

2005

Utah v. Wareham : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Autumn Fitzgerald; Attorney for Defendant/Appellant.

Christopher D. Ballard; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Craig C. Halls; San Juan County Attorney; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Utah v. Wareham*, No. 20050412 (Utah Court of Appeals, 2005).
https://digitalcommons.law.byu.edu/byu_ca2/5787

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/ Appellee,

v.

GREGORY SHANE WAREHAM,

Defendant/ Appellant.

Case No. 20050412-CA

BRIEF OF APPELLEE

Appeal from convictions of one count each of aggravated kidnapping, a first degree felony, driving under the influence of alcohol, a third degree felony, criminal mischief and assault, both class B misdemeanors, and intoxication and open container in a vehicle, both class C misdemeanors, in the Seventh Judicial District Court, San Juan County, the Honorable Lyle R. Anderson presiding

CHRISTOPHER D. BALLARD (8497)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
(801) 366-0180

AUTUMN FITZGERALD
55 East 100 South
Moab, UT 84532

Counsel for Appellant

CRAIG C. HALLS
San Juan County Attorney

Counsel for Appellee

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/ Appellee,

v.

GREGORY SHANE WAREHAM,

Defendant/ Appellant.

Case No. 20050412-CA

BRIEF OF APPELLEE

Appeal from convictions of one count each of aggravated kidnapping, a first degree felony, driving under the influence of alcohol, a third degree felony, criminal mischief and assault, both class B misdemeanors, and intoxication and open container in a vehicle, both class C misdemeanors, in the Seventh Judicial District Court, San Juan County, the Honorable Lyle R. Anderson presiding

CHRISTOPHER D. BALLARD (8497)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
(801) 366-0180

AUTUMN FITZGERALD
55 East 100 South
Moab, UT 84532

Counsel for Appellant

CRAIG C. HALLS
San Juan County Attorney

Counsel for Appellee

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
JURISDICTION AND NATURE OF THE PROCEEDINGS	1
ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	4
STATEMENT OF THE CASE.....	4
STATEMENT OF THE FACTS.....	5
SUMMARY OF ARGUMENT	15
ARGUMENT	16
I. DEFENDANT INVITED ANY ERROR IN THE REASONABLE DOUBT JURY INSTRUCTION; IN ANY EVENT, THE INSTRUCTION DID NOT VIOLATE DEFENDANT’S DUE PROCESS RIGHTS	16
A. Defendant invited any error by asking the trial court to include the term “obviate” in the instruction.....	17
B. Defendant’s <i>Reyes</i> challenge fails because the prosecutor did not argue that the State needed to refute only “doubts that are sufficiently defined.”	19
II. THE TRIAL COURT CORRECTLY REFUSED TO DISQUALIFY DEFENDANT’S COUNSEL	22
A. The trial court sufficiently inquired into Mr. Bengé’s prior prosecution.....	26
B. In any event, any deficiency in the court’s inquiry was harmless because defendant has not demonstrated that a conflict of interest required substitution of counsel.....	29
C. Any conflict affected only the DUI conviction.....	33

III. THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION IN DENYING DEFENDANT’S MOTION FOR CONTINUANCE TO LOCATE A THIRD CHARACTER WITNESS	34
IV. DEFENDANT’S MERGER CLAIM IS UNPRESERVED; IN ANY EVENT IT FAILS ON ITS MERITS.....	38
A. The claim is unpreserved.....	38
B. In any event, the claim fails on its merits because materially different acts established the two crimes.	40
V. THE PRESIDING JUDGE CORRECTLY DENIED DEFENDANT’S MOTION TO RECUSE JUDGE ANDERSON	41
CONCLUSION	45

ADDENDA

Addendum A – UTAH CODE ANN. § 76-5-102 (West 2004)
 UTAH CODE ANN. § 76-5-302 (West 2004)
 Utah R. Crim. P. 29
 Utah R. Civ. P. 10

Addendum B – Reasonable Doubt Jury Instruction (R.133)

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Hernandez v. Johnson</i> , 108 F.3d 554 (5th Cir. 1997)	33
<i>Nix v. Whiteside</i> , 475 U.S. 157 (1986).....	30
<i>United States v. Gallegos</i> , 39 F.3d 276 (10th Cir. 1994)	30
<i>United States v. Smith</i> , 653 F.2d 126 (4th Cir. 1981), <i>abrogated on other grounds</i> by <i>Flanagan v. United States</i> , 465 U.S. 259, 263 n.2 (1984).....	27, 28
<i>United States v. Ziegenhagen</i> , 890 F.2d 937 (7th Cir. 1989)	31, 32

STATE CASES

<i>Commonwealth v. Battle</i> , 879 A.2d 266 (Pa. Super. Ct. 2005)	43
<i>Mueller v. Allen</i> , 2005 UT App. 477, 538 Utah Adv. Rep. 10.....	2
<i>People v. Rodriguez</i> , 741 N.E.2d 882 (N.Y. 2000).....	44
<i>People v. Serio</i> , 830 N.E.2d 749 (Ill. App. Ct. 2005)	43
<i>State v. Alonzo</i> , 973 P.2d 975 (Utah 1998).....	3, 43, 45
<i>State v. Cruz</i> , 2005 UT 45, 122 P.3d 543.....	21, 22
<i>State v. Dean</i> , 2004 UT 63, 95 P.3d 276	39
<i>State v. Geukgeuzian</i> , 2004 UT 16, 86 P.3d 742.....	18
<i>State v. Horton</i> , 848 P.2d 708 (Utah Ct. App. 1993)	34
<i>State v. Larsen</i> , 828 P.2d 487 (Utah Ct. App. 1992)	29, 30
<i>State v. Lovell</i> , 1999 UT 40, 984 P.2d 382	30, 31, 32
<i>State v. Perdue</i> , 813 P.2d 1201 (Utah 1991).....	18
<i>State v. Pinder</i> , 2005 UT 15, 114 P.3d 551	39
<i>State v. Pursifell</i> , 746 P.2d 270 (Utah Ct. App. 1987)	26, 27

<i>State v. Reyes</i> , 2005 UT 33, 116 P.3d 305.....	16, 17, 19, 20, 21
<i>State v. Robertson</i> , 932 P.2d 1219 (Utah 1997), <i>overruled in relevant part by</i> <i>State v. Reyes</i> , 2005 UT 33, ¶30, 116 P.3d 305	16
<i>State v. Smith</i> , 2003 UT App 179, 72 P.3d 692	40, 41
<i>State v. Smith</i> , 2005 UT 57, 122 P.3d 615	3
<i>State v. Taylor</i> , 2005 UT 40, 116 P.3d 360	3, 35, 38
<i>State v. Valencia</i> , 2001 UT App 159, 27 P.3d 573	2, 29, 33
<i>State v. Winfield</i> , 2006 UT 4	38, 39

STATE STATUTES & RULES

UTAH CODE ANN. § 41-6-44 (West 2004)	1
UTAH CODE ANN. § 41-6-44.20(2) (West 2004)	1
UTAH CODE ANN. § 41-6a-503 (West 2004 & Supp. 2005).....	27, 28, 33
UTAH CODE ANN. § 76-5-102 (West 2004)	1, 4, 41
UTAH CODE ANN. § 76-5-302 (West 2004)	1, 4, 18, 41
UTAH CODE ANN. §§ 76-6-106(2)(c) (West 2004)	1
UTAH CODE ANN. §§ 76-9-701(1) (West 2004)	1
UTAH CODE ANN. § 78-2a-3(j) (West 2004).....	1
Utah R. Crim P. 29	41, 42
Utah R. Civ. P. 10	44

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/ Appellee,

v.

GREGORY SHANE WAREHAM,

Defendant/ Appellant.

Case No. 20050412-CA

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from convictions of one count each of aggravated kidnapping, a first degree felony, in violation of UTAH CODE ANN. § 76-5-302 (West 2004); driving under the influence of alcohol, a third degree felony, in violation of UTAH CODE ANN. § 41-6-44 (West 2004); criminal mischief and assault, both class B misdemeanors, in violation of UTAH CODE ANN. §§ 76-6-106(2)(c) & 76-5-102 (West 2004); and intoxication and open container in a vehicle, both class C misdemeanors, in violation of UTAH CODE ANN. §§ 76-9-701(1) & 41-6-44.20(2) (West 2004). The Utah Supreme Court poured the case over to this Court. This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(j) (West 2004).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

1a. Did defendant invite any error in the jury instruction defining reasonable doubt by asking the trial court to instruct the jury that the State's proof must "obviate all reasonable doubt?"

