

2020 UPC Spring Conference Case Summaries

State v. Gavette, 2019 UT App 73 (Hagen)

- Issue:
 - Question: Once a motion to disqualify a judge has been filed under rule 29 of Criminal Procedure, can the court continue without either granting it or certifying it to a reviewing judge?
 - Answer: No, and Counsel need not remind the court about the pending motion.
- Facts:
 - Kevin Gavette was charged with one count of filing a false or fraudulent insurance claim. During the preliminary hearing, the trial judge saw Gavette shaking his head during a witness's testimony. The trial judge interrupted the State's direct examination and advised defense counsel:
 - “[Y]our client's shaking his head. He ought to know that that makes me think he's lying so—he's a liar, so he shouldn't be doing that. So, okay? Go ahead.”
 - Defense counsel offered no response to the judge's comment, and the hearing proceeded. The judge bound Gavette over for trial.
 - 8 months later, counsel filed the motion to disqualify, which the judge ignored
 - The case proceeded to trial, and the Defendant was convicted
 - The trial judge retired, so post-conviction motions were heard by a new judge
 - The new judge recognized the violation of the rule, but where it didn't say the court loses jurisdiction or that it renders judgments made in violation void, he denied the motion to set aside.
- Appeal
 - Gavette argues the trial judge's failure to comply implicates his authority
 - Reviewed for correctness
 - Rule 29 States:
 - “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. The judge shall take no further action in the case until the motion is decided.”
 - Policy: To keep judges detached by protecting them from participating in unseemly disputes regarding their impartiality
 - Vulnerable to abuse by unscrupulous parties or counsel
 - Often, a short recess is all that's necessary for a reviewing judge to make a determination on a patently frivolous motion
 - State's Argument:
 - No error where counsel abandoned the motion, invited the error or failed to preserve the issue below
 - Trial counsel acknowledged the untimeliness of the motion and didn't object when the judge continued to preside without addressing it
 - Analysis
 - Requiring counsel to argue the motion before the judge he's seeking to disqualify is exactly what the rule is intended to avoid
 - The motion automatically triggers the requirements of the Rule, and where it's deemed submitted upon filing, the motion itself functioned as an objection to the court continuing the preside
 - Similar language in Rule 63(b)(2) of Civil Procedure has been construed to void any action taken by the court until the motion is decided.
 - Conclusion

- By the plain language of Rule 29(b), once the motion was filed, the court lacked authority to proceed, and all subsequent actions taken by the court were void.
- Conviction vacated – remanded for new trial
- Issues of partiality by the judge and ineffective assistance of counsel not reached where the 29(b) issue was dispositive

State v. Montes, 2019 UT App 74 (Mortensen)

- Issue:
 - Question 1: Is a threat by the defendant to headbutt his attorney sufficiently egregious to result in forfeiture of his 6th Amendment right to counsel at trial?
 - Answer: No, at least not without a warning that the continuance of such conduct would result in such a waiver
 - Question 2: Must harm be shown due to the deprivation of counsel?
 - No, it's structural error, which is considered intrinsically harmful
- Facts:
 - On a busy morning in October 2016, employees of a bike shop in Moab were outfitting customers who had rented mountain bikes. One employee (Clerk) saw a man—later identified as Montes—removing a bike from an outside display rack and jamming it haphazardly onto a bike rack on the back of a car. Alarmed because the bikes on the display rack were secured with a cable that only an employee could unlock, Clerk ran out the front door of the shop to investigate. By the time Clerk reached the car, Montes was putting a second bike on the car rack. Another employee (Mechanic) positioned himself in front of the car, placed his hands on the hood, and yelled for Montes to stop. Meanwhile, Clerk successfully removed the bikes from the car and then reached inside the car in an attempt to prevent Montes from driving away. Montes ignored the commands to stop and began to pull away. Clerk ran alongside the car as he continued to struggle with Montes through the open driver's door, but he soon jumped free. Mechanic, to avoid being run over, ran up the car's hood, onto the roof, and then jumped off. After the unsuccessful attempt to detain Montes, the employees returned to the bike shop.
 - Montes was subsequently pulled over by UHP trying to get out of town and charged with theft, agg assault and some drug crimes
 - He was found indigent and counsel was appointed
 - 2 days before trial, Montes asked for different appointed counsel based on the following:
 - Their communication had been limited and argumentative
 - Failure to assert his right to a speedy trial (w/in 30 days of arraignment)
 - The court said there's no speedy trial issue where it was set w/in 3 months of Arr.
 - Counsel talked him into waiving prelim, though he couldn't articulate how that harmed him other than that he would have liked to have had it
 - Counsel didn't request a furlough to visit a sick family member
 - Counsel wouldn't test the bolt cutters or assure the bikes, cable and cutters would be presented in evidence (the cutters had been tested, and pictures of the bikes would be presented)
 - Montes had filed a federal complaint against counsel for failing to follow his directives
 - The trial court rejected all of these, saying Montes was trying to delay and confuse things, and right to counsel doesn't mean the right to puppet counsel where he would be the puppeteer
 - Montes wanted to continue, but the court said no, but that he could get new counsel or represent himself, but neither would result in a continuance
 - The morning of trial, Montes refused to proceed with appointed counsel, but also did not want to represent himself – the court left appointed counsel in place

- He was held in contempt and given 30 days 3 times for continuing to argue
 - Appointed counsel then reported Montes threatened to headbutt him. Montes said he asked what he had to do to get new counsel, threaten or headbutt him? He wasn't saying he would do it. It was more of a rhetorical question.
 - The court found the threat to be an election to represent himself, but made appointed counsel stay as stand-by counsel
 - Montes did half the trial pro se, after which he changed his mind and counsel finished it
 - He was convicted of everything, and the court order 90 days for contempt, but released him pending sentencing on the case so he wouldn't get credit
 - The court sentenced him to prison and suspended 43 days of his contempt sentences and gave him credit for 113 days served.
- On Appeal
 - Does a threat to counsel constitute a forfeiture or implied waiver of his right to counsel, even though such a waiver must be made voluntarily, knowingly and intelligently?
 - Should separate acts of contempt in the same hearing be sentenced separately or treated as constituting a single violation?
- Analysis
 - A waiver must be intentional, as well as voluntary, knowing and intelligent.
 - However, a defendant may lose that right by forfeiture or waiver by conduct.
 - Forfeiture results from extremely dilatory or abusive behavior, such as physically assaulting counsel – no warning necessary, but it must be extreme
 - Waiver by conduct or implied waiver combines elements of both true waiver and forfeiture – following a warning, any misconduct may be treated as a waiver
 - Here, none of these occurred
 - He didn't waive – he did the opposite, asking for new counsel and saying he didn't have the ability to represent himself
 - He didn't forfeit, because his conduct wasn't egregious enough
 - He didn't waive by conduct because he wasn't warned
 - Structural error – a limited class of fundamental constitutional errors that defy analysis by harmless error standards
 - Due to nebulous imprecision, “three broad rationales” help identify it:
 - 1) The right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest
 - Here, it's not about the increased likelihood of conviction – it's about the fundamental principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty
 - 2) The effects of the error are too hard (or costly) or impossible to measure
 - 3) The error always results in fundamental unfairness
 - No counsel for indigent defendants or no reasonable doubt instruction
 - **An indicator, but not a necessary component
 - Standing alone, deprivation of the right to counsel is not automatically structural error – only if it's at a critical stage of criminal proceedings
 - Opening statements and examination/cross-examination of witnesses are both critical stages of the proceedings
 - Structural error also requires an objection at trial and being raised on appeal
- Holding

- Because it's not a waiver, actual or implied, as he didn't and no warnings were given, and because his behavior wasn't egregious enough to constitute forfeiture, he was deprived of his right to counsel
- And because it was during opening statements and cross-examination, it was a critical stage of trial, and constituted structural error
- He also challenged separate sentences for separate findings of contempt, but it wasn't preserved, so they decline to consider it

State v. Smith, 2019 UT App 75

- Issue:
 - Question: Does the community caretaker doctrine allow police to “seize” an individual sleeping in a parked car at a McDonald’s parking lot in the middle of the night, despite a lack of reasonable suspicion as to the commission of a crime?
 - Answer: Why yes, yes it does.
- Facts:
 - “In the wee hours of a cold December morning in 2016, several employees of a McDonald's restaurant in West Valley City, Utah noticed that a man—who was later identified as Smith—appeared to be asleep in his car, which was parked in the restaurant's parking lot with the motor running. The restaurant's shift manager (Manager) went out to the parking lot and attempted to wake Smith and tell him that he needed to leave, but Smith did not respond to verbal entreaties. Manager then knocked on the car's window and was finally able to rouse Smith and asked him to leave the premises. Smith then pulled out of the parking spot, drove around the building, and re-parked in the same parking lot. Manager then informed his co-manager that Smith had not left the premises as requested, and one of them notified the police.”
 - Officers arrived, the first of which blocked Smith’s car and shone a spotlight on him. A second and third arrived, parking next to him (2 cars, 3 officers), and they approached the car. They immediately smelled alcohol, did SFSTs and arrested him for DUI. He tested at a .135.
 - Motion to suppress was denied under the community caretaker doctrine
 - After a conditional plea to the DUI, he appealed the denial of his motion to suppress
- Analysis
 - The community caretaker doctrine, established by SCOTUS in *Cady v. Dombrowski*, 413 U.S. 433 (1973) allows investigation into issues of public safety, “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Id.* at 441.
 - In *State v. Anderson*, 2015 UT 90, our Supreme Court articulated a 2-part test:
 - Part 1: “courts must . . . evaluate the degree to which an officer intrudes upon a citizen's freedom of movement and privacy.” *Id.* at ¶ 26.
 - Courts look at the following:
 - The degree of overt authority and force displayed in effecting the seizure
 - Seizing a parked car is less invasive than seizing a moving car, as it lessens interference with the subject’s freedom of movement
 - Not activating lights or drawing weapons are significant factors
 - Probably could have handled this with one officer parked alongside, but this wasn’t so excessive as to render the caretaker doctrine inapplicable
 - The length of the seizure
 - Part 2: “courts must determine whether the degree of the public interest and the exigency of the situation justified the seizure for community caretaking purposes.”

- Courts look at the following:
 - The seriousness of the “perceived emergency”
 - Acting on a call from concerned citizens seems to weigh more in their favor than acting of their own accord
 - The possibility, with the motor running, that he may inadvertently hit the gas and strike another patron, vehicle or structure
 - The likelihood that the motorist may need aid
 - Not as immediate a need as Anderson (vehicle on the side of a rural road with emergency flashers on), but “we cannot say that this situation presented no emergency.”
 - “After evaluating these factors, ‘[i]f the level of the State's interest in investigating whether a motorist needs aid justifies the degree to which an officer interferes with the motorist's freedoms in order to perform this investigation, the seizure is not 'unreasonable' under the Fourth Amendment.’” *Id.* at ¶ 26.
 - Dissent (Pohlman)
 - Agrees this was a seizure with no RS or PC, and that a welfare check of some kind was warranted, but thinks the manner in which the officers performed the check outstripped its justification.
 - Doesn't think SCOTUS intended this to be used broadly
 - Worries about this being totally divorced from a criminal investigation, rather than a pretext to do just that
 - Here, the first officer waited for backup because of suspicion of DUI
 - One officer could have pulled up next to him and knocked on the window – a consensual encounter could have satisfied the necessity of a welfare check, while a seizure was unnecessary to do so
 - Doesn't think it's factually indistinguishable from Anderson
 - Stuck on a rural highway in freezing temperatures is different from sitting in a parking lot of an establishment that's open for business
 - “The idea that the three officers were ‘concerned with Smith's well-being,’ totally apart from the investigation of crime, while perhaps not ‘tax[ing] the credulity of the credulous,’ is still a bit too fanciful for me to accept.” (Quoting *Maryland v. King*, 569 U.S. 435 (2013)).
- NOTE:
 - “The State has not argued, either before the district court or on appeal, that the officers had probable cause (or reasonable suspicion) to detain Smith on account of his refusal to leave the McDonald's parking lot after being asked to do so. Accordingly, we have no occasion to consider that issue.” *Id.* at ¶ 2, n. 1.

State v. Gardner, 2019 UT App 78 (Christiansen Forster)

- Issues:
 - Question 1: At what point does jeopardy attach when a plea is entered?
 - Answer 1: At the entry of plea, not at sentencing
 - Question 2: Does a conviction and sentence in a separate proceeding for the same underlying conduct, all of which occurs after jeopardy attaches, bar sentencing in the present matter by virtue of double jeopardy?
 - Answer 2: No (though it should have barred the other proceeding)
- Facts

- “Witnesses observed Gardner enter a hole in a fence and later exit that hole carrying a wooden floor lamp and a cardboard box of auto parts. He carried the goods to a van and, shortly thereafter, a police officer initiated a traffic stop. A subsequent search of the vehicle uncovered, among other things, “a box of auto parts and a lamp.”
- District Court
 - Gardner was charged with Theft (F3), Burglary (F3) and Criminal Mischief (MB). He pled to the two felonies, in exchange for which the State dismissed the misdemeanor and charges in a separate case. The case was set out for sentencing and a PSR.
- Justice Court
 - After his plea but prior to his sentencing in the district court, Gardner appeared in the South Salt Lake Justice Court on charges of *Theft (MB) and Criminal Mischief (MB).
 - The district court concluded these two sets of charges arose from the same events, so it was accepted as such for purposes of appeal
 - He pled guilty as charged and sentence was imposed, suspending a jail term and imposing \$100 in restitution, which he paid that day.
- Back to District Court
 - Gardner’s counsel realized what had happened and moved to withdraw his plea based on double jeopardy.
 - The State opposed, saying jeopardy had attached when he entered his felony pleas.
 - The District Court denied the motion to withdraw, concluding that his plea was knowing and voluntary, and that jeopardy attached at the entry of plea.
 - Gardner was sentenced to concurrent prison terms on the two felonies.
- Appeal
 - Gardner argues that sentence could not be imposed in the District Court, as the initial attachment of jeopardy is not the critical point; Gardner agrees that jeopardy “attached” when he entered his plea.
 - The pertinent event, according to Gardner, is the “completion” of jeopardy, which he suggests only occurs at sentencing.
 - He asks for relief under both the Federal and State Constitutions
 - He also asks to correct his sentence under Rule 22(e)(1)(c) of Criminal Procedure
 - “The court must correct a sentence when the sentence imposed: ... violates Double Jeopardy.”
- Analysis
 - Other jurisdictions have rejected similar arguments
 - Importantly, this argument would create an absurd result, where it would have precluded Gardner himself from going into the Justice Court and asserting double jeopardy under these very facts, because jeopardy would not yet have been “completed” in the district court.
 - Rule 22(e) doesn’t apply where there’s no violation of double jeopardy.
 - They don’t address State Constitutional claims when no separate analysis is offered.
- Holding
 - “Jeopardy first attached in the district court proceeding, not the subsequent justice court proceeding. Therefore, the prohibition against double jeopardy does not prohibit Gardner's convictions stemming from his guilty plea in district court, nor does double jeopardy bar Gardner's subsequent sentencing on those convictions. Accordingly, the district court did not exceed its discretion when it denied Gardner's motion to withdraw his guilty plea.”
- Note:
 - Potentially, no reason why he can’t go back and challenge his conviction in the Justice Court on the basis of double jeopardy, but because that’s not before the Court, they don’t address is

