2018

STATE OF UTAH, Plaintiff/Appellee, v. PATRICK BOBBY GALINDO, JR., Defendant/Appellant. : Brief of Appellee

Utah Court of Appeals

Public

Case No. 20180116-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

PATRICK BOBBY GALINDO, JR.,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for attempted murder, a first degree felony, and a guilty plea to possession of a firearm by a restricted person, a second degree felony, in the Second Judicial District, Weber County, the Honorable Ernie W. Jones presiding

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INTRODUCTION

Although Defendant shot the victim four times, the victim survived and identified Defendant from a photo lineup. Defendant's fingerprints were also on the magazine of the gun that fired the bullets.

I. After Defendant was charged, Defendant's counsel requested a pre-trial competency evaluation because Defendant allegedly appeared to be unable to understand the proceedings and make rational decisions. After two court-appointed psychologists examined Defendant and found that he was competent, counsel stipulated to Defendant's competency.

Defendant complains that this was ineffective assistance. But Defendant cannot carry his burden to prove ineffectiveness because he offers no evidence of prejudice—a reasonable probability that but for counsel's

stipulation he would have been found incompetent. There can be no prejudice here for two reasons: (1) the competency evaluations conclusively resolved counsel's initial concerns; and (2) Defendant's performance during his police interview and his plea colloquy to a bifurcated charge supported the evaluators' unequivocal conclusions that Defendant was competent. For these same reasons, Defendant cannot prove deficient performance. Reasonable counsel could choose to stipulate to Defendant's competency after both evaluators found Defendant competent and the record overwhelmingly supported that conclusion.

Defendant appears to challenge his convictions for both attempted murder and possession of a firearm by a restricted person. But the trial court bifurcated the firearm-possession charge and Defendant pled guilty to it after the jury convicted him of attempted murder. Defendant therefore can challenge only his attempted murder conviction in this appeal because his guilty plea waived any non-jurisdictional defect in his firearm-possession conviction.

II. Defendant also complains that his counsel was ineffective for not consulting with one of the evaluators. But Defendant cannot prove this claim because it depends on extra-record evidence. Defendant seeks a rule 23B

remand to augment the record, but this Court should deny remand for the reasons explained in the accompanying response to Defendant's motion.

III. The cumulative-error doctrine is inapplicable because a single prejudicial error—had Defendant proved one—would entitle him to relief. Regardless, Defendant has not shown any error.

STATEMENT OF THE ISSUES

1. Defendant demonstrated his competency during his police interview, two competency evaluations, and a plea colloquy. The record contains no evidence of incompetency other than counsel's initial concerns that were ultimately resolved by the competency evaluations. Has Defendant shown that his counsel was ineffective for stipulating to his competency after both evaluators unequivocally found him competent?

2. In an affidavit filed in support of a rule 23B motion for remand, trial counsel reasserts and expands upon his initial concerns about Defendant's competency. Absent a remand under rule 23B, Utah Rules of Appellate Procedure, can Defendant show that his counsel was ineffective for not consulting with one of his competency evaluators?

Standard of Review for Issues 1 & 2. Ineffective-assistance-of-counsel claims raised for the first time on appeal are questions of law reviewed de novo. *State v. King*, 2018 UT App 190, ¶11, 875 Utah Adv. Rep. 13.

3. Does the cumulative error doctrine entitle Defendant to relief?

Standard of Review. None applies.

STATEMENT OF THE CASE

A. Summary of facts.

Around 1:30 a.m. on a June morning, Ramon Guzman and his friend were walking along an Ogden street when someone started yelling insults at them from an apartment window. R768-71,777,838-40,928-30. Guzman responded that if the people in the apartment had "a problem" they should "come down here." R929-30. They accepted his challenge. R768-69,930-31.

Three men came out to the street and continued yelling at Guzman and his friend. R768-71,930-31. After someone yelled "bring it over here mother f----," the three men, one armed with a handgun, sprinted across the street towards Guzman and his friend, who each drew a knife. R768-72,930-32, 807,811-12. But before a physical fight could begin, four gunshots rang out. R772,807,811-12. Although all four bullets hit Guzman, he survived. R840,847-48.

After the shooting, the three men ran back towards the apartment building they had come from. R773-74. Mike Martinez rented the apartment. R1124-25. Defendant and several others had gathered there that night, including Defendant's "homies" Isaiah Moncada and Luis Lara. R865-68;SE#64 at 10:35-10:50.

Police responded and found Moncada and Lara in the apartment. R865-68. They each matched an eyewitness's description of two of the men who had been involved in the shooting. R868,903-04.