Standard of Review. No standard of review applies to this issue.

1b. Did instructing the jury that "[t]he state must eliminate (or obviate) all reasonable doubt" violate defendant's due process rights?

Standard of Review. "'Whether a jury instruction correctly states the law presents a question of law . . . review[ed] for correctness.'" *Mueller v. Allen*, 2005 UT App. 477, ¶17, 538 Utah Adv. Rep. 10, (quoting *State v. Houskeeper*, 2002 UT 118, ¶11, 62 P.3d 444).

2. Did the trial court err in failing to appoint substitute counsel based on defendant's claim that Mr. Bengé had a conflict of interest because he had previously prosecuted defendant?

Standard of Review. "[W]hether the Sixth Amendment required the trial court to appoint substitute counsel" is a question of law "review[ed] for correctness." *State v. Valencia*, 2001 UT App 159, ¶9, 27 P.3d 573 (citing *State v. Maguire*, 1999 UT App 45, ¶5, 975 P.2d 476).

3. Did the trial court erroneously deny defendant's motion for a continuance to locate one of his three character witnesses?

Standard of Review. “A trial court’s decision to grant a continuance is a matter of discretion, . . . review[ed] . . . for abuse of that discretion. *State v. Taylor*, 2005 UT 40, ¶8, 116 P.3d 360 (citing *Seel v. Van Der Veur*, 971 P.2d 924, 926 (Utah 1998)).

4. Did defendant’s conviction for assault merge into his conviction for aggravated kidnapping when the two convictions were based on materially different acts?

Standard of Review. The Court should not review this claim because it is unpreserved and defendant argues no exception to the preservation rule. Had defendant preserved the claim, the issue would be reviewed for correctness. *See State v. Smith*, 2005 UT 57, ¶6, 122 P.3d 615 (“whether one crime is a lesser included offense, which merges with a greater included offense, is a legal question of statutory interpretation reviewed for correctness”) (citing *State v. Bluff*, 2002 UT 66, ¶37, 52 P.3d 1210).

5. Did the presiding judge correctly deny defendant’s motion to recuse Judge Anderson?

Standard of Review. A reviewing judge’s ruling on a motion to recuse, referred to him under Rule 29, Utah Rules of Criminal Procedure, is reviewed for abuse of discretion. *See State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998) (citing *State v. Neeley*, 748 P.2d 1091, 1094-95 (Utah 1988)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Resolution of this case requires interpretation of the following statutes and rules, the full text of which is included in Addendum A:

UTAH CODE ANN. § 76-5-102 (West 2004) (Assault)
UTAH CODE ANN. § 76-5-302 (West 2004) (Aggravated kidnapping)
Utah R. Crim. P. 29 (Disqualification of a judge)
Utah R. Civ. P. 10 (Form of pleadings and other papers).

STATEMENT OF THE CASE

On 16 April 2004 the State charged defendant with the following counts:

- 1) aggravated kidnapping, a first degree felony;
- 2) aggravated burglary, a first degree felony;
- 3) commission of domestic violence in the presence of a child, a third degree felony;
- 4) driving under the influence of alcohol with priors, a third degree felony;
- 5) criminal mischief, a third degree felony;
- 6) assault, a class A misdemeanor;
- 7) possession of drug paraphernalia, a class B misdemeanor;
- 8) driving on a suspended licence, a class C misdemeanor;
- 9) intoxication, a class C misdemeanor; and
- 10) open container in a vehicle, a class C misdemeanor.

R.2-6. Following a preliminary hearing, counts 3, 5, and 6 were amended to class B misdemeanors. R.153. At trial, the State dismissed counts 7 and 8. R.178: 25-26; 179:99-102.

A jury convicted defendant on counts 1, 4-6, and 9-10; and acquitted on counts 2 and 3. R.145-46. Defendant then waived his right to have a jury decide whether he had two prior DUI convictions within ten years. R.179:139-40. The trial court so found, and enhanced defendant's DUI conviction to a third degree felony. R.179:139-40.

During trial, defendant was thrice found in contempt of court. R.178:237-40, 179:68, 70. The trial court sentenced defendant to serve thirty days in jail for the first instance of contempt. R.178:239-40. The court did not impose any additional penalty for defendant's other instances of contempt, and suspended all but one day of the original thirty-day contempt sentence. R.179:161-62.

The trial court sentenced defendant to serve concurrent prison sentences of ten years to life on count 1, zero to five years on count 4, six months each on counts 5 and 6, and ninety days each on counts 7 and 8. R.154-55. Defendant timely appeals. R.157, 165.

STATEMENT OF THE FACTS

On 24 March 2004, defendant, in a drunken rage, ransacked Jennifer Malaska's trailer home in La Sal, leaving a wake of broken lamps, picture frames, and furniture. R.178:87-89, 92-99. Defendant left, but returned a short while later and threw a log with a partially-embedded maul through the front-room window of the trailer, while Jennifer and her daughter sat inside. R.178:103-05,

119. Defendant then entered the trailer, dragged Jennifer through the shards of glass, and drove off with her in his truck. R.178:111-13. As they drove, defendant told Jennifer that her “trip was almost over” and that her “daughter didn’t need a mother any more.” R.178:113, 115, 116.

“Drunker and drunker”

Defendant and Jennifer lived together from 1999 to November, 2003, but they continued to see each other after defendant moved out. R.178:86-88. On 24 March 2004, defendant and Jennifer traveled from Jennifer’s home in La Sal to Monticello, where defendant applied for a job. R.178:87-89. They bought a pint of Jagermeister and some bottles of Mickey’s Bigmouth at the liquor store before driving back to La Sal.¹ R.178:90, 91, 124-25. Jennifer and Defendant each took turns driving back to La Sal; both had a couple of shots of Jagermeister during the trip. R.178:90, 91, 125, 142. The two planned to go “hiking in the hills” and stopped by a golf course in Monticello to see if a mutual friend, Todd McKey, wanted to join them. R.178:90, 125-26. However, the two “wound up just goin’ home.” R.178:90. After they arrived home, defendant made himself a drink

¹ Jagermeister is a 70-proof (35% alcohol) liqueur flavored with 56 herbs. See <http://en.wikipedia.org/wiki/Jagermeister>, visited 3 January 2006. “Mickey’s Bigmouth” is apparently a beer with a with a greater alcohol content than beers sold outside of state liquor stores. R.179:29.

with “100 proof vodka” and went to a friend’s house for “about an hour, taking the vodka with him.”² R.178:94, 138.

Jennifer believed that defendant was getting “drunker and drunker” as the day progressed. R.178:92. When he returned from the friend’s house, defendant was violent, irrational, and upset with Jennifer for no apparent reason. R.178:92, 95, 96. Although he could walk, defendant was “wobbly” and his speech was slurred. R.178:96. Defendant started yelling at Jennifer “that [she] was trash, like [her] neighbors.” R.178:96. Jennifer was bewildered by defendant’s actions because, up to that point, “[they] had had a nice day together.” R.178:96, 100.

Defendant started “throwing lamps around,” screaming, and acting like he was going to hurt Jennifer.” R.178:97. He told Jennifer that she “was nothin’.” R.178:97. He was tearing pictures off the walls, breaking lamps and furniture, and “just ransacking the house.” R.178:97. Jennifer felt threatened because, based on her experience with defendant, “once he’s through breaking my things, if it doesn’t [a]ffect me and get me in a fight mode with him, then I’m next.” R.178:98.

² “Proof” is the alcohol content of distilled liquors. It is the percentage of alcohol multiplied by two. Therefore, 100 proof vodka would contain 50% alcohol. See <http://www.nlm.nih.gov/medlineplus/ency/article/002446.htm>, visited 3 January 2006.

Defendant and Jennifer had fought before, sometimes with Jennifer on the offensive.³ R.178:100, 101. However, this time was different because Jennifer “wasn’t on the offense.” R.178:100. Jennifer explained that she “was on the defense,” because defendant’s violence “caught [her] . . . way off guard.” R.178:100.

After he “[b]roke everything up,” defendant left for about thirty minutes. R.178:102, 104. While defendant was gone, Jennifer went outside to talk to her neighbor because she wondered if her neighbor had said something to upset defendant. R.178:102. Jennifer then got her daughter, went back in her trailer, and locked the door. R.178:88, 102.