State v. Lane, 2019 UT App 86 (Judge Appleby)

- Issues:
 - Question 1: What if, in analyzing the admissibility of prior acts under Rule 404(b), the trial court does not specifically address its admissibility under Rule 403?
 - Answer 1: It's reversible error if the appellate court's confidence in the jury verdict is undermined based on a reasonable likelihood of a more favorable result absent the error.
 - AND, if you're really lucky, they won't just send it back for the trial court to do the analysis – they'll do it for you and retroactively deny the motion to admit.
 - Question 2: Is a judge's remark about the danger the Defendant poses to the community while addressing bail and based on the allegations in the case a basis for disqualification?
 - Answer 2: No, so long as it's based on knowledge gained in the course of the case, as opposed to anything extrajudicial.
- Facts:
 - Mr. Lane was a transient individual living in Salt Lake City in 2016 who got into a knife fight with another individual at a homeless shelter. They initially engaged, got broken up by several other people, and engaged again. Witnesses said it was hard to determine who was the first or primary aggressor, and some said both combatants had blades. Victim ended up with 3 lacerations to his face, requiring medical attention. Lane ended up with a cut on his finger. Surveillance confirmed the fact that there was an altercation, but due to the quality of the footage, not much else.
 - At trial, officers testified that these shelters are high crime areas, and violations ranging from “drug crimes” to “pretty serious cases” are not uncommon.
 - The State moved, in advance of trial, to admit 2 similar prior altercations involving Lane:
 - The 2012 Incident:
 - Officers responded to the shelter on reports of a man with a knife and found Lane bleeding from the mouth, looking like he'd been in an altercation
 - A knife was located and claimed by Lane, though no one else was bleeding
 - Lane said a man headbutted him and punched him, in response to which he drew his knife in self-defense
 - Lane subsequently pled guilty to assault
 - The 2015 Incident:
 - A witness observed Lane arguing with a man at the shelter, separating from the man and returning to “slash” the unarmed man across the face
 - She put a shirt on the wound, which was deep and bleeding through the shirt
 - Officers questioned Lane who produced a box cutter and said it was self-defense
 - Lane was subsequently acquitted by a jury
 - The State argued alternative bases for the admissibility of these prior acts:
 - First, “the State argued that ‘the prior bad act evidence will prove [Lane assaulted Victim with unlawful force or violence] by showing that [Lane] knew what he was doing when he assaulted [Victim] with a sharp object, that he had a plan and motive to injure [Victim], and that he was not acting in self-defense.’” *Id.* at ¶ 7.
 - Alternatively, the State argued – pursuant to the Doctrine of Chances – “‘that it is unlikely that [he] would be placed in a situation three times in four years that would require cutting the victims' faces in self-defense.’ The State claimed it was not ‘assert[ing] that [Lane] has a propensity for cutting faces.’” *Id.* at ¶ 8.

- With respect to each argument, the State also asserted the evidence was relevant, offered for a proper, non-character purpose and its probative value was not substantially outweighed by the danger of unfair prejudice.
 - The court granted the State’s motion, admitting both events under the Doctrine of Chances, failing to conclude its analysis by addressing Rule 403.
 - **The trial court did properly articulate the appropriate standard, including Rule 403, but the appellate court felt the trial court “mechanically applying *Verde*’s foundational requirements under rule 404(b)” amounted to an application of “the wrong legal standard” which “amounts to an abuse of discretion.”
 - At trial, Lane was convicted of aggravated assault and possession of a dangerous weapon by a restricted person.
- Appeal
 - Lane argues the trial court improperly admitted the prior acts evidence under Rule 404(b) without also weighing it under Rule 403
 - Lane also argues his counsel was ineffective for failing to move to disqualify the trial judge over comments made while addressing bail
- Analysis
 - The appellate court notes some important considerations in admitting evidence under Rule 404(b), and the Doctrine of Chances in particular:
 - Evidence offered under the Doctrine “must satisfy four foundational requirements” which “include materiality, similarity, independence, and frequency.” *See Verde*.
 - Dual inferences must be addressed, and if “evidence is really aimed at establishing a defendant’s propensity to commit a crime, it should be excluded despite a proffered . . . legitimate purpose.”
 - Even if the proffered, non-character purpose is legitimate, Rule 403 still requires a weighing of these competing interests, and “‘if the evidence may sustain both proper and improper inferences under rule 404(b),’ courts must ‘balance the [inferences] against each other under rule 403, excluding bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose.’”
 - “Merely stating that evidence is not being offered for propensity purposes does not mean the evidence does not present an improper propensity inference.”
 - It’s not highly strange or unlikely that someone living in homeless shelters might have to defend himself multiple times over years of living in this “high crime area”
 - The way it was presented at trial leans more toward propensity than unlikelihood:
 - In opening, the State referenced the 2015 incident, saying he slashed a guy and said it was self-defense, and that he would do it again. “And that is why we are here today for this 2016 case because he did exactly what he said he was going to do. *He did it again.*”
 - Prejudice
 - The appellate court felt the case, standing alone, was fairly weak and ambiguous, greatly increasing the likelihood that the improper prior acts evidence influenced the outcome of the trial
 - There was also a jury instruction that failed to address the issue, including the following language:

- “You may consider this evidence, if at all, for the limited purpose of self-defense. This evidence was not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait.”
 - In addition to some ambiguity on what they should not consider, the instruction also failed to address the proper purpose for which the jury *COULD* consider the evidence, other than to say they could consider it for “the limited purpose of self-defense.”
 - Disqualification
 - Ineffective Assistance Standard:
 - “(1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's performance there is a reasonable probability that the outcome of the trial would have been different.”
 - When the trial court found Lane to be “a danger to society,” it “was not, as Lane argues, making a premature determination of his guilt, but merely engaging in routine and necessary analysis for purposes of determining his pretrial release status.”
 - “The fact that a judge has formed an opinion regarding a particular defendant based on proceedings occurring in front of the judge is not a ground for disqualification.” citing Rule 2.11(A) Utah Code of Judicial Conduct.
 - “[B]ias or prejudice requiring disqualification must usually stem from an extrajudicial source, not from occurrences in the proceedings before the judge.” *Id.* (simplified).
- Holdings
 - Lane was prejudiced by the admission of the inadmissible prior acts evidence – reversed and remanded for new trial
 - Because the trial judge’s statements did not amount to bias requiring disqualification, Lane’s counsel’s performance did not fall below an objective standard of reasonableness
- Concurrence (Judge Harris)
 - In a very long concurrence (almost identical in length to the analysis by the majority), Judge Harris essentially invites someone to brief the issue of whether the Doctrine of Chances could ever be applied to the issue of self-defense
 - Since the Doctrine is entirely based on statistical probability, and self-defense is based on the actor’s conduct, as well as that of someone else, there are too many factors for it to be based on probability
 - He couldn’t quite identify the rare and unlikely event in which Lane was involved
 - 2 Threshold conditions must be met
 - The party seeking admission should be able to identify that “rare misfortune”
 - That same party should be able to clearly articulate the purposes for which the evidence may be used and the purposes for which it cannot
 - He also thought the trial court should have taken evidence on how common fights are at homeless shelters to address the issue of “frequency”
 - Nevertheless, he concurs.

State v. Tirado, 2019 UT App 115 (Christiansen Forster)

- Issues:
 - Question: If an actual conflict of interest exists, must prejudice be shown to determine that trial counsel was ineffective?

- Answer: Nope, not even a little bit
- Facts:
 - Tirado was arrested after a sting in which an informant tried to buy drugs from him and his cousin. Communications were vague and no drugs exchanged hands, but both Tirado and his cousin were arrested and charged with distribution offenses.
 - The same appointed attorney represented both co-defendants. The cousin pled guilty to possession with intent. Tirado went to trial, at which the cousin's incriminating statement was used without a hearsay objection from defense counsel, and the cousin was not called by either side. Tirado was convicted as charged.
 - After the initial briefing on appeal, it was remanded to the trial court to determine "(1) whether Attorney's representation of Cousin resulted in an actual conflict of interest with respect to his representation of Defendant, to which Defendant did not consent, and (2) whether that conflict of interest caused Attorney's representation of Defendant to be constitutionally ineffective."
 - In other words, the appellate court asked the trial court to decide the issue for them
 - After an evidentiary hearing, the trial court found the following:
 - Trial counsel knew they'd been arrested together, and that he represented both
 - Cousin had told trial counsel that he'd be willing to testify for Tirado
 - They were not working together, he didn't have Tirado contact the informant and Tirado was not acting as his agent
 - He would also deny admitting to police that he intended to sell the drugs found on his person – the trial court found this last bit would have been inconsistent with his admissions as part of his plea
 - The trial court concluded that trial counsel had labored under an actual conflict of interest
 - His representation of Tirado was materially limited by his responsibilities to cousin
 - His arranging cousin's plea and admissions undermined Tirado's defense
 - He could not call the cousin without violating his duties to cousin
 - He could not put himself in a position where he would be forced to cross-examine cousin, as he would "inherently encounter[] divided loyalties."
 - It was also prejudicial and not strategic to fail to object to the hearsay
 - The State objected to the trial court ultimately concluding that trial counsel's assistance was ineffective, arguing both that the findings didn't support the conclusion, and that the trial court exceeded the scope of its mandate from the appellate court
- Appeal
 - On an ineffective assistance claim following a 23B hearing, the court defers to the trial court's factual findings, but reviews its legal conclusions for correctness.
 - When looking at a 6th Amendment claim that a conflict of interest caused an attorney to fail to act, the court considers the following:
 - "(1) whether the arguments or actions allegedly omitted would likely have been made by other counsel, and
 - (2) whether there was a tactical reason (other than the asserted conflict) for the omission."
 - **Different than the *Strickland* "no conceivable tactical basis" standard
 - The State argued that Cousin had credibility issues, and associating Tirado with him would have been poor strategy (trial counsel agreed with this)
 - The State also said the admission of cousin's hearsay statement was harmless where his conviction was also admitted, which also contained his admission
- Analysis

- The Court felt other counsel, unhampered by the conflict, would have approached it differently
 - He was already associated with Cousin by the State, and additional association by having Cousin testify would have been outweighed by the potential exculpatory value of cousin's testimony
- Harmlessness doesn't apply, as prejudice is assumed if the defendant demonstrates an actual conflict of interest that adversely affected his lawyer's performance
- Holding
 - Because an unhampered attorney would likely have called cousin and objected to the hearsay, there is an actual conflict of interest, and prejudice is assumed.
 - Reversed and remanded

State v. Perkins, 2019 UT App 117 (Hagan)

- Issues:
 - Question 1: How recent must evidence be to support reasonable suspicion that would justify a detention?
 - Answer: Not immediately recent
 - Question 2: How long of a detention is "unreasonably long?"
 - Longer than 45 minutes
- Facts:
 - Day zero: Concerned citizen reports Perkins' girlfriend for selling and using drugs, specifically saying he witnessed her selling meth to Perkins
 - Officer spends the next few weeks trying to track down girlfriend without success
 - A few weeks later: Girlfriend reports to AP&P, who contacts Officer who meets with girlfriend
 - She says she has nothing in her car, but on the way out to it, admits she does, and they find baggies of meth in her car
 - She also admits to selling and that Perkins is one of her customers
 - She initially says she was Perkins using that morning, but later say it was the week before
 - When asked if there would be drugs at her residence (which she shares with Perkins and his sister), she says only paraphernalia
 - Same day: Officers and a canine accompany Girlfriend to her residence
 - They conduct a search and sniff of the common areas, as outlined in her probation agreement (Girlfriend lives in the basement; Perkins and his sister live upstairs)
 - In Girlfriend's room, they find hard drugs and unprescribed medication
 - In the upstairs bathroom (used by Perkins and his sister), they find more drugs
 - Based on the concerned citizen's statements and Girlfriend's admission that she sold Perkins methamphetamine and recently saw him use it, Officer wants to detain Perkins
 - Another officer was sent to detain Perkins at his workplace
 - 11:44am: The officer finds Perkins in his company's parking lot and detains him
 - Original Officer is notified, and says he'll send the canine unit, which he does as soon as they're done with the sniff at the house
 - While waiting, Perkins is allowed to get some company-owned stuff from his truck and wait inside the office
 - Due to snowy weather and distance, it takes the canine officer ~20 minutes to get there
 - Between 11:44am and 12:20pm: Original Officer starts drafting an affidavit for a warrant for Perkins' body fluids
 - Between 12:20 and 12:30pm: Canine officer arrives and begins the sniff

- Five minutes later: The dog indicates on Perkins' vehicle
 - Original Officer revises the warrant to include a request to search Perkins' truck
 - They decide to wait for the warrant, rather than conduct a warrantless search based on the indication and Perkins' consent
- 12:45pm: Original Officer leaves the residence and goes to Perkins' work
 - Original Officer completed the affidavit in the car while another officer drove
- 1:31pm: Original Officer arrives on scene and submits the affidavit and warrant for review
- Between 1:31pm and 1:59pm: Original Officer realizes the reviewing magistrate is unavailable, and contacts 2 other magistrates in an effort to get the warrant reviewed, neither of which did
 - An assisting agency is able to reach an available magistrate to review the warrant
- 1:59pm: The search warrant is approved and executed
 - A urine sample is collected from Perkins, which tests positive for meth
 - The search of the truck produced no drugs, but did uncover an assault rifle
- Perkins moved to suppress, based on a lack of reasonable suspicion or, alternatively, an excessive duration of his detention
 - The trial court concluded there was reasonable suspicion, and that officers acted with due diligence in pursuing the investigation in a timely manner
- Perkins entered a conditional plea, allowing him to appeal the suppression issue
- Appeal
 - Perkins argues the same 2 things he argued in his motion to suppress
- Analysis
 - Level 2 ("Terry") stop analysis – two-step inquiry:
 - (1) Whether the stop was justified at its inception, and
 - It's justified at its inception when there's reasonable suspicion
 - (2) Whether the resulting investigation was "carried out in a manner reasonably related in scope to the circumstances that justified the interference in the first place."
 - Officers "must diligently pursue a means of investigation that is likely to confirm or dispel their suspicions quickly. If officers unnecessarily prolong the detention and do not act quickly to confirm or dispel their suspicions, the once-lawful detention can become unlawful."
 - Reasonable Suspicion
 - Perkins focuses on the reliability and timeliness of the concerned citizen's tip
 - The court notes there was more recent corroborating information:
 - Girlfriend confirmed consistent sales and recent use (possibly as recently as that morning)
 - During the search, the dog alerted to narcotics in the bathroom Perkins shares with his sister
 - Plenty here for reasonable suspicion and detention
 - Length of Detention
 - The court breaks it down into two distinct periods of detention
 - Reasonable Suspicion Detention (the period between being detained and the canine indicating on his truck)
 - Perkins argues that even if he had reasonable suspicion, it was unreasonably prolonged waiting for the canine to arrive
 - The court looks at the totality of the circumstances and the diligence of the investigation to confirm or dispel suspicions quickly

