley respectfully requests that this Court (1) reverse his aggravated abuse of a vulnerable adult conviction and remand for a new trial, and (2) declare subsections 76-5-111 (1)(q)(i), (iii), and (iv) of the aggravated abuse statute unconstitutional. Alternatively, Tulley requests that this Court declare subsection 76-3-293.5 (2)(a) of the habitual offender statute unconstitutional and reverse and remand for resentencing with an order to impose a third degree felony sentence.[6]

SUBMITTED this 13th day of September, 2016.

ALEXANDRA S. MCCALLUM
Attorney for Defendant/Appellant

[6] This Court granted Tulley "an additional 1,500 words in his reply brief." *See* Addendum A. This brief, which contains fewer than 8,500 words, therefore complies with the word limit.

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains fewer than 8,500 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

ALEXANDRA S. MCCALLUM

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. MCCALLUM, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 13th day of September, 2016.

ALEXANDRA S. MCCALLUM

DELIVERED this ____day of September, 2016.

ADDENDUM A

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, Appellee, *v.* TRAVIS ROGER TULLEY, Appellant.	)	ORDER Case No. 20150241-CA

This matter is before the court on Appellee's motion, filed May 26, 2016, seeking an extension of time to file Appellee's brief. Appellant did not respond or otherwise respond to the motion.

This matter is also before the court on Appellee's motion, filed June 16, 2016, seeking to file an over-length brief of 18,018 words. Appellant opposes the motion and requests that this court either deny the motion or, if the motion is granted, allow Appellant to withdraw his opening brief and file a replacement brief containing a word limit that is consistent with the extension granted to the Appellee. Appellant did not timely seek or obtain an extension of the word limit before filing his opening brief.

IT IS HEREBY ORDERED that Appellee's motion to file an over-length brief of 18,018 words is denied; provided that, Appellee may file a brief of 15,500 words, which shall be filed no later than ten (10) days form the date of this order. IT IS FURTHER ORDERED that Appellant is entitled to an additional 1,500 words in his reply brief. Our disposition makes it unnecessary to address Appellee's motion for an extension of time.

Dated this 24th day of June, 2016.

FOR THE COURT:

Stephen L. Roth, Judge

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2016, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

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By
Susan Willis
Judicial Services Manager

Case No. 20150241
District Court No. 131905304