Defendant returned. R.178:103. Jennifer and her daughter were sitting in the trailer’s living room. R.178: 119. A log with a partially-embedded maul sat on Jennifer’s porch. R.178:104-05. Defendant picked up the log and maul and threw them through Jennifer’s front window. R.178:104-05. Because she did not have a telephone, Jennifer tried to stall defendant so her daughter could get out of the trailer and call the police. R.178:107. Jennifer asked defendant not to break out all her windows and offered to open the front door. R.178:106-07. While her daughter went out a window, Jennifer opened the door. R.178:107.

³ Jennifer described one incident when she walked into a bar and saw defendant with “his hand up some girl’s skirt.” R.178:136. Jennifer tapped defendant on the shoulder and punched him. R.178:136. Defendant said that the blow caused him to “s[ee] stars.” R.178:136.

"It wasn't gonna get better, unless I obeyed."

Defendant entered and started punching and kicking Jennifer. R.178:107. He threw her down, grabbed her hair, and punched her in the face so hard that her teeth went through her lip. R.178:107-08, 109, 164. Defendant punched Jennifer "at least five or six" times while she begged him to stop. R.178:108-09. He also kicked Jennifer "at least three times." R.178:109. Throughout the beating defendant was telling Jennifer to get in the truck. R.178:110.

Jennifer had no desire to leave with defendant and feared for her safety because she believed defendant would continue to beat her. R.178:110. However, she explained that she also believed "[i]t wasn't gonna get better, unless I obeyed." R.178:110.

Defendant grabbed Jennifer by her hair and arm and dragged her through the broken glass out to the porch. R.178:111, 115. Jennifer then got up and went to defendant's truck. R.178:111. Jennifer begged and pleaded with defendant to go away and leave her alone. R.178:115. She did not try to run away because she knew that defendant could outrun her.⁴ R.178:130.

With Jennifer in the passenger seat, defendant drove one or two miles up a hill near Jennifer's trailer and turned around. R.178:113, 119. Jennifer believed that defendant was going to kill her because he told her that her "trip was almost

⁴ At 250 pounds, Jennifer was physically larger than defendant. R.178: 149-50; 179:125.

over” and that he was going to go to Mexico “because if you kill somebody in the United States and you go to Mexico, they won’t bring you back.” R.178:113, 116. He also remarked that her “daughter didn’t need a mother any more.” R.178:113, 115.

From her location on the hill, Jennifer could see the police gathering on the road near her trailer. R.178:113-14. The police eventually noticed some lights from defendant’s truck and started up the hill. R.178:114-15. Defendant jumped out of the truck and told Jennifer, “Come on.” R.178:115. Hoping to delay defendant, Jennifer pretended that her door would not open. R.178:116. Once she believed that the police were close enough, Jennifer jumped out of the truck and “ran straight to the police cars.” R.178:116.

“She was shaking so bad she couldn’t hardly . . . walk.”

When Officer Harris arrived at Jennifer’s residence, Jennifer’s daughter told him that she was afraid for her mother because defendant had taken her. R.178:157. When he entered Jennifer’s trailer, Officer Harris observed “furniture scattered everywhere . . . lamps were broken . . . blood spots on the floor . . . [and] broken glass.” R.178:158. Officer Harris and other emergency personnel were formulating a plan to search for defendant’s truck when someone observed lights on the nearby hill. R.178:160. Officer Harris and Trooper Taylor drove up the hill and found defendant’s truck. R.178:160-61. As the officers approached,

Jennifer “came running out from around the passenger side of the truck, headed towards [Officer Harris’s] vehicle.” R.178:161. Jennifer was “screamin’ and yellin’” and appeared “terrified.” R.178:161. Officer Harris explained that “she was shaking so bad she couldn’t hardly run, couldn’t hardly walk.” R.178:161. Jennifer “was covered . . . in garbage [and] debris” and there was blood on her legs. R.178:161.

Defendant was also bleeding. R.178:174. Defendant’s balance was “very poor,” he smelled strongly of alcohol, his eyes were red and bloodshot, and his speech was slurred. R.178:165-66.

Defendant’s Version

Defendant testified that on 24 March 2004, he and Jennifer drove to Monticello in Jennifer’s car to inquire about a job for him. R.178:192. After learning that he had a job, defendant and Jennifer decided to celebrate by purchasing a bottle of Jagermeister and a six-pack of Mickey’s Bigmouth. R.178:193. Defendant also had some beer in the car and some vodka in his truck in La Sal. R.178:193. He and Jennifer planned to go camping that evening. R.178:199.

Defendant claimed that when he and Jennifer left Monticello, he had only consumed “two large mixed drinks,” but Jennifer had consumed two large mixed drinks, two of the Mickey’s Bigmouths, and “almost half a bottle of Jager.”

R.178:195-96. He claimed that Jennifer continued to drink on the trip back to La Sal. R.178:199.

Defendant claimed that when he and Jennifer got home, he took Jennifer's daughter to a neighbor's residence to see if the neighbor would baby sit. R.178:200. Defendant admitted that he "might have had a beer" with the neighbor. R.178:201. Defendant left Jennifer's daughter with the neighbor, returned to Jennifer's place, and started to assemble supplies for the camping trip. R.178:201. He knew that it was around 5:30 pm because "The Simpsons" was on television and he sat down to watch the program. R.178:201. Jennifer had gone to visit another neighbor. R.178:201.

"She knows Judo and she's dangerous"

Defendant then claimed that Jennifer returned, hit him "with a big porcelain lamp" as he lay on the couch, and accused him of stealing her "Jager." R.178:202. Although he was allegedly hit on the head, defendant claimed that the lamp cut his finger so badly he required several stitches.⁵ R.178:202. Defendant explained that when Jennifer tried to hit him with the rest of the broken lamp, he grabbed her arms and they both fell down. R.178:204. At this point, defendant explained that "there was actual fighting goin' on" with Jennifer hitting defendant and defendant hitting her with the back of his hand.

⁵ Officer Harris testified that he took defendant to the hospital to have his injuries treated and that defendant received stitches. R.178:177-78.

R.178:208. Defendant explained that Jennifer was “[his] equal or better in a fist fight.” R.178:208. According to defendant, Jennifer “knows Judo and she’s dangerous.” R.178:208. Defendant testified that Jennifer had successfully assaulted him many times before. R.178:204.

Defendant testified that he eventually told Jennifer that he was leaving, grabbed some of his belongings, and started putting them in his truck. R.178:204. Defendant claimed that Jennifer then jumped in the driver’s seat of his truck. R.178:205. Believing that they were now going camping, defendant also got in the truck and they “took off.” R.178:205, 209.

As they drove, defendant claimed that he could see the approaching lights of the police cars and told Jennifer to take a particular turnoff, but Jennifer instead turned up the road that leads up the hill near her trailer. R.178:205. Defendant believed that Jennifer’s neighbor had called the police because he and Jennifer had had a fight, and the neighbor “likes to call the cops over anything.” R.178:205.

Defendant admitted that he threw the log with the maul through the trailer window. R.178:223. However, he claimed that he was merely trying to throw it towards the porch, but “threw it a little too hard.” R.178:223. The porch was five or six feet away from the trailer window. R.178:223.

The State's rebuttal

On rebuttal, Officer Harris testified that he did not find any broken lamp parts or pieces on either sofa in Jennifer's trailer. R.179:45. Officer Harris also testified that he did not observe any bruising, scuffing, or other marks on defendant's head that would indicate that defendant had been hit there. R.179:50, 53. Moreover, defendant did not complain to Officer Harris or any other emergency personnel about a head injury. R.179:50. Officer Harris also testified that when he located defendant and Jennifer, he observed that the steering wheel in defendant's truck had blood around nearly its entire circumference, and that the blood was still wet. R.179:49, 54, 56. Unlike defendant, Jennifer did not have any cuts on her hands. R.179:28. Defendant eventually admitted at sentencing that he was the one who drove his truck away from Jennifer's residence and up the hill. R.179:157.

The trial court's recommendation

At sentencing, the trial court specifically found that "there is convincing evidence that . . . the acts of [defendant] may have resulted in a murder, had not the police arrived in time to intervene." R.179:161. The court included this finding in its judgment and sentence. R.155.

SUMMARY OF ARGUMENT

I. This Court should not consider defendant's challenge to the reasonable doubt jury instruction because he invited the error he now complains of by asking the trial court to include the word "obviate" in the instruction. In any event, defendant's claim fails on the merits because the prosecutor did not argue that the State's proof only had to refute doubts that were sufficiently defined—the potential problem that the Utah Supreme Court identified with the now abandoned "obviate all reasonable doubt" concept.