Eyewitnesses further noted that two of the three men were tall, but the third—who was between the two and directly in front of Guzman—was "dramatically shorter." R770,808. Defendant was three inches shorter than Moncada and Lara. R869-70.

Additional evidence identified Defendant as the shooter. Guzman got a good look at his shooter's face and later picked Defendant's photo from a lineup when asked to identify who shot him. R845,880. In fact, when

Guzman saw Defendant's photo he "ripped" it from the detective's hand and exclaimed, "That's him."[1] R880.

Police found a loaded and cocked .22 caliber handgun behind a building near the apartment building. R718-18; State's Exhibits (SE) #35-40. Defendant left his fingerprints on that gun's magazine. R872-73,1045,1071. Police also recovered three of the four shell casings, all of which were fired from that gun. R706-07,755,957.

It took police two and a-half weeks to find and arrest Defendant. R881-82,920-21. A detective interviewed him at the police station. R886-87;SE#64. Defendant admitted that on the night of the shooting he and his girlfriend were with his "homies" Isaiah Moncada and Luis Lara in the apartment near the shooting, and that he had walked through the area where police found the handgun. R891;SE#64 at 10:35-10:50; 27:00-27:50.

But Defendant claimed that he and his girlfriend did not leave the apartment until after the gunshots. SE#64 at 10:50-11:05; 13:00-14:35. When

[1] Guzman's friend identified Luis Lara from a photo lineup. R947-48,1003-06. The friend told police that he "was almost 100% sure" the person he identified was the shooter. R1005-06. But the friend later explained that he had been more focused on the person who was in front of him, and not on the shooter. R933-34,942-43.

the detective told Defendant that his fingerprints were on the gun, Defendant first claimed that he had never seen or touched the gun, but later said that someone had pulled it on him two days before the shooting. SE#64 at 28:00-30:35.

At trial, Defendant's girlfriend admitted that she and Defendant were at the apartment on the night of the shooting. R1091-92. But in contrast to Defendant's claim to police that he had never touched the gun, his girlfriend testified that she saw Defendant and others in the apartment passing the gun around that night. R1091-92,1114. She admitted that she never told this to police even though she knew Defendant had been charged with attempted murder. R1117-18.

Mike Martinez, who rented the apartment where people had gathered the night of the shooting, testified that Defendant, Moncada, and Lara were at his apartment that night, but he did not remember seeing Defendant's girlfriend. R1124-28. Martinez did not see anyone displaying a gun or passing one around that evening, but he was not in the living room with his guests the entire time they were there. R1131,1136. Martinez remembered that he heard gunshots outside after Defendant, Lara, and Moncada left his apartment. R1129-30.

B. Procedural history.

The State charged Defendant with one count each of attempted murder and felony discharge of a firearm with serious bodily injury, both first-degree felonies, and one count of possession of a firearm by a restricted person, a second-degree felony. R1.

Before trial, defense counsel asked the trial court to evaluate Defendant's competency. R34-37. Counsel asserted that after conversing with Defendant during "the past several court hearings," Defendant did "not appear to be able to comprehend what [was] going on" or to "make rational decisions regarding his case." R37.

Both evaluators find Defendant competent

The trial court appointed two evaluators—Drs. Hawks and Wilkinson—who examined Defendant and both found him competent. R41-48,53-65 (copies of the evaluations are included in Addenda B & C). [redacted]

[redacted]

At the competency hearing, defense counsel stipulated that Defendant was competent "based on those two reports." R378.

On the first day of trial, the prosecution dismissed the felony discharge of a firearm count. R597. The parties also agreed to bifurcate the possession of a firearm count. R598,1250-61.

The jury convicted Defendant of attempted murder. R172. Defendant then pled guilty to possessing a firearm as a restricted person. R134-40;R1251-60.

Both counsel and Defendant certify that he is competent to plead guilty

In conjunction with his guilty plea, Defendant signed an affidavit certifying that he believed himself to be "free of any mental disease, defect, or impairment that would prevent [him] from understanding what [he was] doing or from knowingly, intelligently, and voluntarily entering [his] plea." R179. He also certified that he had read the statement, or had it read to him, understood its contents, and adopted each of its statements. R179. Trial

counsel certified that he had discussed the plea affidavit with Defendant and that counsel believed that Defendant "fully understands the meaning of its contents and is mentally and physically competent." R180.

During the plea colloquy, Defendant cogently responded to all the court's questions. R1253-58. He told the court that he understood what was happening and that his attorney had explained everything to him. R1257. After observing and questioning Defendant, the court stated, "[Y]ou seem to me like you're comprehending and understanding what we're doing here." R1257.