- Here, where they were investigating both Girlfriend and Perkins, it was reasonable to let the dog finish at the house and then get to Perkins as quickly as distance and weather would allow
 - 36 to 46 minutes, under the circumstances, was not unreasonable
 - Perkins distinguishes cases where they didn't know a dog would be needed, whereas here they did
 - The court says they didn't know how long it would take to find Perkins, and they got the dog there as soon as they could once they did
 - Perkins also argues the officer detaining him was not actively questioning him or otherwise investigating while waiting for the dog
 - The court says there's no reason to think questioning would have confirmed or dispelled suspicions, especially by an officer not privy to the details of the investigation
 - Perkins acknowledges that under vertical collective knowledge, an officer may ask another office to detain an individual without communicating the corpus of information known to the first officer
- Probable Cause Detention (the time between the alert on the truck and the execution of the warrant)
 - Perkins says once the dog alerted, they should have done a warrantless search to confirm or dispel quickly
 - The court says, even with probable cause and a valid warrant exception, the more prudent course of seeking and obtaining a warrant is reasonable
 - Particularly here, where it wasn't unreasonably lengthy (~1:30)
- Holding
 - There was reasonable suspicion to detain for further investigation
 - And "the detention was not unreasonably lengthy, given the simultaneous investigations, the distance between the locations, the road conditions at the time, and the developing information."
 - The court agrees with the trial court that the officers acted with due diligence and obtained a search warrant in a timely manner
 - Affirmed

State v. Granados, 2019 UT App 158 (Pohlman)

- Issues:
 - Issue 1: Sufficiency of the Evidence on Att. Murder and Possession of a Dangerous Weapon by a Restricted Person
 - Question 2: Can a juror be disqualified for repeatedly sleeping without further inquiry?
 - Answer 2: Most assuredly
- Facts:
 - Victim saw maroon Chevy Malibu with single male occupant swerving ahead of him. The car pulled into a turn lane and Victim passed him, noticing as the driver reached up for something that he had tattoos on his arm. After passing, the Malibu fell in behind victim and started following him closely and aggressively, at which point victim could see that the driver was Hispanic. Victim headed for the home of a USP Trooper he knew, but the Malibu pulled up next to him and the driver pulled a gun. Victim slammed on the brakes, backed up and turned down another road, trying to lose the Malibu, but it turned and followed, and Victim called 911.

- The Malibu then hit Victim's vehicle, causing him to skid out onto the lawn of a townhome. The driver of the Malibu then opened fire on Victim's car, firing 10 rounds, one of which grazed Victim's neck. The Malibu then sped away.
- Several witnesses saw various things:
 - Witness 1 heard shots, ran outside, and saw a red car and heard 4 or 5 more shots. The red car then did a u-turn and drove right past her. She saw that the car was crushed in on one side, had a white license plate and a baby on board triangle in the back window.
 - Witness 2 was driving, saw a maroon car hit Victim's car, then pull a gun and shoot at Victim's car, noting the driver of the car was its only occupant.
 - Witness 3 was also driving, saw a red car with damage and another car up on the grass with the passenger side caved in. She drove slowly past, making eye contact with the driver of the red car, and describing his face as round, really dark eyes and hair and a mustache. She then saw the driver raise a gun and start shooting at Victim's car, saying he just kept firing before flipping a "u-ey" in her direction, veer around her and run a red light. She saw a piece of his car fly off in the intersection (a headlight was later recovered) and she followed him while calling 911. She saw him stop on a side street and get out to pick up his front bumper, which had fallen off, and put it in the car.
- The shooting occurred at 4:13pm, and Granados was apprehended at 6:55pm
- The previous day, officers had already been looking for Granados and the Malibu, as it belonged to his girlfriend, who said he'd taken it without her permission
 - That same day (the day before the shooting), an officer saw the vehicle, pulled up next to it, and identified Granados as the driver and sole occupant – he tried to stop Granados, who fled, and the officer broke off the pursuit
- The day of the shooting, an officer saw the vehicle at 6:15pm, noting damage and that Granados was the sole occupant
 - Other officers got involved, creating containment and following Granados on a chase, reaching speeds of 95mph.
 - Granados eventually abandoned the vehicle, fleeing on foot, before being arrested
- The following physical evidence was collected and presented a trial:
 - The Malibu he'd abandoned had a baby on board sticker and significant damage, including a missing bumper (found in the back seat) and a missing headlight
 - Inside the car, officers also found shards of glass, two live rounds and ten spent .40 caliber shell casings
 - At the scene, officers identified ten markings and holes consistent with fired rounds (8 in the victim's car, one on the sidewalk and one on the adjacent townhome), recovering five .40 caliber slugs and glass consistent with the shards in the Malibu
 - The bullets and casings found in the car were tested for DNA, and Granados was the major contributor
 - Witness 3 did not identify Granados in a photo lineup but said the person she did identify "resembled" the driver, but that she was not positive. The photo matched the description she'd given police, as does Granados.
- At trial, after the State's case-in-chief, Granados moved for a directed verdict, which the court denied.
- Also at trial, the court excused the jury on day two and told the parties he'd seen juror 16 fall asleep multiple times during the presentation of the evidence, initially just bringing it to the attention of the parties, but after a break, let them know he'd thought about it and consulted with his staff, and he was disqualifying and excusing her.

- Defense counsel objected, saying he hadn't seen her fall asleep and that it was not during crucial portions of the testimony – adding that the defense had “strategically selected her”
 - Counsel requested that she be questioned about what she'd missed before excusing her
 - The Court declined, saying he and his staff had seen her asleep multiple times, and nothing she could say in response to questions would change that
 - Granados was convicted of all charges
- Appeal
 - Granados challenges the sufficiency of the evidence related to attempted murder, criminal mischief and possession of a dangerous weapon by a restricted person (not challenging convictions related to the subsequent chase)
 - He also argues that the trial court exceeded its discretion in releasing the sleepy juror without questioning her, in violation of Rule 17(g) of Criminal Procedure
 - Sufficiency:
 - This gets substantial deference to the jury, with evidence and all inferences which may be reasonably drawn to be viewed in the light most favorable to the verdict
 - The evidence must be “sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he or she was convicted.”
 - Granados challenges identity, acknowledging it can be proven by circumstantial evidence
 - Circumstantial convictions are reviewed for “any evidence” from which reasonable inferences of guilt can be drawn – inferences based on logic and reasonable human experience
 - “an inference is reasonable ‘unless it falls to a level of inconsistency or incredibility that no reasonable jury could accept.’”
 - Granados points to several alternative inferences that can be drawn from the evidence
 - The court doesn't second-guess the inferences of the jury – only determines whether their inferences are sustainable
 - They look at all the evidence, taken cumulatively, rather than a certain piece or certain pieces in isolation (a mosaic of circumstantial considered as a whole – MacNeill)
 - Sleeping Juror
 - Rule 17(g): “If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror.”
 - There is good precedent for excusing a sleeping juror, both in and out of Utah
 - Granados argues the court couldn't determine if she was sleeping to the point of disqualification from service without first questioning her
 - The court says there is no hard-and-fast rule about how to deal with these situations, and courts have considerable discretion
 - In a much longer analysis than the issue deserved, the court said the trial court took breaks specifically because of her and he and his staff observed her sleeping several times – they didn't need more information
 - No violation of Rule 17(g)
- Holdings
 - There was sufficient evidence to support the conviction, viewing the evidence in its totality and making all inferences in favor of the verdict
 - The court did not violate Rule 17(g) by excusing a sleeping juror without further inquiry
 - Affirmed

State v. Bonds, 2019 UT App 156 (Judge Harris)

- Issues:
 - Issue 1: No Due Process violation in denying motion to suppress where officers deprived defendant of sleep and misrepresented the evidence – confession still voluntary
 - Issue 2: Ineffective assistance where counsel failed to object to inconsistent jury instructions on affirmative defense of imperfect self-defense, and to introduction of evidence of defendant's silence while being arrested
- Facts:
 - 4 Major Players: Bonds, His (“Wife”), His friend (“Victim”) and Victim’s (“Girlfriend”)
 - Bonds and Victim were good buddies. Victim stayed with Bonds for a short time before this when Girlfriend kicked him out. One night, Bonds and Wife dropped off the kids at Grandma’s, and went out for drinks with Victim and Girlfriend.
 - They first drank at Girlfriend’s apartment, then smoked some marijuana at Bonds’s apartment, before going to a SL City bar. On the way, they continued to drink in the car. At the bar, Bonds confronted a guy who had allegedly sexually assaulted Wife previously, and she was still mad he hadn’t done anything about it sooner. Victim and Girlfriend were arguing about some cocaine she had lost. The girls wanted to leave, but Victim said Girlfriend was too drunk/high to drive. The four left together with Girlfriend driving, but after continued argument about her intoxication, she pulled over and Victim drove. Bonds talked about going back to the bar and getting the guy before shooting the place up.
 - Back at Bond’s apartment, Bonds went in and got a gun, saying he was going to return to the bar. Victim said he’d go with him to have his back. Girlfriend told Victim if he went back, they were through. The girls went inside to have another drink.
 - Shortly thereafter, at around 2am, the girls heard a gunshot, followed by a ten-second pause and then 2 or 3 more shots. A few minutes later, Bonds came to the door and said he’d shot Victim, nothing more, and then left again. The girls ran out and found Victim bleeding on the ground a few buildings over in the complex. He was conscious and asked where Bonds was, saying “I can’t believe he did this.” He was taken to the hospital where he died at 2:50am of a gunshot wound to the back and another in one arm just below the elbow crease. Toxicology showed him at a .141 and positive for THC.
 - Bonds called a buddy, saying he’d shot Victim, and asking for a ride. His buddy said he seemed drunk and high, and declined. Police found Bonds at a convenience store at 2:17am and transported him to the station for an interview. Bonds sat in an interview room from 2:20 to 5:55, with officers occasionally checking on him, while they interviewed Wife and Girlfriend. They let him sleep on a couch for about an hour, and then interviewed him at about 7am.
 - Officers observed no signs of intoxication or mental illness (Bonds had been previously diagnosed with Bipolar Disorder) during the interview. Bonds initially denied any involvement, saying he didn’t do anything, and that he heard gunshots, but that he wasn’t around when they happened. When officer pushed back, he said he didn’t have access to a gun at all. Officers then began to mix truth with embellishment with respect to what witnesses had seen and told them, including eyewitnesses to the shooting itself. Bonds then questioned how that could be “when me and [Victim] was outside by our self.”
 - Officers then changed their strategy, employing good cop bad cop, saying he may have made a mistake, he may have been protecting his children, asking what God would want him to do, and saying his wife and children wanted him to do the right thing, and would respect him for manning up and doing so. Bonds then asked what he was facing, and officers (knowing Victim

had already passed) said Victim was at the hospital, so they weren't sure. Bonds then said they were the coolest Detectives he'd ever met, and that his mother had been a Sheriff's Deputy. They asked what his mother would want him to do, at which point he said he doesn't know where the gun is, but he did shoot Victim. He said he "shot three shots," and that it occurred between his apartment and his mother-in-law's apartment.

- Bonds said he'd given the gun to his mother-in-law (which she later denied), and that he'd scuffled with Victim over the gun, which fell to the ground and discharged. Bonds then picked it up and shot Victim, because Victim had "said some crazy shit" about shooting the house and Bond's kids, putting Bond in a rage and causing him to shoot in defense of his family.
- Charges
 - Bonds was charged with murder, several counts of discharge of a firearm and possession of a firearm by a restricted person. Bonds moved to suppress his confession based on coercion, but the trial court denied his motion.
- Jury Instruction
 - The State bears the burden to prove, beyond a reasonable doubt, that self-defense and/or imperfect self-defense does not apply. The individual instructions for both defenses correctly stated that principle. However, the elements instructions for the lesser-included offense of manslaughter read as follows:
 - ***
 - 1. Christopher Bonds;
 - 2. Commits murder (see instruction no. 30)
 - 3. But is found to having [sic] acted in accordance with an imperfect self defense (See instruction no. 51)
 - ***
- Trial
 - Bonds acknowledged (through counsel, as he did not testify) having shot Victim, but claimed to have done so in defense of himself and/or his family. Girlfriend and officers testified, and the video of Bonds's interview was shown.
 - In closing, the State emphasized Bonds's silence when he was arrested, noting that he "said nothing ... about defending himself and others" to arresting officers, saying common sense would dictate that someone in that position would say something about self-defense when he was arrested.
 - Bonds was convicted of murder and all but one of the firearm charges. The issue of possession of a firearm by a restricted person was bifurcated, and the court later found him guilty of that offense. The trial court also later merged the discharge offenses with the murder.
- Appeal
 - Bonds argues, under the Due Process Clauses of both the Fifth and Fourteenth Amendments, that his confession was coerced and should have been suppressed.
 - "[T]he overarching question that courts must answer is 'whether, considering the totality of the circumstances, the free will of the witness was overborne.'"
 - The analysis is one of totality of the circumstances.
 - "[E]ven in cases where 'no one single issue or specific circumstance is egregious enough by itself to qualify as coercive,' 'coercion may still result from the cumulative effect of many relatively minor issues.'"
 - The courts look at 2 factors
 - The characteristics of the accused
 - Subjective factors making the defendant susceptible to subtle forms of psychological persuasion, including the suspect's mental health, mental

deficiency, emotional instability, education, age and familiarity with the judicial system

- The details of the interrogation
 - Objective factors, such as the duration of the interrogation, persistence of the officers, police trickery, absence of family/counsel and promises made by the officers
- Finally, there must be causal relationship between the coercion and the confession
- Analysis (Coercion)
 - Objective Factors
 - Threats/Promises – greater or lesser punishment depending on confession
 - They told him he would see his son and that they would put in their reports that he was cooperative
 - The Court: There was no inherent promise or threat that could have overcome his free will
 - False Friend Technique – acting in his best interest (not sufficiently coercive to stand alone, but creates an environment where trust makes other tactics more coercive)
 - They called him “bud” and “friend,” and said they wanted to be fair and let him tell his side of the story
 - The Court: They empathize, but they never claim to be acting in his best interest
 - He never appears to believe they were trying to protect his interests
 - He never goes along with their version of events
 - Misrepresentation of Evidence
 - They said witnesses had seen him outside with the gun, and they claimed not to know the status of Victim
 - The Court: There were misrepresentations, but they were not sufficiently egregious to overcome Bonds’s free will
 - The Court relies on *Rettenberger* and *Werner*
 - *Rettenberger*: 36 false statements, 18yo suspect w/maturity of 15yo and low IQ, and not just half-truths, outright lies - INVOLUNTARY
 - *Werner*: statements that there was “overwhelming evidence against him” and putting a video tape labeled “Mall Security of [Suspect] in the Parking Lot” on the table – VOLUNTARY
 - Here, far less egregious than *Rettenberger* and somewhat less than *Werner*
 - Half-truths and omissions rather than outright fabrications
 - Perhaps short of exemplary police behavior, but not overbearing
 - Extended Periods of Incommunicado Interrogation
 - Five hours of isolation (including a 1-hour nap)
 - The Court: Even 5-to-6-hour interrogations are not in and of themselves coercive
 - No issue with them wanting to talk to Wife and Girlfriend first
 - Appeals to Morality, Family and Religion
 - Talking about his wife and kids, his religion and his mother
 - The Court: Such appeals are usually non-coercive
 - Subjective Factors
 - Intoxication
 - Bonds described himself as “intoxicated” at the end of the interview
 - Officers said he displayed no signs of being so