II. Defendant fails to demonstrate that the trial court erred in denying his request for substitute counsel based on the fact that Mr. Bengé had prosecuted him for one of the DUI convictions that was used to enhance his present DUI conviction. The trial court conducted an adequate inquiry into defendant's claim of conflict. In any event, any inadequacy in the inquiry was harmless because defendant fails to demonstrate that his counsel had an actual conflict of interest.

III. The trial court acted within its discretion in denying defendant's motion for a continuance to locate a third character witness, Diana Hacker. Hacker's proffered testimony would have been merely cumulative of the character testimony that was presented from defendant's two other character witnesses. Moreover, any error was harmless because the additional evidence would not have created a reasonable likelihood of acquittal.

IV. Defendant's merger claim is unpreserved. In any event, his assault conviction did not merge with his aggravated kidnapping conviction because materially different acts established the two convictions. Defendant's assault was complete before the aggravated kidnapping began.

V. Defendant has not demonstrated actual bias, or that the presiding judge abused his discretion in denying defendant's motion to recuse Judge Anderson. Even assuming that Judge Anderson instructed his clerks not to accept any pro se filings from defendant that did not bear a case number, that instruction was proper. As a represented party, defendant had no right to file pro se pleadings. In any event, defendant has not demonstrated how such an instruction could demonstrate actual bias.

ARGUMENT

I. DEFENDANT INVITED ANY ERROR IN THE REASONABLE DOUBT JURY INSTRUCTION; IN ANY EVENT, THE INSTRUCTION DID NOT VIOLATE DEFENDANT'S DUE PROCESS RIGHTS

Defendant claims that the reasonable doubt instruction violated his federal due process rights. Aplt. Br. at 26-30. That instruction, in compliance with *State v. Robertson*, 932 P.2d 1219 (Utah 1997), *overruled in relevant part by State v. Reyes*, 2005 UT 33, ¶30, 116 P.3d 305, informed the jury that "[t]he state must eliminate (or obviate) all reasonable doubt." R. 133 (a copy of the instruction is included in Addendum B). However, after trial, the Utah Supreme Court "expressly

abandon[ed]" the "'obviate all reasonable doubt' element of the *Robertson* test." *Reyes*, 2005 UT 33 at ¶30.

Based on *Reyes*, defendant argues that the phrase "eliminate (or obviate) all reasonable doubt" created a "substantial risk that a juror found [him] guilty based on a degree of proof below beyond a reasonable doubt." Apl't. Br. at 29. However, this Court should not consider defendant's claim because he invited any error. In any event, the instruction did not violate defendant's due process rights.

A. Defendant invited any error by asking the trial court to include the term "obviate" in the instruction.

Prior to closing arguments, the parties and the Court met to discuss the jury instructions. R.179:94-98. The trial court proposed a "standard stock instruction[]" regarding reasonable doubt.⁶ R.179:94. Defense counsel asked that the reasonable doubt instruction "have the word obviate inserted." R.179:95. The prosecutor responded with a request to "add another word that is more in the lexicon of what people would understand" if the trial court chose to include the word "obviate." R.179:95. The finalized reasonable doubt instruction included the phrase: "[t]he State must eliminate (or obviate) all reasonable doubt." R.133 (Add. B).

⁶ The record does not contain the precise language of the proposed instruction.

A Utah appellate court will not review a challenge to the jury instruction when a defendant invites the error by submitting an erroneous instruction. *State v. Geukgeuzian*, 2004 UT 16, ¶12, 86 P.3d 742. “While a party who fails to object to . . . an instruction may have [the] instruction assigned as error under the manifest injustice exception, . . . ‘a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.’” *Id.* at ¶9 (quoting *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993)). Thus, in *Geukgeuzian*, the Utah Supreme Court refused to review the defendant’s jury instruction claim because defendant “led the trial court into adopting the erroneous jury instruction that he now challenges on appeal” by submitting the erroneous instruction to the trial court. *Id.* at ¶12. Similarly, this Court has also held that “a party may not appeal a jury instruction that the same party submitted or requested.” *State v. Perdue*, 813 P.2d 1201, 1205 (Utah 1991).

In this case, defendant asked the trial court to include the term “obviate.” R.179:95. He therefore invited any error in the instruction and cannot now claim that the instruction misdefined the reasonable doubt standard. *See Geukgeuzian*, 2004 UT 16 at ¶12; *Perdue*, 813 P.2d at 1205.

B. Defendant's *Reyes* challenge fails because the prosecutor did not argue that the State needed to refute only "doubts that are sufficiently defined."

Defendant's claim lacks merit in any event. The due process danger identified in the *Reyes* opinion did not arise here.

The reasonable doubt instruction given at trial, reproduced here in its entirety, contained the phrase "eliminate (or obviate) all reasonable doubt":

A defendant is presumed innocent until proven guilty beyond a reasonable doubt. This presumption follows the defendant throughout the trial. If a defendant's guilt is not shown beyond a reasonable doubt, the defendant should be acquitted.

The state must eliminate (or obviate) all reasonable doubt. Proof beyond a reasonable doubt is not proof to an absolute certainty. Reasonable doubt is a doubt based on reason, which is reasonable in view of all the evidence. Reasonable doubt is not a doubt based on fancy, imagination, or wholly speculative possibility. Proof beyond a reasonable doubt is enough proof to satisfy the mind, or convince the understanding of those bound to act conscientiously, and enough to eliminate reasonable doubt. A reasonable doubt is a doubt that reasonable people would entertain based upon the evidence in the case.

R. 133 (emphasis added) (Addendum B).

The *Reyes* court found the "'obviate all reasonable doubt' concept" "[i]nsightful and important," yet "linguistically opaque and conceptually suspect." *Reyes*, 2005 UT 33 at ¶26.

The process suggested by the "obviate all reasonable doubt" standard is also flawed because, contrary to its purpose, it tends to diminish the degree of proof necessary to convict and in that respect violates the *Victor* [*v. Nebraska*, 511 U.S. 1 (1994),] standard. The

“obviation” of doubt contemplates a two-step undertaking: the identification of the doubt and a testing of the validity of the doubt against the evidence. This process suggests a back and forth disputation of a doubt’s merits, all to the end of determining whether the evidence is sufficient to “obviate” the doubt. The “beyond a reasonable doubt” standard does not, however, condition a conclusion that a doubt is reasonable on an ability either to articulate the doubt or to state a reason for it.

Id. at ¶27. The court concluded, “[t]o the extent that the *Robertson* ‘obviate’ test would permit the State to argue that it need only obviate doubts that are sufficiently defined, the test works to improperly diminish the State’s burden.”

Id. at ¶28.

Reyes thus holds that the “obviate test” diminishes the State’s constitutional burden of proof only to the extent it would “permit the State to argue that it need only obviate doubts that are sufficiently defined.” *Id.* Consequently, where the State does not argue that it need only obviate doubts that are sufficiently defined, the “obviate test” does not diminish the State’s constitutional burden.

Defendant does not claim, nor does the record disclose, that the prosecutor argued that the State need obviate only those doubts that are “sufficiently defined.” *Aplt. Br.* at 26-30. Instead, the prosecutor emphasized that portion of the instruction which stated that a reasonable doubt must be “reasonable in view of all of the evidence” and could not be a doubt “based on fancy, imagination, or wholly speculative possibility.” R.179:133. He thus argued that the State’s

evidence refuted all doubts—whether or not sufficiently defined—that were not merely fanciful or speculative. He did not argue that he need not refute any doubts because they were not “sufficiently defined.” *Reyes*, 2005 UT 33, at ¶28.

Defendant’s claim fails for another reason. “[S]o long as the reasonable doubt instructions, ‘taken as a whole, . . . correctly convey[] the concept of reasonable doubt to the jury,’ they pass constitutional muster.” *State v. Cruz*, 2005 UT 45, ¶20, 122 P.3d 543 (quoting *Victor v. Nebraska*, 511 U.S. 1, 22 (1994)). “Simply put, [the court] need only ask whether the instructions, taken as a whole, correctly communicate the principle of reasonable doubt, namely, that a defendant cannot be convicted of a crime ‘except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’” *Id.* at ¶21 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). In *Cruz*, the supreme court approved a reasonable doubt instruction containing the sentence, “The law does not require that the evidence dispel all possible or conceivable doubt, but rather that it dispel all reasonable doubt.” *Id.* at 11. In the context of reasonable doubt instructions, “dispel,” “obviate,” and “eliminate” are synonyms. So in effect, the *Cruz* jury, like the jury here, was told that the State must “obviate all reasonable doubt.” Yet the Supreme Court approved the instruction.