The trial court sentenced Defendant to concurrent prison terms of three years to life for attempted murder and one to fifteen years for possessing a firearm as a restricted person. R339-40. The court also ordered the sentences to run concurrently with sentences Defendant was serving in two other cases. R340.

Defendant timely appealed. R341.

SUMMARY OF ARGUMENT

I. Defendant claims that his counsel was ineffective for stipulating to his competency after two evaluations resolved his counsel's concerns about his mental state and found Defendant competent. Defendant cannot carry

his burden to show that his counsel was ineffective because he offers no evidence of prejudice—a reasonable probability that but for counsel's stipulation, there is a reasonable probability the court would have found him incompetent. Both evaluators unequivocally found Defendant to be competent, thus resolving counsel's initial concerns. Defendant also demonstrated his competence during his police interview and plea colloquy. There is no evidence that Defendant was incompetent.

Defendant also cannot demonstrate deficient performance—that his counsel's decision to stipulate was objectively unreasonable. Defendant claims that all he must show to prove deficient performance is that there was no conceivable tactical basis for his counsel to stipulate to Defendant's competency. This Court's case law supports that position. But both this Court and Defendant misunderstand the deficient performance standard. Deficient performance is measured by whether counsel's performance is objectively reasonable, not by whether it is good strategy. Although Utah law may not be clear on this point, United States Supreme Court case law is. It controls.

Defendant cannot show deficient performance because reasonable counsel could decide to stipulate to Defendant's competency where two

evaluations unanimously and unequivocally resolved counsel's initial concerns about Defendant's mental state and Defendant demonstrated his competency during his police interview and plea colloquy.

During his police interview, Defendant demonstrated a rational and factual understand of the criminal proceedings and possible punishments. He also demonstrated the ability to converse about the charges and evidence with a reasonable degree of rational understanding. He articulated and consistently maintained a coherent defense, despite the officer's insistence that the evidence all pointed to him. Both Defendant and his counsel also certified that Defendant was competent when he entered his guilty plea.

Although Defendant challenges both of his convictions in this appeal, his guilty plea waived all non-jurisdictional defects in his firearm-possession conviction. Defendant can therefore challenge only his attempted murder conviction in this appeal.

II. Defendant also claims that his counsel was ineffective for not consulting with one of the evaluators—Dr. Hawks. He claims that if counsel had shared his additional observations about Defendant's mental state with Dr. Hawks, there is a reasonable probability that the trial court would have found Defendant incompetent. Defendant includes his counsel's additional

observations in an affidavit and seeks a rule 23B remand to include these observations in the appellate record. Because this claim depends on extra-record evidence, this Court cannot grant relief absent a rule 23B remand. This Court should not grant a remand for the reasons stated in the accompanying response to Defendant's remand motion.

III. Defendant argues that the cumulative-error doctrine entitles him to relief. But that doctrine is inapplicable for two reasons. First, had Defendant proven a reasonable probability that he was incompetent, he would have been entitled to relief without any additional prejudice showing. Second, Defendant has not shown any error that could accumulate in any event.

ARGUMENT

I.

Counsel was not ineffective for stipulating to Defendant's competency because there is no evidence that Defendant was incompetent; competency evaluations resolved counsel's initial concerns and Defendant further demonstrated his competency during his police interview and plea colloquy.

Defendant argues that his counsel was ineffective for stipulating to Defendant's competency after counsel had requested a competency evaluation based on concerns that Defendant allegedly could not understand the proceedings or make rational decisions. Br.Aplt.11-16. Defendant argues

that counsel should not have stipulated to Defendant's competency because the "psychologists' reports confirmed trial counsel's observations" and "no sound trial strategy … includes sending a cognitively impaired client to stand trial." Br.Aplt.12-13. Defendant argues that he suffered prejudice because "the trial court relied on [the stipulation] instead of conducting its own review" of Defendant's competency. Br.Aplt.14 (bolding omitted).

Defendant cannot carry his heavy burden to show that his counsel was ineffective because he offers no evidence of prejudice—a reasonable probability that he was incompetent. Moreover, Defendant cannot prove that his counsel was deficient because reasonable counsel could decide to stipulate to Defendant's competency given Defendant's demonstrated abilities during his police interview, competency evaluations, and plea colloquy.

A. Defendant cannot show prejudice because he offers no evidence that he was incompetent at all.

To show that his counsel was ineffective, Defendant must prove that (1) his counsel performed deficiently, and (2) he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-89, 694 (1984). To prove that he suffered *Strickland* prejudice, Defendant must prove that there is "a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Thus, to prove prejudice in the context of a competency issue, a defendant must show a reasonable probability that but for his counsel's deficient performance, the defendant "would have been found incompetent." *State v. Biebinger*, 2018 UT App 123, ¶16, 428 P.3d 36; *accord, Taylor v. State*, 2007 UT 12, ¶95, 156 P.3d 739 (rejecting ineffective-assistance claim in part because defendant "has not shown that, had a competency hearing been requested and granted, the court would have found evidence of incompetence").