- The Court: Insufficient evidence that he was too intoxicated to give voluntary responses
 - Exhaustion
 - He'd basically been up all night, and was in no condition to speak to officers
 - The Court: We're sure he was tired, but he appeared fully awake and alert, and cogently responded to questions
 - Mental Illness
 - Bonds had been previously diagnosed with Bipolar Disorder
 - The Court: No signs, and he hadn't taken medication for a year – not sufficiently severe to be exploitable
- Analysis (Ineffective Assistance of Counsel)
 - Bonds makes 2 claims:
 - Failure to correct or object to the elements instruction
 - Failure to object to the statements about his silence made during closing
 - 2-Part Showing
 - Deficient Performance
 - “[A] ‘defendant must overcome the strong presumption that his trial counsel rendered adequate assistance, by persuading the court that there was no conceivable tactical basis for counsel's actions.’”
 - “[O]nly when no reasonable attorney would pursue the chosen strategy will we determine that counsel has been constitutionally ineffective.”
 - Imperfect Self-Defense – “the defendant caused the death of another . . . under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.”
 - Different from Perfect Self-Defense in 2 Ways:
 - Partial defense – results in a reduction of the conviction (Perfect self-defense is a complete defense, resulting in acquittal)
 - Applicable when there is a Mistake of Law (Perfect self-defense applies when there is a reasonable mistake of fact)
 - I.e., one who is entitled to defend himself, but not to use deadly force, would have an imperfect self-defense
 - The burden is on the State to prove BARD it doesn't apply
 - “The State, with somewhat surprising vigor, attempts to defend this set of jury instructions, pointing out that both Instructions No. 48 and No. 51 correctly allocated the burden of proof, and noting that Instruction No. 35—the troublesome one—contained an explicit cross-reference directing the jury to Instruction No. 51, and concluding that ‘the instructions read together accurately stated the law.’”
 - “We might lend the State's argument more credence, had we not rejected nearly-identical arguments three times in recent years.”
 - I disagree, where the instructions in all of those other cases were directly contradictory, whereas this instruction just failed to explicitly state the burden in the elements, albeit making reference to the other instructions that do correctly state the burden
 - The cross-reference to the other instruction (absent in those other cases), is a “relatively minor factual difference” that leaves the

court unconvinced as to the inapplicability of those cases to these facts.

- Absent an argument from the State that there could have been a strategic reason for not objecting, the Court can't think of one, and concludes counsel's performance was deficient
- Defendant's Silence
 - Arresting officers testified, and the State argued, that Bonds did not claim self-defense to them when he was arrested
 - The State acknowledges an objection would have been granted, but suggests a possible strategic reason for not doing so
 - Where he'd had 2 other conversations in which he didn't say anything about self-defense (Wife/Girlfriend and Buddy who didn't pick him up), the State contends counsel may have wanted to address the issue through the officer's testimony
 - The Court: Unconvinced by the State's suggested strategy
 - He had a lot more reason to say something about self-defense to the officers than in the other two brief conversations
 - It's easier to explain failing to mention it twice than three times
 - It could have been "addressed" through Girlfriend's testimony or Buddy's testimony just as easily
 - There is no strategic reason for having failed to object
 - Deficient Performance
- Prejudice – But for the errors, the result of the proceeding would have been different
 - The standard is a "reasonable probability," which is less exacting than a "more likely than not" standard
 - There's a reasonable probability when the court's confidence is undermined
 - 2 instances of deficient performance, but the analysis is cumulative
 - The State argues no prejudice, where the evidence was overwhelming, and the facts do not support any claim of self-defense, imperfect or otherwise
 - The Court: "While the evidence supporting Bonds's self-defense claim is hardly crystal clear, in our judgment there is sufficient evidence of self-defense to cause us significant unease about the role counsel's decisions might have played in the outcome of the trial."
 - Bond said Victim threatened his family and he wrestled with him over the gun, which might give rise to defense of a third person
 - The State says he already had control of the gun when he shot Victim (in the back), and that there's no evidence Victim was headed toward any particular place
 - "But the State overstates it."
 - The evidence is unclear on which direction he was going, but the State acknowledged in closing that Victim ran in the direction of Mother-in-law's apartment
 - The State also argues Victim no longer had a gun, so he couldn't shoot the kids or anyone else
 - "[E]ven a person without a gun is capable of visiting great harm upon children."

- This is where the imperfect self-defense comes into play, where he was unjustified in using the level of force he did, or in addressing a non-immediate threat with immediate force, though he was not legally justified in doing so
- A reasonable probability of a different outcome exists – Prejudice
- Holdings
 - The confession was not coerced, so the trial court did not err in refusing to suppress it
 - Bonds received ineffective assistance of counsel – Remanded for new trial

State v. Fredrick, 2019 UT App 152 (Harris)

- Issues:
 - Question 1: Is a person who voluntarily drove himself to the police station, was never handcuffed or restrained and was told that he was not under arrest in custody for purposes of *Miranda*?
 - Answer 1: No, no he isn't
 - Question 2: May propensity evidence, introduced under Rule 404(c) be used for propensity?
 - Answer 2: As a matter of fact, it can
- Facts:
 - Fredrick and his wife provided daycare services for their neighbor's daughter (Victim) for eight years, beginning when she was one. Before school, Victim's parents would drop her off in the morning and pick her up in the evening. Once she was in school, her mother would drop her at school, and Fredrick would pick her up. Victim's parents would still pick her up in the evening. Gradually, Fredrick became the primary caregiver when Victim was at his home, and she thought of him as a second father, calling him "Daddy Blane."
 - One evening, Victim disclosed to her mother that "Daddy Blane has touched my in my privates." Her mother asked her to show her on a doll, which she did, saying it happened quite often, and her mother called CPS and arranged for an interview at the CJC. Essentially, when they watched cartoons alone in the basement, he could put her on his lap, put his hand down her pants and "play around with [her] private spot" with his eyes closed. This had gone on every 2 to 3 weeks since she was around seven.
 - A detective went to Fredrick's house, said he need to talk to him about an "important issue" and asked him to come to the police station. Fredrick agreed to do so and drove in his own vehicle.
 - At the station, he was taken to a room with a table and 2 chairs, one of which Fredrick chose and sat it. Detective then came in sat in the other chair (which happened to be closer to the door), closing (but not locking) the door behind him. Detective was in a polo shirt and dark pants with no visible weapon.
 - The detective said Fredrick was "not under arrest" and gave a partial Miranda warning. Fredrick said he "wish[ed] to waive" his rights and speak with the detective. When asked about Victim, Fredrick initially denied anything inappropriate, but gradually admitted to contact, saying tickling escalated into touching the top of her underwear and eventually going "under her panties and touch[ing] her vagina." Fredrick was adamant, however, that this only happened once.
 - At the conclusion of the interview, Fredrick was placed under arrest.
- Prosecution
 - Prior to trial, the State became aware of communications between Fredrick and another individual related to prior acts of child molestation and their shared sexual interest in children
 - The State filed notice of intent to introduce this evidence at trial
 - Fredrick filed motions to exclude 3 things:
 - The CJC interview, arguing it was unreliable under Rule 15.5 of Criminal Procedure
 - The trial court denied this motion, allowing the interview

- His interview, arguing custodial interrogation without proper Miranda
 - The trial court also denied this motion, concluding Fredrick was not in custody
 - The electronic evidence of his communications under Rule 403 of Evidence
 - The trial court excluded 6 pieces of evidence and allowed 14 others
 - The State introduced the following at trial:
 - The CJC interview (despite the fact that Victim had turned 14 a few weeks prior to trial)
 - 7 of the 14 pieces of electronic evidence (at least one of which was solely admissible under Rule 404(c) – the remainder were ruled to be admissible, at least in part, under Rule 404(b)(2)).
 - Fredrick was convicted of both charged counts of Aggravated Sexual Abuse of a Child
 - Fredrick filed a motion to arrest judgment and for a new trial, arguing the CJC shouldn't have been shown since Victim was not under 14 at the time of trial – the trial court denied the motion
- Appeal
 - The CJC Interview – Fredrick makes 2 arguments as to its inadmissibility
 - Victim's Age
 - The Court punts on this, as an unpreserved issue
 - Rule 15.5(a)(8)
 - There is no record of the trial court's oral ruling as to the CJC interview comporting with Rule 15.5, so the appellate court assumes regularity in the proceedings below
 - The party seeking the court's review must provide an adequate record, and missing portions are presumed to support the action of the trial court
 - Other places in the record, the parties make reference to the court's ruling, stating that it concluded the interview was trustworthy and reliable
 - Where Fredrick argues the ruling didn't support those two conclusions with specific findings, but provides no record to support that, the court presumes regularity and declines to address the argument
 - Fredrick's Interview
 - Fredrick argues he was in custody – 2-part test
 - Whether a reasonable person would have felt at liberty to terminate the interrogation and leave (objective standard)
 - Relevant factors: location, duration, statements made, presence/absence of physical restraints, release at the end, who transported, requirement of a certain time, threats of arrest, focus of questioning and requested breaks
 - Factors weighing both ways
 - Not free to leave
 - Police station, small interview room, chair farthest from door, 2 hours, focused on him, attempt at Miranda (suggesting the officer thought it was necessary), never told he was free to leave, arrested at the conclusion
 - Free to leave
 - Voluntarily drove himself, retained possession of his phone/wallet/keys, he chose the seat farthest from the door, which was never locked, no handcuffs or restraints, being told he was not under arrest and could stop answering questions at any time, no uniform or weapon and a respectful, accommodating tone throughout

- The advisory committee notes to Rule 404 say a trial court should consider, among other things, *Shickles*. “That is simply not presently the law. I would hope our trial courts would ignore this misdirection.”

State v. Riddle, 2019 UT App 150 (Christiansen Foster)

- Issue:
 - Question: Does a business relationship between a prosecutor (not the one prosecuting the case, but someone in his or her office) and a juror, with no evidence of actual bias, constitute a sufficient basis to set aside a verdict?
 - Answer: Not even close
- Facts:
 - At trial, Riddle was convicted of four counts of distribution of a controlled substance. Three days later, his trial counsel had lunch with the local County Attorney, one of whose deputies prosecuted Riddle. During lunch, a man trial counsel recognized as one of the jurors from Riddle’s trial approached the County Attorney to discuss some paperwork. Counsel asked, and the County Attorney responded that the juror was his personal accountant, and the paperwork had been his tax return. During voir dire, the potential jurors had never been asked about any type of relationship with other individuals from the County Attorney’s Office outside the Deputy prosecuting the case.
 - Shortly thereafter, Riddle moved the trial court to set aside the jury’s verdict and grant a new trial. Riddle acknowledged there was no evidence the juror was actually biased, relying solely on the implicit impropriety of the business relationship between the juror and the County Attorney. The trial court denied his motion.
- Appeal
 - “Riddle urges us to hold that the very existence of an undisclosed professional relationship between [the County Attorney] and the juror created an appearance of impropriety that required a new trial. While he asserts that this is a matter of first impression, our case law is clear that a jury verdict need not be reversed on grounds of juror partiality when there is no evidence of bias on the part of the juror.”
 - After analysis of Rule 24 of Criminal Procedure, which allows a trial court to “grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party,” as well as reference to the Due Process Clause of the Fourteenth Amendment, which guarantees each defendant the fundamental right of a fair trial, the Court explains that “due process does not require a new trial every time a juror has been placed in a potentially compromising situation.”
 - Rather, “a new trial under rule 24 is appropriate only where the alleged “error or impropriety . . . had a substantial adverse effect upon the rights of a party. Thus, to obtain a new trial on grounds of juror partiality, the defendant must ‘prove actual bias’ on the part of the juror.”
 - Riddle relies on the principle of “implied bias,” the continued validity of which the appellate court questions in light of the “actual bias” standard adopted by SCOTUS in *Smith v. Phillips*, 455 U.S. 209 (1982). However, the court assumes, without deciding, implied bias still exists.
 - Even under implied bias, the court can find no evidence that bias could be implied based on the relationship at issue here. Implied bias applies only to “extreme situations,” such as employees of the prosecuting agency, close family members or interested parties to the case.
 - The trial court specifically found that, had it been aware of the relationship during voir dire, it would not have stricken the potential juror for cause on that basis.

- Where the relationship itself does not in itself call into question a juror’s ability to be impartial, much less such a relationship with a non-participant in the case, the court is unpersuaded that “a mere possibility of bias is []sufficient to demonstrate implied bias, let alone actual bias.”
- In reviewing for harmlessness, where Riddle is asking that prejudice be presumed, the court is unwilling to do so, finding no error in the trial court’s denial of Riddle’s motion.
- Holding
 - With no evidence to support implied or actual bias, Riddle has failed to show a denial of his right to a fair trial based on juror partiality.
 - Affirmed.

State v. Thomas, 2019 UT App 177 (Pohlman)

- Issues:
 - Issue 1: Inclusion of case law interpretation into an elements instruction when it is a correct statement of the law
 - Issue 2: Inclusion of statutory provisions in jury instructions that ultimately end up being superfluous
- Facts:
 - Mom, Dad and Son were playing soccer in a park when Thomas began yelling at Mom from approximately twenty yards away, asking if she wanted to “touch” or “see” his “dick.” Son was right next to Mom when this offer was made. The family began walking to the car as Thomas continued to yell at them. Mom looked back to see if they were being followed, which is when she saw that Thomas has pulled his pants down “below his pelvic region” such that “everything was exposed.” Mom was more focused on making sure her son didn’t see than making note of the specific details, but she was “absolutely sure” she saw Thomas’s penis, and confident her son did not.
 - In the car, the family called the police, and Mom kept an eye on Thomas, pointing him out to officers when they arrived. Officers smelled alcohol on Thomas, and noted signs and symptoms of intoxication, including aggressive behavior, yelling and screaming.
 - Thomas was charged with lewdness (with priors), lewdness involving a child and intoxication. Prior to trial, Thomas stipulated to the elements instructions for both lewdness charges proposed by the State. Each instruction included, in addition to the specifically enumerated acts prohibited by the statutes, the statutory catchall element of “any other act of lewdness.”
 - At trial, the trial court suggested the removal of language pertaining to female body parts, to which the parties stipulated. No one suggested removal of any other potentially superfluous or irrelevant language.
 - The State proposed an additional instruction, to which Thomas did not object, defining the catchall provision as including “acts of the same general kind, class, character, or nature as the enumerated conduct of public intercourse, sodomy, exposure of the genitals or buttocks, or masturbation.”
 - Thomas proposed two additional definitional instructions for lewdness:
 - The Sexual Nature Instruction: explaining that “lewdness involves conduct of a sexual, lascivious nature and an irregular indulgence of lust”
 - The Strange Conduct Instruction: clarifying that “conduct may be strange and socially inappropriate without the conduct being lewd.”
 - After discussion, the trial court combined the Sexual Nature Instruction with the State’s catchall definition and declined to give the Strange Conduct Instruction, indicating that while accurate, it would be addressed in an argument that the State failed to meet its burden.