The jury instructions here “pass constitutional muster” because, “taken as a whole,” they “correctly convey[ed] the concept of reasonable doubt to the jury.” *Cruz*, 2005 UT 45, ¶20 (internal quotation marks and citation omitted). This concept was conveyed not only by the reasonable doubt instruction quoted above, but also by one other. See R.128 (“In order to obtain a conviction, the State must prove every element of the offense beyond a reasonable doubt”) (“If you believe that the state has proven each of these elements beyond a reasonable doubt, you should find defendant guilty. If the state has failed to prove any one of those elements beyond a reasonable doubt, you should find defendant not guilty”).

In sum, even if defendant had not invited any error in the reasonable doubt instruction, his claim would fail on its merits.

II. THE TRIAL COURT CORRECTLY REFUSED TO DISQUALIFY DEFENDANT’S COUNSEL

Defendant claims that the trial court failed to adequately inquiry into his reasons for seeking to disqualify his appointed counsel, Mr. William Bengé, and that a sufficient inquiry would have revealed that Mr. Bengé had an inherent conflict of interest under the rules of professional conduct requiring disqualification. *Aplt. Br.* at 32-34. According to defendant, Mr. Bengé’s conflict of interest arose because he previously prosecuted defendant on a misdemeanor

DUI charge when he was Grand County Attorney, and that charge was used to enhance defendant's DUI conviction in this case. Aplt. Br. at 33-35.

Defendant's claim fails. His reliance on the rules of professional conduct is misplaced because an apparent violation of the professional rules does not entitle defendant to reversal of his conviction. Rather, defendant must show a conflict of interest violated his Sixth Amendment right to counsel. Defendant does not acknowledge, let alone satisfy, the constitutional standard.

Background. Defendant was charged on 16 April 2004 and Mr. William Schultz was appointed to represent him. R.2, 15. On 1 February 2005 Mr. Schultz moved to withdraw, and the trial court granted the motion. R.86, 88. Although there is no order of appointment in the record, Mr. William Bengé entered an appearance as defendant's appointed counsel on 8 February 2005. R.93.

Although he undoubtedly knew that Mr. Bengé had previously prosecuted him, defendant waited until the morning of trial—13 April 2005—to bring this to the court's attention. R.178:1, 7. Moreover, defendant's prior prosecution by Mr. Bengé was only one part of a larger discussion on defendant's motion for continuance. R.178:5-23. Mr. Bengé moved for a continuance on defendant's behalf because (1) he had been unable to serve a subpoena on defense witness Diana Hacker; (2) defendant informed him "this morning" that he wanted a

continuance to retain private counsel; (3) he questioned defendant's competence to proceed; and (4) defendant had failed to keep his appointments with Mr. Bengé so that they could prepare for trial. R.178:5-6, 20-21.

When the court asked defendant to explain his plans for retaining other counsel, defendant stated that he questioned Mr. Bengé's appointment "from the beginning because he has prosecuted me in your court before." R.178:7. Defendant explained that he wanted to hire his own attorney because he had "a hard time trusting [Mr. Bengé]." R.178:7. The trial court then asked Mr. Bengé whether it was true that he had prosecuted defendant. R.178:22. Mr. Bengé explained that he had, but that he could not recall the case, or even the charge. R.178:22. Defendant then stated that Mr. Bengé had prosecuted him on two cases before the trial court: "assault and a DUI." R.178:22. The trial court had no recollection of either case. R.178:22. The court then asked defendant when the prosecutions occurred. R.178:22. Defendant responded, "Nin[e]ty--." R.178:23.

The trial court then denied defendant's motion for a continuance, stating, "I am not going to delay the trial because [defendant] wants a chance to hire private counsel. We — we've been over this again and again. It's . . . a request that I might have considered, had he made it [earlier]. But it's too late now." R.178:23. Trial proceeded.

Following the State's rebuttal evidence, but before the case had been submitted to the jury, the court discussed with defendant his claims that Mr. Bengé should have introduced certain evidence. R.179:63-77. In the midst of that discussion, defendant again mentioned that Mr. Bengé had previously prosecuted him. R.179:68. The court explained that it would not allow defendant to present that fact to the jury because it was irrelevant. R.179:68. The court again mentioned that the prosecution must have occurred "about 10 years ago" because the court could not remember it. R.179:69. Only then did defendant explain that the prosecution must have occurred after 1999 because he was convicted after he and Jennifer started seeing each other. R.179:69. After further discussion about whether Mr. Bengé should have elicited additional evidence, the prosecutor stated that he had reviewed a list of defendant's prior convictions and discovered that Mr. Bengé had prosecuted defendant for a class B misdemeanor DUI in 2002 and that defendant had pled guilty to the charge. R.179:75-76. The trial court observed that the prosecution occurred "just at the end of Mr. Bengé's term as Grand County Attorney." R.179:76. The trial court also noted that the prosecution had indeed occurred in his court because the case also involved a class A misdemeanor charge. R.179:76. The jury had no evidence of the prior DUI conviction during deliberations. R.179:140.

After the jury returned a guilty verdict on the DUI charge, the court explained to defendant that he could have either the jury or the court decide whether he had prior DUI convictions that would enhance his present conviction. R.179:139. Defendant responded, "It's already proven, so there's no decision." R.179:140. The court clarified, asking "You think its' pretty well established by the judgments themselves?" R.179:140. Defendant responded, "Yes," and explicitly waived his right to have the jury decide the enhancement issue. R.179:140. The court then found that defendant had been convicted of two prior DUI's, one in December, 2002, and another in April, 2004, and therefore found defendant guilty of the enhanced DUI charge. R.179:144-45.

A. The trial court sufficiently inquired into Mr. Bengé's prior prosecution.

Defendant claims that the trial court failed to make a sufficient inquiry into Mr. Bengé's prior prosecution, and that had it done so, it would have learned that Mr. Bengé had prosecuted defendant for a DUI that was used to enhance the DUI offense in this case. Aplt. Br. at 32-34. He relies on *State v. Pursifell*, 746 P.2d 270, 273 (Utah Ct. App. 1987), for the proposition that, upon an expression of dissatisfaction with appointed counsel, a trial court "must make some reasonable, non-suggestive efforts to determine the nature of the defendant's complaints and to apprise itself of the facts necessary to determine whether the

defendant's relationship with his or her appointed attorney has deteriorated to the point that sound discretion requires substitution." *Pursifell*, 746 P.2d at 273.

The trial court made the required inquiry. The court asked all of the questions necessary to determine whether the prior prosecution could create a potential conflict of interest.

The prior DUI prosecution would create a potential conflict of interest only if it was related to the current proceedings. "[T]he singular circumstance of having prosecuted a defendant does not disqualify a former government attorney from defending the same individual on subsequent criminal charges unrelated to the attorney's former duties." *See United States v. Smith*, 653 F.2d 126, 128 (4th Cir. 1981), *abrogated on other grounds by Flanagan v. United States*, 465 U.S. 259, 263 n.2 (1984). The prior DUI conviction could be related to the current proceedings only if it could be used to enhance defendant's present DUI conviction. The prior conviction could be used to enhance the present conviction if it was obtained within the ten years of trial. *See UTAH CODE ANN. § 41-6a-503* (West 2004 & Supp. 2005) (establishing that a DUI conviction may be enhanced if it occurs "within ten years of two or more prior convictions"). If the prior DUI conviction occurred more than ten years before trial—in other words, before April, 1995—it would not give rise to a potential conflict of interest. *See id.*

The trial court's pre-trial inquiry allowed defendant to explain that the prior prosecution resulted in a DUI conviction that could be used to enhance his present charge. The trial court learned that the prior prosecution was for a DUI and asked when it occurred. Defendant's response, "Nin[e]ty- —," placed the prior conviction beyond the ten-year limit on convictions that could be used to enhance a DUI charge. *See* UTAH CODE ANN. § 41-6a-503 (West 2004 & Supp. 2005). Had defendant responded, as he did near the end of trial, that the prior prosecution occurred sometime within the decade before trial, then the trial court may well have had a duty to conduct a further inquiry to determine more precisely the date of the prosecution. However, given defendant's response, no further inquiry was necessary because the prior prosecution was too old to be used to enhance the present charge, and therefore did not give rise to a potential conflict. *See Smith*, 653 F.2d at 128 (holding that no conflict arises where defense counsel previously prosecuted his client on an unrelated charge).