Defendant cannot prove prejudice because there is no evidence of a reasonable probability that the trial court would have found him to be incompetent absent his counsel's stipulation. Though counsel alleged that Defendant seemed to be unable to understand the proceedings and make rational decisions, two independent psychologists concluded otherwise after complete competency evaluations. R41-48,53-65. Both evaluators unequivocally concluded that Defendant was competent. R55,47. The evaluations conclusively dispelled any concerns about Defendant's competency, whether from his counsel or some other source.

Moreover, both counsel and Defendant later certified that Defendant was competent during the plea colloquy on the bifurcated charge on the last

day of trial. R179-80. And the trial court noted that Defendant appeared competent based on the court's observations throughout trial and his interaction with Defendant in particular during the plea colloquy. R1257.

Defendant therefore points to no evidence that would show that, but for his counsel's stipulation, there is a reasonable probability that the trial court would have found him incompetent. To the contrary, all the evidence shows that he was competent. He therefore has not proven prejudice. *See Biebinger*, 2018 UT App 123, ¶16.

B. Defendant cannot show deficient performance because he misunderstands, and thus fails to satisfy, *Strickland's* deficient performance standard.

Relying on *State v. Jamieson*, 2017 UT App 236, ¶32, 414 P.3d 559, *cert. granted* 421 P.3d 439, Defendant argues that he can show that his counsel performed deficiently merely by demonstrating "'that there was no conceivable tactical basis for counsel's actions.'" Br.Aplt.12 (quoting *Jamieson*, 2017 UT App 236, ¶32). Defendant is incorrect. Although a footnote in *Jamieson* supports Defendant's argument, both Defendant and *Jamieson* misunderstand *Strickland's* deficient performance element.

1. *Strickland's* deficient performance standard requires Defendant to prove that his counsel's performance was objectively unreasonable, not merely that it lacked a conceivable tactical basis.

To show that his counsel performed deficiently, Defendant must show more than that there was no conceivable tactical basis for his counsel's actions. *Strickland* measures deficient performance by whether counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. Thus, the determinative question "is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

An evaluation of possible strategic reasons for counsel's decisions is relevant to a *Strickland* deficient-performance analysis, but it is not dispositive. Possible strategic explanations are relevant because *Strickland* recognizes that "[t]here 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." 466 U.S. at 689. Thus, to ensure counsel the flexibility to defend their clients in the way they believe is most effective, the *Strickland* standard "strongly presume[s]" that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Given this presumption, when conceivable tactical bases support trial counsel's actions, a defendant has not rebutted the strong presumption that his counsel performed reasonably. *See State v. Clark*, 2004 UT 25, ¶7, 89 P.3d 162 (explaining that defendant claiming ineffective assistance must show that "there was *no conceivable tactical basis* for counsel's actions") (cleaned up) (emphasis in original). The *Strickland* presumption of a sound strategy thus can be dispositive, but only of a finding of effective performance, not deficient performance.

The lack of a considered strategic basis for counsel's performance does not automatically render his performance objectively unreasonable. *See Flores-Ortega*, 528 U.S. at 481. Even when a considered strategic reason for counsel's performance seems elusive, a defendant still cannot carry his burden of proving deficient performance unless he can show that his counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Counsel's performance is not deficient merely because a reviewing court cannot conceive of a tactical basis for counsel's performance.

This is because the *Strickland* standard further recognizes that counsel cannot possibly be expected to have a strategic reason for his every act or

omission. The purpose of the Sixth Amendment right to counsel "is not to improve the quality of legal representation.'" *Flores-Ortega*, 528 U.S. at 481 (quoting *Strickland*, 466 U.S. at 689). Rather, it is "'simply to ensure that criminal defendants receive a fair trial.'" *Id*. (quoting *Strickland*, 466 U.S. at 689). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Counsel performs deficiently only when overlooking an issue is "'sufficiently egregious and prejudicial,'" *id*. at 111 (citation omitted), that "no competent attorney" would have missed it, *Premo v. Moore*, 562 U.S. 115, 124 (2011).

The Sixth Amendment therefore recognizes that counsel may "focus[] on some issues to the exclusion of others." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). When that occurs, "there is a strong presumption that [counsel] did so for tactical reasons rather than through sheer neglect." *Id.* "The Sixth Amendment," therefore, "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id.*; *accord Burt v. Titlow*, 571 U.S. 12, 24 (2013); *Strickland*, 466 U.S. at 687.