- The State also proposed an instruction defining “in the presence of a child” as meaning that “a child need only be in the same place as a person committing a lewd act,” based on language from *Salt Lake City v. Howe*, 2016 UT App 219. Thomas argued that *State v. Bagnes*, 2014 UT 4 was more directly on point, requiring “some sort of visual contact or a showing of that particular part of the body.” The trial court agreed with the State that *Howe* was more on point, and that the State’s proposed instruction was pulled directly from the language of that case.
- At the end of a one-day jury trial, Thomas was convicted on all counts.
- Appeal:
 - Thomas argues the Presence Instruction was given in error, and that the Catchall provision should have been more narrowly defined.
 - Alternatively, Thomas suggests the trial court should have *sua sponte* excised the Catchall provision in its entirety from the elements instructions for both lewdness offenses.
- Analysis:
 - The Presence Instruction
 - Thomas argues that *Howe* was a sufficiency of the evidence case, not a jury instruction case, and that *State v. Walker*, 2017 UT App 2 instructs that cases “holding that the evidence is minimally sufficient” do “not hold—or even address—whether juries in subsequent cases should be instructed using the language the court used to reject a sufficiency argument.”
 - The State argues the Presence Instruction was simply a statement of the law, and that *State v. Lambdin*, 2017 UT 46 controls, stating “there is no error when a district court includes [an appellate court's] interpretation of a statutory term in instructions for the jury, because that interpretation is simply a statement of the law.”
 - The Court agrees with the State.
 - Trial courts are charged with instructing the jury in the law, limited to questions of law, careful “not to step into the jury’s fact-finding shoes” by “giving instructions that ultimately invade the jury's role by effectively "removing an element of an offense from the jury's consideration.”
 - Trial courts must be careful not to use “factually based sufficiency conclusions as jury instructions—[] distinguishable from circumstances when a district court instructs a jury using an appellate court's purely legal interpretation of a statute.”
 - This proper legal analysis occurs independent of the facts of any particular case and creates no new law – rather, it clarifies what the existing law is.
 - Including an appellate court’s interpretation of a statutory term is appropriate. Such interpretation can be a threshold matter addressed in a sufficiency case.
 - Thus, *Lambdin* is on point, as the “Presence” language in *Howe* was addressing just such a threshold issue
 - Here, it was a correct statement of the law, as interpreted in *Howe*, so there was no error in the instruction
 - The Court also addresses several other throwaway arguments about the instructions, but rejects each in turn (I won’t bore me with too much detail)
 - They think this definition was rejected in *Bagnes*, but it wasn’t
 - They think it’s broader than *Howe*, but it isn’t – it’s almost word for word
 - They think it’s broader than the same definition in violent offenses under UCA 76-3-203.10, but that’s a different statute, and the Legislature didn’t adopt that definition presumably on purpose
 - The Catchall Instruction

- Thomas says the court should have narrowed the definition of the Catchall provision. Instead, the court gave a definition (a combination of the State’s proposed instruction and the Sexual Nature Instruction) of lewdness, generally, not specifying its application or not to the Catchall provision
 - The instruction given included the word “includes,” failing to make clear that it’s a limiting instruction
 - Also, it didn’t specify that it applies to the Catchall provision
- The State says it was not error, but even if it was, it was not prejudicial
- The Court assumes, without concluding, that the instruction was erroneous but finds no prejudice, as there was no reasonable probability the error affected the final outcome
 - Thomas says he might have been convicted under the Catchall, because the evidence of his statement was stronger than that of his exposure
 - The State says the evidence of the exposure was overwhelming and unequivocal
 - Also, the prosecution focused at trial on the exposure variant of the lewdness offenses, not the Catchall
 - All arguments were about the exposure – the only mention of the remark was to show that the exposure was sexual in nature
 - Defense counsel even acknowledged the exposure, arguing it wasn’t sexual, but was just because his client was “just being a knucklehead because he was drunk.”
- With no reasonable likelihood of a different result with a narrower instruction, Thomas’s argument is rejected
- Inclusion of the Catchall Provision
 - Thomas says this shouldn’t have been included, and because it wasn’t preserved, he must argue it under plain error
 - This requires a showing that the law on the issue was clear, or plainly settled, at the time of the alleged error
 - The Court says he has failed to “establish[] the proposition that a variant not relied on must be excised from the jury instructions and that a district court errs if it fails to do so.”
 - Neither has he shown any settled law on excising this particular provision
 - “Thomas has not demonstrated that the court plainly erred by failing to sua sponte excise the Catchall Variant.”
 - The Court notes that it might have been more prudent to have removed the Catchall provision, along with the female body parts language, but failure to do so *sua sponte* was not plain error.
- Holding
 - Having failed to show any error on the part of the trial court with respect to the jury instructions, Thomas’s convictions are affirmed.

State v. Sabbagh, 2019 UT App 179 (Harris)

- Issue:
 - Question: What is the appropriate restitution if the wholesale price paid by the retailer is higher than the retail price for which the item was offered for sale?
 - Answer: The victim always gets hosed in restitution
- Facts:
 - “In June 2017, the bookstore at Weber State University (the Store) was running a screaming deal on sets of wireless headphones: although the Store had paid a wholesale price of \$299 for the headphones, it marked them for sale for just \$175. But this deal—as good as it was—was not

good enough for Bashar Sabbagh, who elected to walk into the Store and steal four sets of the headphones. After being caught and prosecuted for retail theft, Sabbagh pled guilty, and the district court imposed a sentence that included a requirement that Sabbagh pay restitution to the Store.”

- At a restitution hearing, the State argued for the wholesale price, which is what it would have cost the store to replace the items. Sabbagh argued for retail as the fair market value of the item. The District court agreed with the State, ordering the wholesale restitution amount.
- Appeal:
 - Same arguments
 - A court will not “disturb a [district] court's restitution order unless it exceeds that prescribed by law or the [district] court otherwise abused its discretion.”
 - Generally, restitution represents “pecuniary damages” and is measured by “fair market value,” which is defined as “what the owner of the property could expect to receive, and the amount a willing buyer would pay to the true owner for the stolen item.”
 - “Nevertheless, the measure of damages is flexible, allowing [district] courts to fashion an equitable award to the victim. In calculating restitution, a court should consider all relevant facts, including the cost of the damage or loss, and the income lost by the victim as a result of the offense.”
 - “Almost always, a retailer offers an item for sale at a price higher than the wholesale price the retailer paid to obtain the item. We have already held that, in retail theft cases arising out of this typical scenario, the proper measure of a victim's lost pecuniary damages is the wholesale replacement cost of the stolen item.”
 - The Court also expressed a wariness “of the possibility that restitution would be improperly used to grant a windfall to the victim.”
 - The Court sees this as a unique situation, where the retail price is lower than the wholesale price.
 - Sabbagh suggests the retail price represents a ceiling, but not necessarily a floor, on pecuniary damages.
 - The State argues a concept of “Loss leader,” by which the retailer offers a low-priced item to entice buyers into the store, in hopes that they will buy other items. This tangential potential for profit is what the State argues the victim retailer has lost here.
 - The Court says this may be a sound strategy, and it may pay dividends at times, but the State has offered no evidence of what that actual loss might be, or if it can be quantified.
 - “To the extent possible, the fundamental purpose of compensatory damages is to place the plaintiff in the same position he would have occupied had the tort not been committed.”
 - Here, where the retailer would have accepted retail price for these items, and absent evidence of what any lost “Loss leader” profits would have been, wholesale price would result in a windfall for the Retailer, and the District court’s calculation was incorrect.
- Holding:
 - The District court miscalculated, and the case is remanded for further proceedings.

State v. Fleming, 2019 UT App 181 (Mortensen)

- Issues:
 - Issue 1: Counsel’s advice that defendant should not testify
 - Issue 2: Counsel’s factually incorrect argument during closing
- Facts:
 - During a search incident to arrest on an outstanding warrant, officers found two pipes and some Brillo pads in Fleming’s jacket pocket, as well as a pill bottle with a hard, white substance in his pants pocket. When asked what the substance was, Fleming said “it might be meth or it might be

a rock,” be he hadn’t had a chance to try it yet. The substance tested positive for cocaine, and Fleming was charged with possession with priors.

- At suppression, Fleming testified the cocaine was found in the jacket pocket, not his pants pocket, and that he had borrowed his girlfriend’s coat, in addition to his own coat, unaware of the presence of the cocaine. The State filed notice that if he testified that way at trial, they would present his three prior drug-related convictions to rebut his lack-of-knowledge argument.
- At trial, defense counsel said in opening that the jury would hear Fleming’s account of what had occurred. The officer testified that the cocaine was found in Fleming’s pants pocket. Defense counsel then asked for a ruling as to whether the prior convictions would come in if Fleming testified. The trial court refused to rule in advance, saying admissibility would turn on the contents of Fleming’s testimony. Counsel then advised Fleming not to testify.
- In closing, defense counsel focused on four principal points. Three were salient, but the fourth was based on a misunderstanding of the evidence. Counsel argued that two officers’ testimony had been conflicting on whether a pastor had been present during the arrest or had driven away in a car and had to be brought back for questioning. The State clarified in rebuttal that there was no conflict, as the pastor had merely sat in his car without driving away, which correctly represented what the testimony had been.
- Fleming was convicted as charged.
- Appeal:
 - Fleming argues ineffective assistance in both counsel’s advice not to testify and in counsel’s misunderstanding of the evidence.
 - Such a claim requires both deficient performance and prejudice
 - To show deficient performance, “[a] defendant must overcome the strong presumption that [the defendant's] trial counsel rendered adequate assistance by persuading the court that there was no conceivable tactical basis for counsel's actions.”
 - “To show prejudice in the ineffective assistance of counsel context, the defendant bears the burden of proving . . . that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. It is insufficient to show some conceivable effect on the outcome of the proceeding; rather, the likelihood of a different result must be substantial.”
 - Counsel’s Advice Not to Testify:
 - Not knowing how the court might rule on his prior convictions, this decision was a quintessential question of judgment and strategy, which could have gone either way.
 - Where the trial hinged on Fleming’s knowing possession of the drugs, the decision not to inform the jury of his prior drug use was reasonable and sound
 - His performance in advising Fleming not to testify was not deficient
 - Counsel’s Closing Argument:
 - Counsel’s misunderstanding of the evidence did not prejudice Fleming, as three of his four main points were correct and well-made, while the erroneous point about a mere bystander was neither central nor critical to the case.
 - It is unlikely the jury would have discounted or disregarded everything else counsel said based solely on this relatively minor misstatement of the testimony.
 - This minor misunderstanding did not prejudice Fleming by undermining the Court’s confidence in the outcome.
- Holdings
 - Counsel’s advice not to testify did not constitute deficient performance
 - Counsel’s misstatement of the evidence did not prejudice the outcome of the trial
 - Affirmed

- Issues
 - Issue 1: Admissibility of other acts evidence when a chiropractor is accused of inappropriate touching
 - Issue 2: Sufficiency of the evidence as to penetration in object rape
 - Issue 3: Jury Instructions alleged to have been “incomplete, legally inaccurate and confusing”
- Facts:
 - Victim
 - “When Victim could not find relief from chronic back pain, her mother recommended that Victim seek treatment from Heath, mother's chiropractor. From October 2012 to December 2012, Victim, then age 20, saw Heath nine times. The first four visits were mostly uneventful, though by the fourth visit she was starting to feel ‘a little uncomfortable.’ Heath's conduct at the next four visits forms the basis of Heath's criminal case.”
 - Visit 5: Count 1 (Sexual Battery)
 - Victim changed into a medical gown but kept her yoga pants on. Heath massaged her inner thigh and ended up rubbing right over the seem of her pants, right on her vagina. She asked what he was doing, and he said he was massaging her psoas attachment. She orgasmed, but gave no indication of that, and cried all the way home, trying to “explain it away” in her mind.
 - Visit 6: Count 2 (Sexual Battery)
 - Because victim was in a lot of pain and didn’t want to believe what had occurred, she went back, as the treatment had been providing her some relief. The same type of massage occurred until Victim’s sister, who had accompanied her, walked into the room. From that point, Heath massaged her thigh with two hands while talking to her sister.
 - Visit 7: Count 3 (Sexual Battery)
 - Still trying to convince herself things were fine, and that she’d imagined it, Victim went back, and Heath began to massage her stomach. This time he went lower than before, into her underpants, until he was moving his finger in a circular motion on the outer portion of her labia majora.
 - Visit 8: Counts 4 & 5 (Forcible Sexual Abuse and Object Rape)
 - This was the same as the last, with Heath going under her underpants and moving his fingers in a circular motion on the outer structures of her genitals. She then clearly felt him move one finger beyond her labia majora to make contact with her clitoris.
 - Victim still didn’t tell anyone immediately, fearing that saying it out loud would mean it really happened. About a month later, she told her mother and then the police.
 - Previous Victims
 - J.T.:
 - A massage therapist herself, J.T. visited Heath in 2011 for hip and leg pain. During a particular visit, Heath began “grinding back and forth in [J.T.’s] crotch,” touching and rubbing her clitoris. She opened her eyes and saw that he looked different, like he was enjoying what he was doing. She ended the appointment and never returned, knowing there was no reason to ever be rubbing that area, as no muscles attached there.