The trial court's inquiry gave defendant the opportunity, prior to trial, to provide the information necessary to evaluate whether a conflict of interest required substitution of counsel. Therefore, the inquiry was sufficient.

B. In any event, any deficiency in the court's inquiry was harmless because defendant has not demonstrated that a conflict of interest required substitution of counsel.

Assuming arguendo that the trial court should have conducted a more searching inquiry, any error was harmless because the prior prosecution did not create a conflict of interest requiring substitution of counsel. *See State v. Valencia*, 2001 UT App. 159, ¶14, 27 P.3d 573 (finding that any inadequacy in the inquiry into an indigent defendant's dissatisfaction with counsel was harmless where good cause did not require substitution of counsel).

Defendant claims that, under the rules of professional responsibility, the prior prosecution created an "inherent conflict of interest" that required substitution of counsel. Aplt. Br. at 30, 34-35. His claim of a conflict of interest is based exclusively on his interpretation rules 1.7 and 1.9 of the Utah Rules of Professional Conduct. Aplt. Br. at 30-35.

Defendant's reliance on the rules of professional misconduct is misplaced. Even assuming arguendo that the prior prosecution created a conflict under the professional rules, a violation of those rules does not establish a violation of the Sixth Amendment right to counsel. "[A] criminal defendant 'is not automatically entitled to a reversal of his conviction' merely because of an apparent violation of a rule of professional conduct.'" *State v. Larsen*, 828 P.2d 487, 492 (Utah Ct. App. 1992) (quoting *State v. Ford*, 793 P.2d 397 (Utah Ct. App. 1990)); *see also Nix v.*

Whiteside, 475 U.S. 157, 165-66 (1986) (“Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel”). In determining whether an attorney possessed a conflict of interest, the “inquiry is *not* whether a state disciplinary rule for lawyers has been violated by the [attorney], but whether, everything considered, [defendant’s] counsel ‘actively’ represented conflicting interests.” *United States v. Gallegos*, 39 F.3d 276, 278 (10th Cir. 1994) (emphasis in original). Because defendant relies exclusively on the rules of professional conduct to demonstrate a conflict of interest, his claim fails. See *Larsen*, 828 P.2d at 492; *Nix*, 475 U.S. at 165-66; *Gallegos*, 39 F.3d at 278.

In any event, the prior prosecution did not create a conflict of interest under the Sixth Amendment. To establish a violation of the Sixth Amendment’s right to counsel based on a conflict of interest, a defendant “must establish both [1] that [counsel] had an actual conflict of interest, and [2] that the conflict adversely affected [counsel’s] performance.” *State v. Lovell*, 1999 UT 40, ¶22, 984 P.2d 382 (citing *State v. Taylor*, 947 P.2d 681, 686 (Utah 1997)). Neither prong is satisfied in this case.

“To establish an actual conflict of interest, [defendant] must show that [his counsel] had to make choices that would advance his own interests to the detriment of [defendant’s].” *Lovell*, 1999 UT 40 at ¶22. Presumably, a conflict

could arise if Mr. Bengé had failed to challenge the validity of the prior DUI conviction because he had been the prosecutor. However, nothing in the record demonstrates, or even suggests, that Mr. Bengé was so personally invested in the prior DUI conviction that he chose to somehow advance his own interests by refusing to challenge it. In fact, the record discloses no valid basis on which Mr. Bengé could have challenge the prior conviction that resulted from a guilty plea. Therefore, the prior prosecution did not create an actual conflict of interest. *See id.*

The Seventh Circuit found what it termed an “actual conflict of interest” in *United States v. Ziegenhagen*, 890 F.2d 937, 940-41 (7th Cir. 1989), because defense counsel had appeared twenty years earlier as a prosecutor at a sentencing hearing on charges that were used to enhance Ziegenhagen’s conviction. This holding was based, in part, on the court’s conclusion that defense counsel “could [have] decide[d] his defense strategy either at sentencing or on appeal on the basis of the conflict,” and its further observation that “there may [have been] countless ways in which the conflict could have hindered a fair trial, the sentencing hearing or even this appeal.” *Id.* at 941. The Seventh Circuit ultimately remanded the case for an evidentiary hearing to “consider whether the conflict of interest in this case denied Ziegenhagen the right to fair representation or if Ziegenhagen waived the conflict.” *Id.* at 938.

Ziegenhagen is not persuasive precedent. The Seventh Circuit's finding of an "actual conflict of interest" was premature because there was no evidence that Ziegenhagen's counsel actually "was required to make a choice advancing his own interests to the detriment of his client's interests." *See Ziegenhagen*, 890 F.2d at 939; *see also Lovell*, 1999 UT 40 at ¶22. Rather, the Court based its holding on speculation that the conflict "could" have caused counsel to make such choices. *See Ziegenhagen*, 890 F.2d at 941. In fact, "the district court on remand in *Ziegenhagen* found that the defense counsel played a peripheral role in the prior prosecution and did not actively represent conflicting interests by defending Ziegenhagen." *Hernandez v. Johnson*, 108 F.3d 554, 561 n.9 (5th Cir. 1997) (citing *United States v. Ziegenhagen*, No. 89-1256; 907 F.2d 152, 1990 U.S. App. Lexis 9835 (7th Cir. 1990)). Because no evidence demonstrated that Ziegenhagen's counsel actively represented conflicting interests, the Seventh Circuit's holding is unpersuasive.

Moreover, even if Mr. Bengé's prior prosecution created an actual conflict, nothing demonstrates, or even suggests that the conflict "adversely affected [his] performance." *See Lovell*, 1999 UT 40 at ¶22. As noted above, the record does not reveal any valid basis upon which Mr. Bengé could have challenged the prior DUI conviction. Nor does defendant now provide one. Therefore, defendant's Sixth Amendment right to counsel was not violated based on a conflict of

interest. See *Hernandez v. Johnson*, 108 F.3d 554, 560 (5th Cir. 1997) (finding no conflict of interest where defense counsel participated in prior convictions that were relied on at the penalty phase of a capital trial, in part because there was no evidence “that there was a viable basis upon which the prior convictions could be attacked”). Consequently, the trial court did not err in denying defendant’s request for substitute counsel. See *State v. Valencia*, 2001 UT App. 159, ¶14, 27 P.3d 573.

C. Any conflict affected only the DUI conviction.

Even if a conflict of interest existed for which Mr. Bengé should have been disqualified, that conflict affected only defendant’s DUI conviction. Again, if any conflict existed, it arose from Mr. Bengé’s failure to challenge the validity of the prior DUI conviction that was used to enhance defendant’s current DUI conviction. Therefore, the remedy for any error should be limited to reducing the degree of the present DUI conviction from an enhanced third degree felony to the standard class B misdemeanor. See UTAH CODE ANN. § 41-6a-503(1)(a) (West 2004) (classifying a first or second DUI conviction as a class B misdemeanor).

III. THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR CONTINUANCE TO LOCATE A THIRD CHARACTER WITNESS

Defendant claims that the trial court erroneously denied his motion for a continuance to locate a third character witness, Diana Hacker. Apl't. Br. at 36-39. He argues that court should have granted his continuance because Hacker's testimony was material and likely would have changed the outcome because "this matter [was] a he said/she said type of case." Apl't. Br. at 36-39. The trial court denied the continuance on the basis that Hacker's character testimony would be essentially cumulative of two other character witnesses—Joyce and Jerome Jones—that defendant planned to call. R.178:15. The court stated, "I don't think I'll postpone the trial because of one of three character witnesses is not here." R.178:15. This was an appropriate exercise of the trial court's discretion.

"When moving for a continuance, the moving party must show that denial of the motion will prevent the party from obtaining material and admissible evidence, that any additional witnesses it seeks can be produced within a reasonable time, and that it has exercised due diligence in preparing for the case before requesting the continuance." *State v. Horton*, 848 P.2d 708, 714 (Utah Ct. App. 1993) (citing *State v. Oliver*, 820 P.2d 474, 476 (Utah Ct. App. 1991)). A trial court abuses its discretion in denying a continuance when "'review of the record

persuades the court that without the error there was a reasonable likelihood of a more favorable result for the defendant.’” *State v. Taylor*, 2005 UT 40, ¶8, 116 P.3d 360.