Thus, to prove deficient performance, a defendant must do more than merely rebut the strong presumption that "under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (cleaned up). A defendant must ultimately prove that his counsel's performance "fell below an objective standard of reasonableness." *Strickland* 466 U.S. at 688; *Flores-Ortega*, 528 U.S. at 481.

The Supreme Court has distilled the rule to this: counsel's representation is objectively reasonable, and therefore constitutionally compliant, unless "no competent attorney" would have proceeded as he did. *Premo*, 562 U.S. at 124.

The State made this argument in *Jamieson* and this Court rejected it in a footnote, asserting that the argument was "not supported by [Utah] case law." 2017 UT App 236, ¶37 n.7. But "the standard of proof for claims of ineffective assistance of counsel … is a matter of federal law, on which [Utah Court's] are bound to follow Supreme Court precedent." *State v. Sessions*, 2014 UT 44, ¶37, 342 P.3d 738). The above-cited case law demonstrates that *Strickland's* deficient-performance prong require a defendant to prove objectively unreasonable performance, not the mere absence of a conceivable tactical basis for counsel's action.

2. Defendant has not shown that counsel's stipulation that Defendant was competent was objectively unreasonable where all evidence demonstrated that Defendant was competent.

Reasonable counsel could decide to stipulate to Defendant's competency because all the evidence showed that Defendant was competent. The competency evaluations resolved counsel's earlier concerns about Defendant's competency and there is no other evidence that Defendant was incompetent.

When Defendant committed his crimes, the Utah Code provided that:

> a person is incompetent to proceed if he is suffering from a mental disorder or mental retardation resulting either in:
>
> (1) his inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or
>
> (2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.

Utah Code Ann. §77-15-2 (2017).

There is no evidence that Defendant met this standard. Rather, all the evidence showed that Defendant was competent: two psychologists found that he was and his statements to both police and to the trial court further demonstrated that he was.

Evaluations. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Police Interview. Defendant also demonstrated his competency during his police interview. During that interview, Defendant was able to coherently describe a defense. He claimed that although he was in the apartment where others involved were later located, Defendant said that he was kissing his girlfriend in the bathroom when he heard gunshots and that he left the apartment only after the gunshots. SE#64 at 10:50-11:05;13:00-14:35. Defendant was able to recall and relate what he did in the hours and minutes both before and after the shooting. SE#64 at 7:08-14:35.

Defendant also demonstrated the ability to understand the significance of the evidence against him. When the Detective said that Defendant's fingerprints were on the gun, Defendant first claimed that he had never seen the gun, but later claimed that someone had pulled that gun on him two days before the shooting. SE#64 at 28:00-29:35. He maintained that he had never touched the gun. SE#64 at 30:20-30:35. Towards the end of the recorded interview, the detective left the room while Defendant called his mother on the detective's phone. SE#64 at 32:00-41:00. Defendant showed that he comprehended the significance of the evidence against him when he told his mother "They have all this s---. All this s---. Even though I—even though it wasn't me you know how many people that they got f----n tellin'." SE#64 at 34:20-34:40.

Defendant was also able to logically explain why the police should not suspect him. He reasoned that if he were guilty, he would have fled rather than stay in Utah where the police could find him. SE#64 at 5:45-6:55;17:30-18:00. He explained that it would be "just dumb" to shoot someone and not flee and asked "Why would I do some stupid s--- like that?" SE#64 at 12:30-12:55. He reminded the officer that he did not flee or hide. SE#64 at 12:46-12:55. Defendant later added that he was "a straight-up person" who would

confess if he were guilty. SE#64 at 17:30-18:00. He then explained what he would have done if he were guilty. He told the detective, "I wouldn't even be here right now, I wouldn't even be in Utah…. That is stupid to stay out here if I did do some stuff like this." SE#64 at 17:30-18:00.

Defendant was also able to offer a reasoned explanation for his inability to recall the names of anyone else in the apartment besides Isaiah Moncada and Luis Lara. The detective insisted that Defendant must have at least known the others' names because he would have introduced himself to people he did not know. SE#64 at 15:00-17:20. Defendant maintained that he did not know any of the others' names and explained he was not the kind of person who introduced himself to others or who wanted to make friends. SE#64 at 16:45-17:20.

Defendant consistently maintained his innocence, despite the detective's persistence, including telling Defendant that the victim had identified him and that his fingerprints were on the gun. SE#64 at 5:45-31:15.