- J.T. reported the incident to DOPL, who had concerns but declined to investigate further or take formal action against Heath’s license. Heath promised to examine and adjust his practice.
 - E.B.:
 - E.B. visited Heath a total of four times in 2015. During the third and fourth visits, Heath touched her genital area, including her clitoris, over her clothing. It seemed unintentional at first, but by the end of the fourth visit, she was convinced it was completely intentional and also filed complaints with DOPL and the police.
- Charges
 - In 2015, the State charged Heath for crimes against Victim and E.B., but the cases were severed, and Heath moved to exclude “other acts” evidence at the trial of Victim. Under the Doctrine of Chances, the trial court allowed the use of both J.T.’s and E.B.’s testimonies to prove *mens rea*, but NOT to prove *actus reus*.
 - The trial court said, as to *actus reus*, that the State had failed to make a foundational showing with respect to frequency, providing no statistics on frequency of false accusations of inappropriate touching among chiropractors, thus reasoning that any conclusion on that point “would be nothing more than conjecture.”
 - Does that mean we need to show such statistics relative to the general population when we present Doctrine of Chances evidence in other contexts?
 - As to *mens rea*, the trial court felt “the relevant inquiry was “the frequency of [Heath’s] involvement in a type of event—the accidental touching of his patients’ genitals.”
 - Another chiropractor testified at trial, saying the standard of care is to avoid incidental touching of sensitive areas by “draping techniques” and “physical blockage.” He also testified there would be no medical reason to have touched Victim below the top of the pubic bone.
 - Heath also testified, claiming any touching was unintentional, and that incidental touching would be possible during that treatment. He said he did not notice Victim’s arousal, and she didn’t say anything. He also admitted there would be no reason to intentionally touch a patient’s labia or clitoris during lower back treatment.
 - Heath was convicted of all charges.
 - The trial court, on its own motion after reviewing *State v. Patterson*, 2017 UT App 194, requested briefing on Count 5 (Object Rape) on the issue of genital penetration.
 - Heath also filed a Motion to Arrest Judgment, citing the same concern with penetration on Count 5, as well as intent “to arouse or gratify the sexual desire of any individual” on Count 4 (Forcible Sexual Abuse).
 - The trial court ultimately rejected both arguments, concluding entry of the outer folds of the labia satisfies the penetration requirement, and that based on the “nature, duration and progression of the touching,” the jury could have reasonably inferred the requisite intent, additionally noting “no medical purpose” for such touching.
 - Heath was sentenced to concurrent prison terms.
- Appeal:
 - Heath challenges admission of the other acts evidence, sufficiency on all counts and jury instructions.

logic and reasonable human experience sufficient to prove the defendant did have the requisite intent

- Any Evidence
 - Progression – On the fifth visit the touching began, and by the seventh visit, he was putting his hand inside her underwear
 - Duration/Nature – The touching described by Victim could not have been incidental or accidental, as he rubbed around and around, skin-to-skin, for a few minutes
 - No medical reason for the touching
 - Heath’s prior acts
- Inferences of Heath’s Intent to arouse or gratify
 - Nature, duration and progression
 - No medical reason
 - No precautions
- A reasonable jury could have found he acted with the requisite specific intent to arouse or gratify
- Victim’s Non-Consent and Heath’s *Mens Rea* Thereof
 - Heath repeats his previous arguments (Victim didn’t express a lack of consent, didn’t resist, returned for subsequent visits, no indication of discomfort, etc.)
 - Without having been informed, he cannot have acted with the requisite mens rea as to Victim’s non-consent
 - These arguments were unpreserved
 - The State must prove both non-consent and the Defendant’s *mens rea* as to non-consent, but this is a fact-intensive, context-dependent question, decided on a case-by-case basis. As such, the question of consent has long [been] left . . . in the hands of the jury.”
 - Utah Code Ann. § 76-5-406(2)(l) identifies a number of circumstances under which forcible sexual abuse “is without consent,” including the following:
 - “the actor is a health professional . . . , the act is committed under the guise of providing professional diagnosis [] or treatment, and at the time of the act the victim reasonably believed that the act was for medically [] appropriate diagnosis [] or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.”
 - The Court points out that Heath fails to acknowledge the plethora of evidence presented at trial that he was a health professional ostensibly providing treatment the victim believed to be medically appropriate, and having so failed to engage with the evidence, they affirm his conviction on this count.
- Count 5 (Object Rape)
 - Heath argues the State failed to prove penetration, relying on Victim’s testimony that he touched “the outer lip of [her] vagina” and “on [her]

clitoris,” arguing that the clitoris is not the genital opening – rather, it should be the “vaginal opening.”

- He argues parallel language with the “anal opening” in the same statute.
- The Court cites to *Simmons* and *Patterson*, which defined “penetration,” for purposes of object rape (among other offenses) as “entry between the outer folds of the labia.”
 - Heath suggests *Patterson* blindly (and unadvisedly) pulled this language from *Simmons*, despite *Simmons* having been a rape case, and *Patterson* was addressing object rape. He encourages the Court to reject that definition in the context of object rape.
 - The statutes do have slightly different language, in that the rape statute refers to “sexual penetration,” while object rape speaks of “penetration ... of the genital or anal opening.”
 - Heath suggests, because the “anal opening” is the point where the gastrointestinal tract ends and exits the body, the same should be true of the end of the internal sexual organs, not the skin and folds surrounding it. He actually used the term “hole” in his brief.
 - The Court disagrees, concluding “that the plain meaning of ‘penetration ... of the genital ... opening’ is consistent with the definition of ‘penetration’ announced in *Simmons* and applied in *Patterson*.” Accordingly, Heath’s proposed definition is rejected.
 - The Court then walks through an exercise in statutory interpretation, first discussing plain meaning and looking at dictionary definitions. It then discusses context, landing on the fact that if the legislature had intended genital opening to mean vaginal opening, they could have said so.
- Addressing next the sufficiency of the evidence, given their conclusion on the definition of penetration, the Court feels no inferences are required.
 - Victim testified that he went “beyond [her] labia majora to touch [her] clitoris.”
 - They cite to two cases from other jurisdiction in which the court find, as a factual anatomical matter, that the clitoris lies within the labia majora, and penetrating the outer portions of the vulva is required to touch it.
- Heath’s conviction for object rape is affirmed.
- Jury Instructions
 - Heath claims to have received ineffective assistance regarding the jury instructions at trial. The Court feels “no need to describe the challenges in detail. Heath paints with a broad and indiscriminate brush, and he has failed to meet his burden of demonstrating prejudice.”
 - Heath claims the instructions were “incomplete, legally inaccurate and confusing,” but fails to show how, even if that’s true, different instructions would have led to a different outcome.
 - The Court concludes there is no demonstrable ineffective assistance in regard to jury instructions.
- Holdings
 - The trial court did not abuse its discretion in admitting the Other Acts evidence

- The evidence was sufficient to support each of Heath’s convictions
- Trial counsel was not ineffective for failing to object to the jury instructions, as Heath has failed to show prejudice from the lack of an objection.
- Affirmed.

State v. Mitchell, 2019 UT App 190 (Harris)

- Issue:
 - Question 1: Is gang membership, an aggressive comment to another individual and an officer’s intention to arrest a member of the suspect’s party enough for reasonable suspicion to support a Terry Frisk?
 - Answer: Sho’ ‘nough is, I reckon.
- Facts:
 - Officers in an unmarked vehicle were about to pull an ’82 Blazer with no top and three occupants over for traffic violations when the Blazer pulled into the parking lot of a convenience store. Officers then heard Mitchell, the shirtless front passenger of the Blazer, yell at a man walking in the parking lot to “Come here, you mother f***er!”
 - One of the officers recognized Mitchell as a felon and a member of SAC (a violent white supremacist gang). Mitchell also had several visible tattoos, including a SAC patch (a swastika wrapped around an iron cross) on the back of his head, a large “88” (which means “Heil Hitler”) on his stomach, the number “187” (the California penal code for homicide) under his left eye and his SAC moniker, “Lowdown,” on both his forehead and his torso.
 - Officers initiated a stop on the Blazer, getting identifying information from the occupants and consent to search the vehicle from the driver. They discovered the back passenger had active warrants and asked everyone to exit the vehicle so they could arrest him and search it. All three occupants complied, and Mitchell was immediately frisked by one of the officers. On Mitchell, they found a switchblade and heroin.
 - Mitchell was charged with possession of a dangerous weapon by a restricted person and possession of heroin. He moved to suppress the evidence of both, as neither would have been found but for the frisk, for which he said officers lacked reasonable suspicion.
 - The District court concluded there was reasonable suspicion, denying Mitchell’s motion. He entered a conditional plea and appeals the denial of his motion to suppress.
- Appeal
 - As a mixed question of fact and law, this is reviewed for clear error on the factual findings and correctness on the legal conclusion.
 - The trial court’s ruling was based on three primary facts: 1) that Mitchell was a known member of the SAC gang; 2) that Mitchell had acted aggressively toward, and appeared to be on the verge of starting a fight with, the individual in the parking lot; and 3) that the backseat passenger was being arrested for outstanding warrants, a fact that might increase the potential volatility of the situation.”
 - A Level II encounter requires reasonable suspicion. Specifically, this type of pat-down, or Terry Frisk, requires two conditions to be satisfied:
 - The investigatory stop must be lawful
 - The officer must reasonably suspect that the person stopped is armed and dangerous
 - Both are evaluated objectively according to the totality of the circumstances
 - The Court cautions against “the temptation to divide the facts and evaluate them in isolation from each other.”
 - The officer “must be able to point to specific facts which, considered with rational inferences from those facts, reasonably warrant the intrusion.”

- Mitchell does not challenge the initial stop, moving to the second part of the analysis: the Frisk
 - He argues the officers lacked reasonable, articulable suspicion that he would be armed and dangerous – correctly pointing out that many of the usual hallmarks are absent
 - He was wearing little clothing (only shorts), so few places to conceal something
 - The officers did not notice any bulges
 - He did not make any furtive movements, possibly reaching for a weapon
 - No hands in his pockets
 - No evidence he was typically armed
 - Complete compliance with every command
 - The State argues the same three facts relied upon by the District court
 - Admitted/known member of SAC
 - Aggressive comment, possibly initiation a fight or confrontation
 - Impending arrest of his associate
- Analysis
 - Known Member of SAC
 - An officer testified that gang members are more likely than other individuals to be armed, as they “typically carry weapons”
 - The Court cites precedent holding that gang affiliation is not enough, in isolation, to give rise to reasonable suspicion, but it can be a factor
 - The analysis includes the certainty of the affiliation and the nature of the gang
 - Here, they were certain of his affiliation, and the gang is known to be violent
 - These facts lend more weight than a suspected member of a non-violent gang
 - Aggressive Behavior
 - “[T]he officers had also just observed potentially violent behavior ... , and it appeared to the officers as though Mitchell was acting aggressively and that he was on the verge of starting a physical altercation.”
 - “Loud and boisterous behavior” has previously been recognized as “a fact that tends to support an officer's reasonable suspicion that a suspect may be armed and dangerous.”
 - “although many people carry weapons for defensive purposes, common sense tells us that a person trying to start a fight is at least somewhat more likely to have a weapon than a person trying to avoid one; after all, having a weapon in one's pocket tends to raise the odds of victory in any resulting altercation.”
 - Mitchell argues he was actually giving a friendly greeting to an old friend, but the officers’ interpretation was reasonable, and the Court won’t second-guess that.
 - This factor also weighs in favor of reasonable suspicion
 - Impending Arrest
 - This doesn’t affect whether he was armed, but it had the potential to make the situation more dangerous
 - Officers can’t frisk everyone for safety concerns, but “the circumstances of a particular traffic stop may give rise to specific concerns.”
 - Not knowing the affiliation (if any) of the arrestee, they were concerned about Mitchell’s possible loyalty, as well as one officer taking his attention from Mitchell and the driver
 - This becomes another factor in favor of reasonableness
 - The Court concludes the officer were reasonable in suspecting Mitchell might be armed and dangerous, and therefore justified in conducting a Terry Frisk.
- Holding

- Mitchell’s particular known gang affiliation, in combination with his aggressive behavior, gave rise to reasonable articulable suspicion that he might be armed (“under the unique circumstances of this case”).
- The danger was heightened by the additional concern of arresting Mitchell’s associate
- Though a close case, there was reasonable suspicion, and the District court did not err in denying the motion to suppress

State v. Higley, 2020 UT App 45 (Appleby)

- Issues:
 - Issue 1: Ineffective assistance of counsel for failing to move to arrest judgment on the DUI on the sufficiency of the evidence.
 - Question 2: Is reckless driving necessarily a lesser-included offense of DUI?
 - Answer: No
 - Issue 3: 23B on counsel’s failure to call certain witnesses or to adequately question witnesses who were called
- Facts:
 - Around midnight, a driver noticed a vehicle stopped in a left-turn lane, extending slightly into the intersection. Getting closer, the driver heard the car running and saw Higley in the driver’s seat, slumped over and sleeping with his window down. The driver honked and called out to him, but got no response, so he called the police.
 - An officer arrived and noted the vehicle (a manual transmission) was in neutral without the park brake engaged. The officer had to “jostle” Higley’s arm to wake him, and he appeared “drowsy” and “out of it.” Higley said he needed a cigarette and moved toward the center console, but the officer stopped him and called for backup.
 - Three other officers arrived, and they asked Higley if he’d taken any medication or consumed alcohol. He said he’d taken Alprazolam (Xanax). FSTs were administered, and Higley failed two of the three (walk and turn and one-legged stand). After being instructed to take nine steps out and nine steps back, he took 18 out and 22 back, struggling to keep his balance. He said he had injured ankles and asked if he could pop them before the one-legged stand, which the officer allowed, but he was still unable to balance for more than a second or two.
 - Higley was arrested for DUI, and a search of his vehicle produced a cigarette box in the center console with heroin inside. When asked about the heroin, Higley said the car belonged to his mother and the drugs were probably hers (at the beginning of the stop, he’s said he was the car’s registered owner). The cigarette box was the only thing found in the vehicle. A subsequent blood test was positive for Xanax, but nothing else.
 - Higley was charged, in part, with possession of heroin and DUI. At trial, the toxicologist said the amount of Xanax found in Higley’s system was consistent with clinical use but could still cause the symptoms he was displaying. Higley’s doctor testified he’d been prescribing Xanax to Higley for roughly six years, and Higley testified that he’d broken his ankles years earlier, and they hadn’t healed properly, causing him pain and an “off” gait.
 - Higley said he’d been driving around and had picked up a man and a woman and given them a ride. He said the man spilled his backpack in the car but said he hadn’t left anything on cross. Higley said he was exhausted, and that he’d put his car in neutral, leaned back to take a few breaths, and the next thing he knew the officer was there.
 - At the end of the trial, defense counsel moved for a lesser-included instruction of reckless driving on the DUI, as a driving violation. The State argued this was an actual physical control case, so reckless driving was not a lesser-included. The trial court agreed with the State, refusing to give the instruction. Higley was convicted on all counts.