Defendant has not demonstrated that the trial court abused its discretion because he fails to show a reasonable likelihood that Hacker’s testimony would have changed the result. The trial court correctly found that Hacker’s testimony would have been merely cumulative of defendants two other character witnesses—Joyce and Jerome Jones. Moreover, contrary to defendant’s characterization, this case was not a mere credibility contest.

Defendant claims that, in contrast to Joyce and Jerome, Hacker would have been a “long-term character witness” because she “lived next door to [Jennifer] and [defendant] for years.” Aplt. Br. at 37. However, Joyce and Jerome had also known Jennifer and defendant for nearly their entire relationship. Joyce testified that she had known both Jennifer and defendant “[a]lmost five years” at the time of trial, and had been their neighbor for “somewhere around a year.” R.179:7. Jerome testified that he had known both Jennifer and defendant for “[a]bout four-and-a-half years” at the time of trial. R.178:14. Jerome was the maintenance person for the Slick Rock Campground, where Jennifer and defendant had lived,

and saw the two “on a pretty regular basis.”⁷ R.179:14-15. Jennifer and defendant had been together for approximately five years. R.178:86, 190. Therefore, contrary to defendant’s suggestion, Hacker’s association with Jennifer and defendant was not significantly longer than Joyce’s and Jerome’s.

Defendant also claims that he “proffered that Hacker would have been able to testify to an established pattern of behavior by [Jennifer] over years.” Aplt. Br. at 37. Actually, his proffer to the trial court stated that “Hacker would testify that [1] [Jennifer] . . . is of a violent nature . . . [2] she has witnessed Jennifer assault [defendant] severely on several occasions; [and 3] that [defendant was] more of a victim in the fights . . . than [Jennifer] was.” R.178:13.

This proffered testimony is merely cumulative of Joyce and Jerome’s testimony. Joyce testified that Jennifer was “mean and violent and she gets drunk.” R.179:7. She also testified to one incident when she had observed Jennifer assault defendant by “crack[ing] him up the side of the [head] with a frozen elk steak.” R.179:7, 10. According to Joyce, Jennifer was the controlling party in the relationship. R.179:8.

Jerome described the interaction between defendant and Jennifer as “violent, at times.” R.179:15. He testified that he had seen Jennifer assault defendant at least three times and described two of those incidents. R.179:15.

⁷ The record does not establish how long Jennifer and defendant live at the campground.

On one occasion, Jerome saw Jennifer throw a package of elk steaks at defendant and hit him in the back of the head. R.179:15. Jerome believed that the blow “just about knocked [defendant] cold.” R.179:15. Jerome described another incident at the Outlaw Saloon where Jennifer hit defendant. R.179:15. Jerome also testified that he viewed Jennifer as the dominant party in the relationship. R.179:16.

Joyce and Jerome’s testimony was substantively indistinguishable from Hacker’s proffered testimony. Therefore, the trial court correctly concluded that Hacker’s testimony would have been merely cumulative.

Moreover, this case was not simply a credibility contest. The physical evidence refuted defendant’s story and confirmed Jennifer’s. Defendant’s claim that Jennifer started the fight in the trailer by hitting him on the head with a lamp was refuted by evidence that no broken lamp pieces were found on either of Jennifer’s couches, and also that defendant’s head showed no signs of injury. R.179:45, 50, 53. Jennifer’s injuries, including her teeth being driven through her lip, refuted defendant’s claim that he was merely trying to defend himself against Jennifer’s assault by hitting her with the back of his hand. R.178:107-08, 109, 164, 208. Defendant’s claim that he was merely trying to toss the log and maul up to the porch was refuted by evidence that the window was five to six feet from the porch. R.178:223. Finally, the fresh blood on his truck’s steering

wheel demonstrated that defendant lied when he claimed that Jennifer drove the truck away from her trailer—a fact he eventually admitted at sentencing. R.179:49, 54, 56, 157.

This was not a close case; substantial evidence supported Jennifer’s version of the events and refuted defendant’s. Therefore, defendant cannot show that Hacker’s cumulative testimony would have likely changed the outcome of his trial. Consequently, he has not shown that the trial court abused its discretion in denying his request for a continuance. *See Taylor*, 2005 UT 40, ¶8.

IV. DEFENDANT’S MERGER CLAIM IS UNPRESERVED; IN ANY EVENT IT FAILS ON ITS MERITS

Defendant claims that the trial court erred in failing to merge his assault charge with his aggravated kidnapping charge. Aplt. Br. at 39-42. This Court should not consider this claim because it is unpreserved and defendant argues no exception to the preservation rule. Alternatively, the claim fails on its merits.

A. The claim is unpreserved.

Defendant’s merger claim is unpreserved because he did not raise it the trial court. “‘Generally speaking, a timely and specific objection must be made [at trial] in order to preserve an issue for appeal.’” *State v. Winfield*, 2006 UT 4, ¶14 (quoting *State v. Pinder*, 2005 UT 15, ¶45, 114 P.3d 551) (additional citations omitted). “When a party raises an issue on appeal without having properly preserved the issue below, ‘[this Court will] require that the party articulate an

appropriate justification for appellate review, . . . specifically, the party must argue either plain error or exceptional circumstance.” *Id.* (quoting *Pinder*, 2005 UT 15, ¶45) (additional quotations and citations omitted). Defendant did not raise his merger claim below; therefore, it is unpreserved. *See id.*

This Court should not consider defendant’s unpreserved merger claim because he fails to argue that any exception to the preservation rule applies. “[I]n general, appellate courts will not consider an issue, including constitutional arguments, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances.” *State v. Dean*, 2004 UT 63, ¶13, 95 P.3d 276 (citing *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346). A party seeking review of an unpreserved issue must “articulate the justification for review in the party’s opening brief.” *State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551 (citing *Coleman v. Stevens*, 2000 UT 98, ¶ 9, 17 P.3d 1122). When a party fails to do so, an appellate court may refuse to consider the unpreserved issue. *Id.* at ¶¶50, 58 (refusing to consider Pinder’s unpreserved claims because he “failed to argue plain error or show exceptional circumstances on appeal”). Defendant does not argue that “plain error” or “exceptional circumstance” should excuse his failure to preserve his merger claim; therefore, this Court should decline to consider it. *See id.*

B. In any event, the claim fails on its merits because materially different acts established the two crimes.

Defendant claims that his assault conviction should merge into his aggravated kidnapping conviction because the elements of assault are entirely subsumed by the elements of aggravated kidnapping, and “[t]here were no separate acts occurring by which to charge [him] separately for assault and aggravated kidnap[p]ing.” Aplt. Br. at 39-42. Defendant is incorrect. A comparison of the elements of assault and aggravated kidnapping demonstrates that assault is not a lesser included offense of aggravated kidnapping. However, even if it were, defendant’s assault conviction does not merge into his aggravated kidnapping conviction because the crimes were established by independent acts.

Merger is appropriate when a defendant is convicted of both a greater and a lesser included offense. *See State v. Smith*, 2003 UT App 179, ¶12, 72 P.3d 692. However, where “materially different acts” establish the two convictions, the convictions do not merge. *See id.* at ¶16.

Here, defendant’s assault and aggravated kidnapping convictions were proven by materially different acts. Defendant committed three separate assaults before the aggravated kidnapping began. Defendant committed assault when he threw lamps and pictures around Jennifer’s trailer in her presence, and again when he threw the log and maul through the window of the room where Jennifer

was sitting, because those unlawful acts “create[d] a substantial risk of bodily injury to another.” *See* UTAH CODE ANN. § 76-5-102(c). Defendant committed a third assault when he punched and kicked Jennifer, driving her teeth through her lip, because those unlawful acts “cause[d] bodily injury to another.” *See id.* Only after those assaults were completed did defendant commit aggravated kidnapping by grabbing Jennifer by her hair and arm, dragging her out of her trailer, and driving off with her in his truck while threatening to kill her. *See* UTAH CODE ANN. § 76-5-302(1)(b)(iv). Therefore, because “materially different acts” establish the assault and aggravated kidnapping counts, the convictions do not merge. *See Smith*, 2003 UT App 179 at ¶16.

V. THE PRESIDING JUDGE CORRECTLY DENIED DEFENDANT’S MOTION TO RECUSE JUDGE ANDERSON

Defendant argues that Judge Anderson should have recused himself, and the presiding judge should have granted his motion to recuse Judge Anderson, because Judge Anderson had violated his “right to file pleadings” by allegedly instructing the court clerks to retain only those pro se filings from defendant that listed a case number. Aplt. Br. at 42-45. Defendant’s claim fails because he has not demonstrated actual bias or abuse of discretion.