Plea Colloquy. Finally, Defendant also demonstrated his competency when he pled guilty to the bifurcated possession of a firearm charge. R134-40;R1251-60. As part of that plea, Defendant certified in a plea affidavit that he believed himself "to be of sound and discerning mind" and "mentally

capable of understanding these proceedings and the consequences of [his] plea." R179. He further certified that he was "free of any mental disease, defect, or impairment that would prevent [him] from understanding what [he was] doing or from knowingly, intelligently, and voluntarily entering [his] plea." R179. His counsel also certified that he had discussed the plea affidavit with Defendant and that counsel believed Defendant "fully understands the meaning of its contents and is mentally and physically competent." R180. Utah courts have relied on a defendant's and his counsel's representations during a plea colloquy, and the defendant's demonstrated abilities during the colloquy, as evidence of competency. *See Helbach v. State*, 2009 UT App 375U, ¶4; *Ellis v. State*, 2014 UT 50, ¶4, 321 P.3d 1174; *York v. Shulsen*, 875 P.2d 590 (Utah App. 1994).

Defendant's two competency evaluations, his police interview, and his plea colloquy all demonstrated that he had a rational and factual understand of both the criminal proceedings against him and the specified punishments for his crimes. *See* Utah Code. Ann. §77-15-5(2). This evidence also demonstrated that Defendant had the ability to consult with his counsel with a reasonable degree of rational understanding. *See id.* In short, it conclusively demonstrated Defendant's competence.

Given this evidence, reasonable counsel could decide to stipulate to Defendant's competency. Reliance on mental-health "experts' unanimous conclusion" that a defendant is competent is "a reasonable exercise of professional judgment." *Jacobs v. State*, 2001 UT 17, ¶23, 20 P.3d 382. Here, not only did the psychologists unanimously agree that Defendant was competent, Defendant demonstrated his competence during his police interview and plea colloquy. Counsel's stipulation therefore did not constitute deficient performance. *See id.*

3. The evaluations dispelled trial counsel's initial concerns about Defendant's competency.

Defendant argues that the competency evaluations "confirmed" trial counsel's initial concerns about Defendant's competency: that Defendant did "'not appear to be able to comprehend what is going on[, o]r make rational decisions regarding this case.'" Br.Aplt.12 (quoting R37). Defendant relies on two aspects of the evaluations to support this assertion. He first states that [redacted] Br.Aplt.12-13. Defendant also relies on an isolated sentence from the summary portion of Dr. Wilkinson's evaluation which states that [redacted]

[redacted]

Br.Aplt.12-13 (quoting R41) (emphasis added).

[redacted]

[redacted] *See United States v. Bell*, 280 Fed. Appx. 548, 550 (7th Cir. 2008). "[A] low IQ score alone is not enough to show that a defendant is incompetent." *Id.* Indeed, as noted, even though Dr. Hawks concluded that [redacted]

Second, the "not" in Dr. Wilkinson's summary statement is most reasonably read to be a typographical error. R41. [redacted]

[redacted]

[redacted]

In short, the evaluations resolved any concerns about Defendant's competency and his police interview and plea colloquy further supported the evaluators' conclusions that he was competent. No evidence in the record shows otherwise. Counsel therefore reasonably decided to stipulate to Defendant's competency.

C. Defendant's guilty plea waived any challenge to his conviction for possessing a firearm as a restricted person.

Defendant purports to challenge in this appeal his convictions for both attempted murder and possession of a firearm by a restricted person. Br.Aplt.2,26. He does not differentiate between his convictions anywhere in his brief. Br.Aplt.1-26.

But Defendant cannot now challenge his firearm-possession conviction because he pled guilty to that charge. R134-40;R1251-60. "'The general rule applicable in criminal proceedings, and the cases are legion, is that by pleading guilty, the defendant is deemed to have admitted all of the essential elements of the crime charged and thereby waives all nonjurisdictional defects, including alleged pre-plea constitutional violations.'" *State v. Rhinehart*, 2007 UT 61, ¶15, 167 P.3d 1046 (quoting *State v. Parsons*, 781 P.2d 1275, 1278 (Utah 1989)).

Defendant's guilty plea both explicitly and implicitly waived any challenge to his firearm-possession conviction. The plea explicitly waived any challenge to this conviction based on alleged incompetency when, as mentioned, both Defendant and his counsel certified during the plea colloquy that Defendant was competent to plead guilty. R179,180. And even without these certifications, the guilty plea implicitly waived all nonjurisdictional defects in this conviction. *See Rhinehart*, 2007 UT 61, ¶15. Defendant therefore can challenge only his attempted-murder conviction.

II.

Defendant cannot show that his counsel was ineffective for not consulting with one of the evaluators because this claim depends on extra-record evidence.