- Appeal
 - Higley’s arguments on appeal are threefold:
 - His trial counsel was ineffective for failing to move to arrest judgment on the DUI for insufficient evidence
 - The trial court erred in not instructing the jury on reckless driving as a lesser-included offense of DUI
 - His trial counsel was also ineffective for failing to “adequately question or call witnesses regarding Higley's possession of heroin and possession of drug paraphernalia.”
- Analysis:
 - Ineffective Assistance of Counsel
 - Strickland (2 prongs)
 - Deficient Performance
 - Prejudice
 - Failure to Move to Arrest Judgment on DUI
 - Higley concedes he had actual physical control with a drug in his system
 - He suggests the State didn’t prove he was incapable of safely operating a vehicle because “no officer observed any erratic driving pattern.”
 - He also noted his clarity of mind in putting his car in neutral and parking with the tires resting in a gutter so it wouldn’t move,” he was responsive to questioning, offered clear and correct information, got out of his car without a problem and walked around without tripping or staggering.
 - He relies on State v. Harvey, 2019 UT App 108, where two failed FSTs were found to be insufficient, standing alone, to support a DUI
 - The Court points out that there was nothing else in Harvey, whereas here, there was officer testimony about how FSTs can show impairment, he was parked in an intersection and asleep at the wheel with the motor running, he struggled to keep his balance, leaned on a fence, repeatedly delayed taking the FSTs and had difficulty complying with orders. He spoke slowly, fell over repeatedly and almost walked into a sign on the side of the road.
 - The Court also points out that his testimony, that his car was pulled over with the tires in the gutter, is belied by video evidence and the officer’s testimony, both showing his vehicle in an active traffic lane, protruding into the intersection.
 - With this “ample evidence,” any motion to arrest judgment would have been futile, and counsel’s “failure” to make such a motion was not deficient.
 - Lesser-Included Instruction
 - “A defendant is entitled to a jury instruction for a lesser included offense where (1) the charged offense and the lesser included offense have overlapping statutory elements and (2) the evidence provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.”
 - “An offense is a lesser included offense if [i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged.”
 - “If a court determines there are some overlapping elements, it must then determine whether "the evidence offered provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.”

- “[T]he decision to call a witness is squarely within the trial strategies and tactics that are given wide latitude when determining whether an appellant received objectively deficient assistance of counsel.”
 - There were “conceivable legitimate strategic bas[e]s” for not having called Higley’s mother.
 - Calling his mother could have highlighted the fact that he first blamed her for the presence of the drugs before blaming his passengers.
 - Also, as his mother, the inherent bias in her testimony makes it something the jury was not likely to have given a great deal of weight.
- Holdings
 - Trial counsel was not ineffective for not moving to arrest judgment, as it would have been futile
 - The trial court did not err in refusing the lesser-included instruction, as Reckless Driving is not a lesser-included of DUI due to insufficient overlap in the statutory elements
 - Higley has failed to establish non-speculative facts that show ineffective assistance for failing to question more thoroughly or to call his mother to testify
 - Rule 23B motion denied. Convictions affirmed.

S. Salt Lake City v. Maese, 2019 UT 58 (Pearce)

- Issues:
 - Amendment of a traffic offense down to an infraction by prosecutor
 - Denial of a jury trial on an infraction – constitutionality of UCA 77-1-6(2)(e) and Ut. R. Crim Pro Rule 17(d), which disallow a jury for an infraction, based on Art. I, Sec. 12
- Facts:
 - A Trooper saw Maese cross the double white lines and several lanes of traffic in rapid succession, all without signaling properly. He was charged with lane violation and failure to obey traffic control devices.
 - At arraignment, the city amended both charges to infractions, presumably because Maese requested a jury trial. Maese moved to dismiss the Information, arguing the prosecutor lacked authority to amend in this way, and that Utah’s Constitution ensured a right to a jury trial in all criminal prosecutions. The Justice Court denied the motion and the request for a jury trial, ultimately convicting Maese on both counts and imposing a \$240 fine.
 - Maese appealed, making the same motions in the District Court. The motions were denied, and Maese was again convicted of both counts.
- Appeal:
 - “Maese raises two meaty issues. First, Maese argues that the Utah Constitution's Separation of Powers Clause prevented the City from amending the charges against him from misdemeanors to infractions because the Utah Code designated them as misdemeanors.”
 - “Before we reach that question, however, we need to address the City's contention that we lack jurisdiction to hear Maese's argument. The City argues we cannot address the question because Utah Code section 78A-7-118(8) limits appeals from justice court to a trial de novo in district court unless the district court rules on the constitutionality of a statute or ordinance.”
 - “Second, Maese posits that Utah Code section 77-1-6(2)(e) and Utah Rule of Criminal Procedure 17(d) are unconstitutional because they deny him the jury trial promised by article I, sections 10 and 12 of the Utah Constitution.”

- Analysis
 - Jurisdiction of the Supreme Court Over Justice Court Cases
 - Maese argues Separation of Powers, in that only the legislature can define crimes and their penalties, and “no statement of law or legal principle” allows prosecutors to exercise the legislative power of designating an offense’s penalty.
 - Though “an intriguing question,” the Court lacks jurisdiction to address it
 - The City points to UCA § 78A-7-118(8)
 - “The decision of the district court [on appeal from the justice court] is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance.”
 - Here, the Court has not been asked to address the constitutionality of a statute or ordinance, nor did the District Court rule on such.
 - “Maese does not challenge a statute that permits prosecutors to do what the City did here: amend charges to lower the level of the charged crime. Indeed, it does not appear that this practice enjoys any statutory authorization whatsoever. So Maese is left challenging a practice that is apparently justified by notions of prosecutorial discretion.”
 - “This does not mean, however, that Maese—or someone in his position—is without a mechanism to press that argument. As the court of appeals has recognized, a petition for extraordinary relief under Utah Rule of Civil Procedure 65B can be the procedurally correct avenue to challenge an alleged violation that occurred in justice court that does not involve the constitutionality of a statute or ordinance.”
 - Expect to see such a petition from Mr. Maese
 - Constitutionality of Statutes/Rules Limiting Right to Jury Trial
 - “Maese next argues that “any Utah statute or procedural rule denying the right of a jury trial in prosecutions for infractions is unconstitutional. Specifically, he argues that Utah Code section 77-1-6(2)(e) and Utah Rule of Criminal Procedure 17(d) are unconstitutional because they exclude infractions from the right to a jury trial.”
 - UCA § 77-1-6(2)(e):
 - “No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.”
 - Utah Rules of Criminal Procedure Rule 17(d):
 - “No jury shall be allowed in the trial of an infraction.”
 - Maese argues that Art. I, Sec. 12 of the Utah Constitution guarantees the right to jury trial in all criminal cases, including prosecutions for infractions, wherein it states that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury.”
 - “When we interpret constitutional language, we start with the meaning of the text as understood when it was adopted. In interpreting the Utah Constitution, prior case law guides us to analyze its text, historical evidence of the state of the law when it was drafted, and Utah’s particular traditions at the time of drafting. There is no magic formula for this analysis—different sources will be more or less persuasive depending on the constitutional question and the content of those sources.”
 - The Court expresses fear of “zeitgeist” (the defining spirit or mood of a particular period of history as shown by the ideas and beliefs of the time) in this analysis,

wanting to avoid the assertion of one historical fact and letting the analysis flow from there.

- The Text of Article I, Section 12
 - “Our task is to understand what "criminal prosecutions meant to those who voted to approve the Utah Constitution and whether those voters would have understood that they were guaranteeing a jury trial to every person in every circumstance under which they would be hauled into court.”
 - Maese cites two contradictory cases, one saying, “if [a] constitutional provision is clear, then extraneous or contemporaneous construction may not be resorted to,” while the other says, “courts should analyze ‘text, historical evidence of the state of the law when [the constitution] was drafted, and Utah's particular traditions at the time of drafting.’”
 - The Court cites its own precedent in *In re Young*, 1999 UT 6, in which it said, “in interpreting the constitution, we consider all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy.”
 - “Thus, although the text is generally the best place to look for understanding, historical sources can be essential to our effort to discern and confirm the original public meaning of the language. . . . unlike contract interpretation, constitutional inquiry does not require us to find a textual ambiguity before we turn to those other sources.”
 - The City turns to the Sixth Amendment of the Federal Constitution, with almost identical language, which has been interpreted to apply only to offenses carrying at least six months of incarceration. The phrase “criminal prosecutions,” therefore, must exclude some petty offenses.
 - The Court, while tempted to “accept the City's invitation to interpret our constitution in lockstep with the federal and skip an analysis of our own state constitution,” declines to do so.
 - Not only has the Court declined to presume identical interpretation of even identical provisions, it has “not hesitated to interpret the provisions of the Utah Constitution to provide more expansive protections than similar federal provisions where appropriate.”
 - “When we look to the historical record, we hope that it resembles a Norman Rockwell painting—a poignant, straightforward, and easy to interpret representation. But frequently it does not. In some cases, like this one, the historical record is more like a Jackson Pollock. And we find ourselves staring at the canvas in hopes of finding some unifying theme. After studying the colors and lines of the historical record, we find evidence that suggests a narrative.”
- Delegates of the Utah Constitutional Convention
 - Justice Pearce spends some time talking about discussion at the convention, talking about the importance of jury trials and the right thereto “for any person charged with a crime.” There is no discussion, however, of what a “crime” or a “criminal prosecution” means.
 - Most of the debate focused on the size of juries and whether unanimity would be required.
- Legal Backdrop of the Federal and Other States’ Constitutions

- The Convention occurred in a legal environment in which “the federal constitution had been interpreted to exclude certain "petty" offenses from the jury trial right.”
 - Specifically, SCOTUS interpreted “crime” in the context of the Sixth Amendment as including “some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen,” rejecting the claim that it might only comprise of felonies.
 - “The Court therefore interpreted ‘crime’ in Article III and ‘criminal prosecution’ in the Sixth Amendment as consistent with each other and determined that they were to be read consistent with the meaning that they had at common law.”
 - This meaning seemed to include a recognition “that there is a class of petty or minor offenses not usually embraced in public criminal statutes, and not of the class or grade triable [under] common law by a jury.”
- Other contemporaneous state supreme court decisions reflected a similar brand of thinking.
- According to our Court, “it is beyond debate that at the time the framers were drafting the Utah Constitution, the United States Supreme Court and other state supreme courts recognized that, despite the seemingly sweeping constitutional language, some classes of offenses were not included in the right to a jury trial.”
- The 1898 Code
 - This was the first attempt to codify the law after the Constitutional Convention, commissioned by Governor Heber M. Wells, the former temporary secretary of the Utah Constitutional Convention.
 - Crimes were defined as felonies and misdemeanors, the latter of which was “punishable by imprisonment in a county jail not exceeding six months, or by a fine in any sum less than three hundred dollars, or by both.”
 - Even offenses punishable only by fine permitted a judge to impose “imprison[ment] at hard labor until such fine ... [is] paid.”
 - The law permitted request of a jury trial in the prosecution of any crime in the state code.
 - Newspaper articles from the time (scoured by both parties) showed jury trials for seemingly minor offenses, and neither party, nor the court, could find any evidence of a jury trial being denied around that period.
 - The code, however, contains a wrinkle: Section 241
 - “All actions before a city justice arising under the city ordinances shall be tried and determined by such justice without the intervention of a jury, except in cases where imprisonment for a longer period than thirty days is made a part of the penalty, or where the maximum fine may exceed fifty dollars.”
- Section 241 Has Persisted
 - Although addressed and subject to minor changes multiple times over the years, no substantive change occurred until 1983, when the 30-day limitation was changed to “any imprisonment.”
 - This aligned with the then-recent change in the code excluding infractions from the right to a jury trial
- Other States

- “While many of the analyses that our companion courts have undertaken do not focus on the original public understanding of their constitutions at the time of their adoptions, those decisions paint a consistent picture that most jurisdictions recognize that the constitutional right to a jury trial does not include some class of minor offenses.”
 - Potential Imprisonment: The Original Public Understanding of the Utah Constitution
 - Clearly, “at the time of statehood, the people of Utah would have understood that the trials for violations of certain minor offenses were not ‘criminal prosecutions’ for which the Utah Constitution guaranteed a jury. The trick, however, is trying to wring from the historical record exactly what kind of criminal trials were not included in Article I, Section 12’s guarantee.”
 - Municipal offenses? Regulatory offenses? Type/severity of punishment?
 - Municipal offenses are much broader now
 - Regulatory offenses aren’t consistent with the history
 - Punishment seems the cleanest and most historically faithful
 - “We therefore conclude that the Utah Constitution’s guarantee of a jury trial does not extend to prosecutions where the maximum sanction is thirty or fewer days incarceration and/or a minor financial penalty.”
- Holding:
 - “[T]he Utah Constitution guarantees the right to a jury trial for crimes that are punishable by more than thirty days of imprisonment and/or carry the possibility of a substantial financial penalty.”
 - Affirmed
- Concurrence (Lee)
 - “I concur wholeheartedly in the above-noted aspects of the majority opinion and commend Justice Pearce for the laboring oar he has taken in cementing these refinements in our jurisprudence. I write separately, however, because I disagree with the specific line established by the court in reaching its holding. I see no basis for the decision to establish conclusively that the ‘potential for incarceration of longer than a month is what the people of Utah understood to guarantee the right to a jury trial.’ I would instead hold only that Maese has failed to carry his burden of establishing a constitutional right to a jury trial for an offense (here, an infraction) for which there is no risk of incarceration.”
 - “[W]e can reserve for a future case—a case in which the matter is squarely presented—a decision on the question of what precise term of incarceration may trigger a constitutional right to a jury trial.”
 - “[T]he majority’s public understanding is not tied to a constitutional right to a jury trial. It is tied only to a statutory provision. And the majority is making the leap that the public would have viewed the scope of the statutory right to a jury trial to be the same as the underlying constitutional right. That may not follow.”
 - “The 1898 Legislature could have been establishing a statutory jury trial right that exceeded the constitutional floor. ... The Legislature, alternatively, may have inadvertently been seeking to drop below the floor—in violation of the founding document. That Legislature was not immune from constitutional violations.”
 - “The majority objects to my approach on the ground that it renders the originalist inquiry a “fruitless exercise where a combination of the presumption of constitutionality and the imprecisions in the historical record persistently frustrate our ability to interpret the Utah Constitution.”

- “I am puzzled by this response. . . . If a party seeking to challenge the constitutionality of a law enacted by the representatives of the people fails to provide a sufficient basis for the establishment of a clear constitutional standard, then the presumption of constitutionality kicks in. The whole point of that presumption is to preserve the law as enacted by the people in the face of only a "murky" basis for setting it aside.”
 - “The majority complains that if the record in this case ‘is insufficient to permit us to interpret our constitution using an originalist approach, it is difficult to imagine what . . . would ever allow us to opine.’ That makes little sense to me. Again, the historical record here is strikingly scant.”
 - “We can resolve the constitutional uncertainty conceded by the majority by falling back on the longstanding notion of a presumption of constitutionality. . . . Maese bears the burden of overcoming this presumption. And his failure to do so is a basis for a ruling against him.”
 - I concur.