Rule 29(c), Utah Rules of Criminal Procedure establishes the procedures that a court must follow when a motion to disqualify a judge is filed. *See* Utah R. Crim. P. 29(c). The rule provides that “[t]he judge against whom the motion and

affidavit are directed shall, without further hearing, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge.” Utah R. Crim. P. 29(c)(2).

In this case, the trial court complied with Rule 29. Defendant filed a pro se motion to disqualify. R.53. “Because defendant was represented by counsel, the clerks did not file the document, but did call it to the attention of the court.” R.53. At a subsequent hearing, the trial court asked defendant’s counsel to file a memorandum explaining his position on the motion to disqualify. R.54. Counsel filed a motion to disqualify and affidavit that “essentially repeat[ed] the language of the pro se motion, and state[d] that it [was] filed under an Anders rationale.” R.54. The affidavit also included a two-page hand-written supplement to the motion prepared by defendant. R.48-49. The trial court entered an order referring the motion to the presiding judge. R.53-56. The order explained the above background, and also stated that “since filing the motion to disqualify, defendant ha[d] showered the court with papers that may or may not be treated as pleadings. Those that bear a case number have been retained.” R.54-55. The trial court forwarded to the presiding judge the motion to disqualify, the affidavit, “eighteen pages of handwritten submissions from defendant bearing the case number for this case,” and other materials. R.55. The presiding judge denied the motion. R.73-76.

If a trial judge complies with Rule 29 and is approved by the reviewing judge to continue, “the burden shift[s] to the [defendant] to show actual bias or abuse of discretion.” *State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998) (citing *State v. Neeley*, 748 P.2d 1091, 1094 (Utah 1988)). Defendant has not shown either.

Defendant claims that he has shown actual bias because two of his alleged pro se filings—the motion to disqualify, and a motion for speedy resolution—do not appear in the record. Aplt. Br. at 43. He argues that “[t]he absence of these pleadings from the district court record indicate that Judge Anderson *possibly* instructed his clerks in a manner in violation of Ut. R. Civ. P. 10 (f).” Aplt. Br. at 44 (emphasis added). Defendant claims that Rule 10(f) required the clerk to accept defendant’s pro se filings. Aplt. Br. at 44. Defendant’s allegations fail to show actual bias.

Defendant had no right to file pro se pleadings while he was represented by counsel, and Rule 10 does not create that right. “When a defendant is represented by counsel, he generally has no authority to file pro se motions, and the court should not consider them.” *People v. Serio*, 830 N.E.2d 749, 757 (Ill. App. Ct. 2005). A defendant is not entitled to “‘hybrid representation,’ whereby he would receive the services of counsel and still be permitted to file pro se motions.” *Id.* (additional quotations and citations omitted); *see also Commonwealth v. Battle*, 879 A.2d 266, 268 (Pa. Super. Ct. 2005) (“there is no

constitutional right to hybrid representation, neither on appeal, nor at trial”); *People v. Rodriguez*, 741 N.E.2d 882, 884 (N.Y. 2000) (“While the Sixth Amendment and the State Constitution afford a defendant the right to counsel or to self-representation, they do not guarantee a right to both”).

The language of rule 10, Utah Rules of Civil Procedure, does not create a right to hybrid representation. The rule states that if papers filed with the court “are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers.” Utah R. Civ. P. 10(f). It also states that “[t]he clerk or the court may waive the requirements of this rule for parties appearing pro se.” *Id.* Therefore, the rule contemplates that a party is either represented by counsel, or is appearing pro se, but not both. If a party is represented by counsel, and counsel files a nonconforming pleading, the clerk “shall accept the filing but may require counsel to substitute properly prepared papers.” *Id.* On the other hand, if a party is pro se, that party may obtain a waiver of the rule’s requirements for pleadings. *Id.* Therefore, Rule 10 does not allow a party to engage in hybrid representation. Consequently, even if Judge Anderson instructed his clerks not to retain defendant’s pro se filings that did not contain a case number, those instructions were correct.

Even if defendant Rule 10 creates a right to engage in hybrid representation, defendant has not shown that Judge Anderson actually instructed his clerks to violate that right. As defendant admits, the fact that some of defendant's pro se pleadings are allegedly missing from the record only "indicate[s] that Judge Anderson *possibly* instructed his clerks in a manner in violation of [rule 10]." Aplt. Br. at 44 (emphasis added).

Moreover, even if Judge Anderson had instructed his clerks in violation of the rule, defendant fails to explain how that action evidences actual bias. There is no evidence that Judge Anderson's instructions were directed only at defendant, as opposed to all defendants who seek to engage in hybrid representation. Consequently, defendant has not shown that Judge Anderson was actually biased. *See Alonzo*, 973 P.2d at 979.


For these same reasons, defendant has not shown that the presiding judge abused his discretion in denying the motion to recuse. *See id.* Consequently, defendant's claim fails.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's convictions.

Respectfully submitted 27 January 2006.

MARK L. SHURTLEFF
Utah Attorney General



CHRISTOPHER D. BALLARD
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on 27 January 2006, I mailed, postage prepaid, two accurate copies of the foregoing BRIEF OF APPELLEE to:

Autumn Fitzgerald
55 East 100 South
Moab, Ut 84532

Lee Nakamura

Addenda

Addendum A

76-5-102. Assault.

(1) Assault is:

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

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

- (a) the person causes substantial bodily injury to another; or
- (b) the victim is pregnant and the person has knowledge of the pregnancy.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

Amended by Chapter 109, 2003 General Session

76-5-302. Aggravated kidnapping.

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:

(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) acts with intent:

- (i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;
- (ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;

- (iii) to hinder or delay the discovery of or reporting of a felony;
- (iv) to inflict bodily injury on or to terrorize the victim or another;
- (v) to interfere with the performance of any governmental or political function; or
- (vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.

(2) As used in this section, "in the course of committing unlawful detention or kidnapping" means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:

- (a) Section 76-5-301, kidnapping; or
- (b) Section 76-5-304, unlawful detention.

(3) Aggravated kidnapping is a first degree felony punishable by imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life. Imprisonment is mandatory in accordance with Section 76-3-406.

Amended by Chapter 301, 2001 General Session

Utah R. Crim. P. Rule 29. Disability and disqualification of a judge or change of venue.

(c)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias or prejudice, or conflict of interest.

(B) The motion shall be filed after commencement of the action, but not later than 20 days after the last of the following:

- (i) assignment of the action or hearing to the judge;
- (ii) appearance of the party or the party's attorney; or

(iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 20 days prior to a hearing, the motion shall be filed as soon as practicable.

(C) Signing the motion or affidavit constitutes a certificate under Rule 11, Utah Rules of Civil Procedure and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action.

(2) The judge against whom the motion and affidavit are directed shall, without further hearing, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. If the judge grants the motion, the order shall direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. Assignment in justice court cases shall be in accordance with Utah Code Ann. ' 78-5-138. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so. Assignment in justice court cases shall be in accordance with Utah Code Ann. ' 78-5-138.

(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion and affidavit an affidavit responsive to questions posed by the reviewing judge.

(C) The reviewing judge may deny a motion not filed in a timely manner.

Utah R. Civ. P. Rule 10. Form of pleadings and other papers.

(a) Caption; names of parties; other necessary information. All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or

other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action." Every pleading and other paper filed with the court shall also state the name, address, telephone number and bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page. Every pleading shall state the name and address of the party for whom it is filed; this information shall appear in the lower left-hand corner of the last page of the pleading. The plaintiff shall file together with the complaint a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council.

(f) Enforcement by clerk; waiver for pro se parties. The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

Addendum B

JURY INSTRUCTION NO. 6

A defendant is presumed innocent until proven guilty beyond a reasonable doubt. This presumption follows the defendant throughout the trial. If a defendant's guilt is not shown beyond a reasonable doubt, the defendant should be acquitted.

The state must eliminate (or obviate) all reasonable doubt. Proof beyond a reasonable doubt is not proof to an absolute certainty. Reasonable doubt is a doubt based on reason, which is reasonable in view of all the evidence. Reasonable doubt is not a doubt based on fancy, imagination, or wholly speculative possibility. Proof beyond a reasonable doubt is enough proof to satisfy the mind, or convince the understanding of those bound to act conscientiously, and enough to eliminate reasonable doubt. A reasonable doubt is a doubt that reasonable people would entertain based upon the evidence in the case.