Defendant argues that his counsel was ineffective because counsel did not consult with one of the evaluators, Dr. Hawks, before he completed his evaluation. Br.Aplt.16. Defendant asserts that his counsel had additional concerns and observations about Defendant's competency but failed to share them with Dr. Hawks. Br.Aplt.17-20. Defendant argues that his counsel performed deficiently because there was "no conceivable tactical basis" not to discuss counsel's concerns with Dr. Hawks. Br.Aplt.17. Defendant contends that he suffered prejudice because he reasons that his counsel's observations, coupled with Defendant's mentally retardation, "would have led the court to conclude that [Defendant] was incompetent." Br.Aplt.20.

Defendant cannot prove that his counsel was ineffective in this regard because trial counsel's alleged additional concerns and observations about Defendant's competency are not part of the record. Rather, they are listed in a short affidavit that Defendant references and attaches to his brief. Br.Aplt.18-20,Addendum D. Defendant seeks a rule 23B remand to include counsel's additional observations in the record. Br.Aplt.18.

Absent a rule 23B remand, Defendant cannot prove that his counsel was ineffective. To prove an ineffectiveness claim, Defendant must "point[] to specific instances in the record demonstrating both counsel's deficient performance and the prejudice it caused [him]." *State v. Griffin*, 2015 UT 18, ¶16, __ P.3d __. Because this claim depends on extra-record evidence, this Court cannot hold that Defendant's counsel was ineffective absent a remand.[2] *See id.*

III.

The cumulative error doctrine is inapplicable because a single prejudicial error would entitle Defendant to relief and, in any event, Defendant has shown no error.

Defendant argues that if the errors he has alleged are not sufficiently prejudicial on their own, they are sufficiently prejudicial together. Br.Aplt.22-26. The cumulative-error doctrine applies only when "the

[2] This Court should strike counsel's affidavit, contained in Defendant's Addendum D, and all references to it in Defendant's brief. This Court will "'consider [evidence] supporting Rule 23B motions solely to determine the propriety of remanding ineffective assistance of counsel claims for evidentiary hearings.'" *Id.* (quoting *State v. Bredehoft*, 966 P.2d 285, 290 (Utah App.1998)). A party cannot supplement the appellate record "by simply including the omitted material in the party's addendum." *State v. Pliego*, 1999 UT 8, ¶ 7, 974 P.2d 279. Defendant's Addendum D and all references thereto in his brief, are therefore improperly included in his brief.

cumulative effect of the several errors undermines [this Court's confidence] ... that a fair trial was had." *State v. Martinez-Castellanos*, 2018 UT 46, ¶39, 872 Utah Adv. Rep. 51 (quotation and citation omitted). Only errors that are "substantial" enough to have some "conceivable potential for harm" can accumulate into reversible error. *Id.* ¶¶40-42.

The cumulative error doctrine is inapplicable here for two reasons. First, proof of prejudice on either of Defendant's claims would entitle him to relief. As explained, to prove prejudice, Defendant must prove that there is a reasonable probability that but for counsel's allegedly deficient performance, there is a reasonable probability that he would have been found incompetent. *See State v. Biebinger*, 2018 UT App 123, ¶16, 428 P.3d 36. That showing alone—had Defendant made it—would justify relief.

But even if that showing were somehow insufficient on a single claim, Defendant has shown not shown any error at all. The cumulative-error doctrine is therefore inapplicable because there are no errors to accumulate. *See Martinez-Castellanos*, 2018 UT 46, ¶39.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted on December 5, 2018.

SEAN D. REYES
Utah Attorney General

/s/ Christopher D. Ballard
CHRISTOPHER D. BALLARD
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 7, 199 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Christopher D. Ballard
CHRISTOPHER D. BALLARD
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on December 5, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melanie Kendrick

Addenda

Addendum A

Utah Code Ann. § 77-15-2 (2017). "Incompetent to proceed" defined

For the purposes of this chapter, a person is incompetent to proceed if he is suffering from a mental disorder or mental retardation resulting either in:

(1) his inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or

(2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.

Credits
Laws 1980, c. 15, § 2; Laws 1993, c. 142, § 1; Laws 1994, c. 162, § 1.

Addendum B
REDACTED

Addendum C
REDACTED

Addendum D

SECOND DISTRICT COURT APPROVED PLEA AGREEMENT

DEFENSE COUNSEL'S NAME: Randall Richards

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. Patrick Bobby Galindo, Sr. Defendant.	STATEMENT OF DEFENDANT IN SUPPORT OF GUILTY PLEA AND CERTIFICATE OF COUNSEL Case No. 161901398 Judge Jones

I, Patrick Galindo Sr, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

NOTIFICATION OF CHARGES

I am pleading guilty (or no contest) to the following crime(s):

	CRIME & STATUTORY PROVISION	DEGREE	PUNISHMENT MIN/MAX AND/OR
A.	Poss of dangerous weapon by restricted person	2°	1-15 years prison
B.	§ 76-10-503(2)(A)		$10,000
C.			
D.			

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of the crime(s) to which I am pleading guilty (or no contest).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:

On or about June 16 2016 the defendant intentionally possessed - dangerous weapon, a gun - in a vehicle of theft for a category I restricted person this occurred in Weber County

Plbgd

I understand that by pleading guilty I will be admitting that I committed the crime(s) listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crime(s)). I stipulate and agree (or, if I am pleading no contest, I do not dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the Court to accept my guilty (or no contest) plea(s) and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

On June 16, 2016 the defendant was a restricted person held a gun in Weber County

WAIVER OF CONSTITUTIONAL RIGHTS

I am entering this/these plea(s) voluntarily. I understand that I have the following rights under the constitutions of Utah and the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

COUNSEL: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the Court at no cost to me. I understand that I might later, if the Judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reason:

If I have waived my right to counsel, I certify that I have read this statement and that I understand the nature and elements of the charge(s) and crime(s) to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

If I have **not** waived my right to counsel, my attorney is _____. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

JURY TRIAL: I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES: I know that if I were to have a jury trial, (a) I would have the right to see and observe the witnesses who testified against me and (b) by attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

RIGHT TO COMPEL WITNESSES: I know that if I were to have a jury trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of the witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

RIGHT TO TESTIFY AND PRIVILEGE AGAINST SELF-INCRIMINATION: I know that if I were to have a jury trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I choose not to testify, the jury would be told that they could not hold my refusal to testify against me.

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF: I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty" and my case will be set for trial. At a trial, the State would have the burden of proving each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

APPEAL: I know that under the Utah Constitution, if I were convicted by jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest).

I know and understand that by pleading guilty (or no contest), I am waiving and giving up all the statutory and constitutional rights as explained above.

CONSEQUENCES OF ENTERING A GUILTY (OR NO CONTEST) PLEA

POTENTIAL PENALTIES: I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an eighty-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crime(s), including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

CONSECUTIVE/CONCURRENT PRISON TERMS: I know that if there is more than one crime involved, the sentence may be imposed one after the other (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or to which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed upon me. If the offense to which I am now pleading guilty (or no contest) occurred when I was imprisoned or on parole, I know the law requires the Court to impose consecutive sentences unless the Court finds and states on the record that consecutive sentences would be inappropriate.

PLEA AGREEMENT: My guilty (or no contest) plea(s) (is/are not) the result of a plea bargain between myself and the prosecuting attorney. All the promises, duties, and provisions of the plea bargain, if any, are fully contained in this statement, including those explained below:

the state will agree this charge shall run concurrent to his 2H. murder conviction

TRIAL JUDGE NOT BOUND: I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecution attorney are not binding on the Judge. I also know that any opinions they express to me as to what they believe the Judge may do are not binding on the Judge.

IMMIGRATION/DEPORTATION: I understand that if I am not a United States citizen, my plea(s) today may, or even will, subject me to deportation under the United States immigration

laws and regulations, or otherwise adversely affect my immigration status, which may include permanently barring my re-entry into the United States. I understand that if I have questions about the effect of my plea on my immigration status, I should consult with an immigration attorney.

DEFENDANT'S CERTIFICATION OF VOLUNTARINESS

I am entering this plea of my own free will and choice. No force, threats, or unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.

I am 20 years of age. I have attended school through the 8th Grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty (or no contest). I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I understand that for a plea to be held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty or no contest. I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. Once I am sentenced, I lose my right to withdraw my plea. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78B, Chapter 9 and Rule 65C of the Utah Rules of Civil Procedure.

DATED this 15 day of Sept, 2017.

Galindodr
DEFENDANT

CERTIFICATE OF DEFENSE ATTORNEY

I certify that I am the attorney for Patrick Galindo, the defendant above, and that I know he/she has read the statement or that I have read it to him/her. I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

ATTORNEY FOR DEFENDANT
BAR NO. 403

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in the case against Patrick Galindo, defendant. I have reviewed this statement of defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of the defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest. #4407

13038

PROSECUTING ATTORNEY
BAR NO. _____

ORDER

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and based on any oral representations in this Court, the Court witnesses the signatures and finds that defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

It is hereby ordered that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

DATED this 15 day of Sept, 2017.