Kahler v. Kansas, 140 S. Ct. 1021 (2020) (Kagan, 6-3)

- Issue:
 - Question: Does the Due Process Clause of the Federal Constitution compel the acquittal of any defendant who, because of mental illness, could not tell right from wrong when committing his crime?
 - Answer: No
- Facts:
 - In 2009, in an all too common scenario, the victim filed for divorce from Kahler and moved out. Kahler went to where she was staying and shot her twice, shot her grandmother, and shot his two daughters, killing all four. He let his son live.
 - The Defendant surrendered the following day and was charged with capital murder. Prior to trial, Kahler filed a motion arguing Kansas’s treatment of insanity claims violates the Fourteenth Amendment’s Due Process Clause, abolishing the insanity defense by allowing the conviction of a mentally ill person “who cannot tell the difference between right and wrong.”
 - The trial court denied the motion, “leaving Kahler to attempt to show through psychiatric and other testimony that severe depression had prevented him from forming the intent to kill.” Kahler was convicted at trial, after which the trial court allowed him to present any additional evidence he pleased of his mental illness to mitigate his sentence. He was still given the death penalty.
 - Kahler appealed to the State. The Kansas Supreme Court relied on its earlier precedent to say no single version of the insanity defense it so “ingrained in our legal system” as to be “fundamental.” Thus, “[d]ue process does not mandate that a State adopt a particular insanity test.”
 - Kahler then “asked this Court to decide whether the Due Process Clause requires States to provide an insanity defense that acquits a defendant who could not ‘distinguish right from wrong’ when committing his crime.” Cert. was granted.
- Appeal:
 - Background:
 - In *Clark v. Arizona*, 548 U.S. 735 (2006), the Court catalogued insanity defenses among the various states, counting four primary strains:
 - Cognitive Capacity: “unable to understand what he [was] doing”
 - Moral Capacity: “unable to understand that his action [was] wrong”
 - Subsequent spinoff: “...understand that his action was *illegal*”

- Volitional Capacity: “subject to irresistible impulses or otherwise unable to control his actions”
 - Product-of-Mental-Illness: “defendant’s criminal act stemmed from a mental disease”
 - Cognitive Capacity and Moral Capacity are considered two prongs of what has come to be known as the *M’Naghten* test.
- Kansas’s Law:
 - “It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the offense charged.”
 - This is “cognitive capacity”
 - The statute also says “[m]ental disease or defect is not otherwise a defense.”
 - This excludes “moral capacity” as a possible defense, eliminating the second prong of *M’Naghten*
 - Nothing but cognitive ability to form the requisite *mens rea*
 - After conviction, the statute gives wide latitude to present mental illness evidence to show the defendant is less than fully culpable and deserving of a lesser punishment
 - Cognitive, Moral, Illegal (spinoff), Volitional, etc.
- Analysis
 - “[A] state rule about criminal liability—laying out either the elements of or the defenses to a crime—violates due process only if it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”
 - The Court will look primarily to “historical practice,” relying heavily on “eminent common-law authorities, as well as to early English and American judicial decisions.”
 - “An affirmative answer, though not unheard of, is rare.”
 - “[D]octrine[s] of criminal responsibility must remain the province of the States.”
 - “Nowhere has the Court hewed more closely to that view than in addressing the contours of the insanity defense. Here, uncertainties about the human mind loom large.”
 - “Nothing could be less fruitful” than to define a specific “insanity test in constitutional terms. ... [T]he choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy” about when mental illness should absolve someone of criminal responsibility.” Thus, “it would be indefensible to impose upon the States[] one test rather than another for determining criminal culpability for the mentally ill, and thereby to displace a State’s own choice.”
 - Prior appellants have asked the Court to similarly define a particular test or disavow another, but the Court has always declined to do so.
 - Kahler says the moral-incapacity test, “jettisoned” by Kansas, pre-dates *M’Naghten*, going back centuries in English common law.
 - The Court agrees “that for hundreds of years jurists and judges have recognized insanity (however defined) as relieving responsibility for a crime.”
 - It disagrees, though, that Kansas departs from that broad principle by way of this statute.
 - “So Kahler can prevail here only if he can show (again, contra *Clark*) that due process demands a specific test of legal insanity.”
- Holding
 - “Contrary to Kahler’s view, Kansas takes account of mental health at both trial and sentencing. It has just not adopted the particular insanity defense Kahler would like. That choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds. No insanity rule in

this country's heritage or history was ever so settled as to tie a State's hands centuries later. For that reason, we affirm the judgment below."

- Dissent (Breyer with Ginsberg and Sotomayor)
 - "Kansas has not simply redefined the insanity defense. Rather, it has eliminated the core of a defense that has existed for centuries: that the defendant, due to mental illness, lacked the mental capacity necessary for his conduct to be considered morally blameworthy."
 - "Kansas' law 'offends . . . principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"
 - Examples:
 - "A much-simplified example will help the reader understand the conceptual distinction that is central to this case. Consider two similar prosecutions for murder. In Prosecution One, the accused person has shot and killed another person. The evidence at trial proves that, as a result of severe mental illness, he thought the victim was a dog. Prosecution Two is similar but for one thing: The evidence at trial proves that, as a result of severe mental illness, the defendant thought that a dog ordered him to kill the victim. Under the insanity defense as traditionally understood, the government cannot convict either defendant. Under Kansas' rule, it can convict the second but not the first."
 - "I do not mean to suggest that *M'Naghten's* particular approach to insanity is constitutionally required. As we have said, '[h]istory shows no deference to *M'Naghten.*' *M'Naghten's* second prong is merely one way of describing something more fundamental. Its basic insight is that mental illness may so impair a person's mental capacities as to render him no more responsible for his actions than a young child or a wild animal. Such a person is not properly the subject of the criminal law."
 - "The Court contends that the historical formulations of the insanity defense were so diverse, so contested, as to make it impossible to discern a unified principle that Kansas' approach offends. I disagree."
 - He then goes through analyses set forth by "eminent jurists," in which they and "other commentators expressly linked criminal liability with the accused's capacity for moral agency."
 - He says the majority accuses him of cherry-picking references to moral understanding, while ignoring those made to intent and *mens rea*. He counters that "[t]he modern meaning of *mens rea* is narrower and more technical" than it was at common law.
 - Citing to more case examples, he suggests that "around the time of the founding. Judges regularly instructed juries that the defendant's criminal liability depended on his capacity for moral responsibility."
 - He contends the states that have broken away from *M'Naghten* have done so because they thought it too restrictive in assessing the accused's capacity for criminal responsibility.
 - Thus, the "Product" test
 - Today, 45 states, the Federal Government and DC recognize an insanity defense that inquires into the blameworthiness of the accused.
 - A community's moral code informs its criminal law. That doesn't mean it perfectly tracks, and it's no defense to claim one's criminal conduct was morally right. "But the criminal law nonetheless tries in various ways to prevent the distance between criminal law and morality from becoming too great."
 - While the states have broad leeway, they can't just do away with anything they want.
 - This is fundamental, and Kansas did away with it
 - I dissent.

State v. Ray, 2020 UT 12 (Peterson)

- Issues:
 - Question: Does action taken by counsel with no conceivable strategic basis necessarily constitute deficient performance for purposes of ineffective assistance?
 - Not necessarily
- Facts:
 - Ray was 28 years old attending law school in Illinois. He accidentally texted the victim, who was 14 years old. The two continued to communicate and eventually Ray flew to Utah to meet the victim. Ray picked up the victim and took her to his hotel room. They kissed, he touched her “bra” and “underwear areas.” Over the course of multiple days and multiple encounters, the two continued to engage in more serious sexual activities. The victim was then hospitalized for a vaginal infection, and when Ray repeatedly contacted the hospital and her parents, claiming to be a school friend, they eventually figured out who he was and called police.
 - He was charged with multiple counts, but only convicted on the forcible sexual abuse. He was acquitted of object rape, and the jury hung on two counts of forcible sodomy. The jury instruction included in the elements “indecent liberties” but did not include a definition for indecent liberties. Neither side argued under a theory of “indecent liberties.”
 - The pertinent language is: “Touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another.”
 - The Court of Appeals held that Ray’s attorney was ineffective for not objecting to the jury instructions and reversed the conviction. The Supreme Court reviews that determination.
- Appeal:
 - “To prevail on this claim, Ray must demonstrate that (1) his counsel’s performance was deficient in that it ‘fell below an objective standard of reasonableness’ and (2) ‘the deficient performance prejudiced the defense.’”
 - “[A]t the time of the offense here, the statute did not define the term ‘indecent liberties. We have interpreted the statute[] ... to mean that the indecent liberties variant ‘proscribe[s] the type of conduct of equal gravity to that interdicted in the first part’ of the statute.”
 - “The court of appeals reasoned that defense counsel had two basic options consistent with his duty to render effective assistance. Either he could have requested an instruction defining ‘indecent liberties,’ or he could have requested that the problematic phrase be excised from the elements instruction. The court of appeals concluded that ‘[t]here was no conceivable tactical benefit to [Ray]’ in taking neither of these actions, and therefore trial counsel performed deficiently.”
 - “First, not objecting to an error does not automatically render counsel’s performance deficient.”
 - The Court agrees that “indecent liberties” should be defined in a situation like this
 - Reasonableness, though, must be judged on the facts of the case viewed at the time
 - “Counsel could pick his battles. We must view a decision to not object in context and determine whether correcting the error was sufficiently important under the circumstances that failure to do so was objectively unreasonable”
 - “Second, the ultimate question is not whether counsel’s course of conduct was strategic, but whether it fell below an objective standard of reasonableness.”
 - “*Strickland* demands reasonable assistance, not strategic assistance.”
 - If there is a conceivable strategy to counsel’s actions, a defendant necessarily fails to show unreasonable performance, “[b]ut the converse is not true.”
 - The Court acknowledges that its prior precedent on this topic has “muddied this point.”
 - Clarifying, it was not error for the Court of Appeals to analyze whether there may have been a sound strategic reason for not objecting – a defendant must overcome that presumption
 - Finding no such reason, though, does not end the analysis – they must still look at reasonableness

- Here, though, the Court disagrees that there was no strategic reason not to object
 - Neither side relied on the provision, and a more specific definition might have drawn more attention to it, by both the State and the jury
 - There was plenty of evidence of other acts not falling precisely within those enumerated by the statute, many of which were corroborated by Ray's communications with police
- Having found a possible strategic reason for the non-objection, Ray fails to overcome the presumption of effective assistance.
 - Had they found no such reason, though, it still might not have gone Ray's way, as "indecent liberties" was not a sufficiently germane issue to be unreasonable
 - **I feel like they're conflating prejudice with deficient performance in this analysis
- Holding
 - Counsel's performance was not deficient, so no ineffective assistance
 - Reversed, conviction reinstated. Remanded to the Court of Appeals to address other claims.

State v. Scott, 2020 UT 13 (Peterson)

- Issue: Ineffective Assistance
 - Question: Was it objectively unreasonable for counsel not to argue that a threat was non-hearsay and should be admitted in an extreme emotional distress case?
 - Answer: No one knows, since the Court of Appeals didn't ask what the threat was.
- Facts:
 - Scott and his Wife had a violent marriage. There was physical abuse, the kids heard Scott threaten to kill her, and he tried to run her over with a car once. Scott testified that the day before he shot and killed his wife, he went into their room and saw Wife on the other side of the bed, her hands down where he couldn't see them, and that their gun safe was open and Wife's gun was missing.
 - The day of the shooting, they fought verbally. Scott had seen early in the day that the gun safe was again open in their bedroom and Wife's gun was missing. He went into the garage and became very nervous because as he walked around in the yard, Wife was staring at him out of the doorway and window. He decided to go inside and "confront the situation." When he went inside, he heard his wife talking to her mom on the phone and saying bad things about him. He walked into the bedroom and Wife was sitting on the bed pointing her cell phone at him as though she were about to take a photo. He reached into the gun safe, pulled out his gun, and shot and killed Wife.
 - During his testimony, the Scott tried to testify about his state of mind based on a threat Wife made to him days before. The State objected on hearsay grounds, and the Court sustained the objection. The Defense attorney did not respond, and the threat was not put on the record. Scott did, however, testify that a threat had been made, and that he thought it was serious. Scott admitted he killed Wife, but claimed he was acting under extreme emotional distress, which would have resulted in a lesser conviction of manslaughter. After eight hours of deliberation, including an *Allen* charge at about the six-hour mark when the jury informed the trial court they were deadlocked, the jury convicted Scott of murder.
 - The State conceded on appeal that the threat was non-hearsay, and the Court of Appeals agreed. Scott also filed a motion with the Court of Appeal, pursuant to Rule 23B of Appellate Procedure, to develop the record as it related to the contents of the threat. Scott also challenged the verdict-urging (*Allen*) instruction given by the trial court. The Court of Appeals held, without addressing Scott's motion, that it was ineffective assistance of counsel to fail to argue the threat was non-hearsay, and that counsel's inactions were prejudicial. The substance of the threat was never introduced into the record. The Court addressed the instruction in the context of the jury's apparent deadlock, suggesting that more evidence as to the threat might have caused the deadlock to persist, ultimately resulting in a hung jury.
- Appeal

- “The sole issue before us is whether the court of appeals erred in concluding that Scott's counsel provided ineffective assistance when he did not counter the State's hearsay objection with argument that the threat was admissible non-hearsay.”
- Analysis
 - Deficient Performance
 - The State seeks a “no competent attorney would have proceeded as his attorney did” standard. This language comes from *Premo v. Moore*, 562 U.S. 115 (2011).
 - *Amicus curiae* described this as “transform[ing] an already daunting standard to an impossible one.”
 - The Court wonders whether this is “a new, higher hurdle” or “a synonymous statement of the *Strickland* standard.” Since SCOTUS has not elaborated further on that language, however, the Court decides to fall back on the plain language of *Strickland*, asking whether counsel’s failure to argue non-hearsay “fell below an objective standard of reasonableness.”
 - The Court of Appeals disagreed with the State’s argument that counsel’s decision was strategic, as the specific words of the threat would not have strengthened Scott’s case. “The State reasoned that counsel may have strategically let the objection stand because the jury might imagine a threat that was worse than the actual words spoken.”
 - The State argues that the lower court’s conclusion that no strategic reason ended the analysis without addressing an objective standard of reasonableness is well taken.”
 - “[E]ven where a court cannot conceive of a sound strategic reason for counsel's challenged conduct, it does not automatically follow that counsel was deficient.”
 - “The State argues that without the content of the threat in the record, there is insufficient information to determine whether counsel's failure to argue for its admission was objectively unreasonable. We agree.”
 - “Without knowing these specifics, it is impossible to conclude that counsel's inaction was objectively unreasonable.”
 - “Scott must do more than claim his lawyer made a mistake. He must show that his counsel "made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed [him] by the Sixth Amendment.”
 - “[I]t was error for the court of appeals to conclude that Scott's lawyer was deficient without considering the content of the threat in its analysis.”
 - Prejudice
 - “The court of appeals also held that Scott was prejudiced by his counsel's failure to respond to the State's objection. But whether Scott was prejudiced also depends on the content of the threat.”
 - “The burden is on the defendant to demonstrate a reasonable probability that the outcome of his or her case would have been different absent counsel's error.”
 - “However, without the content of the threat, the record is insufficient to conclude that the outcome of the trial would have been different if it had been admitted.”
 - A weak threat could have harmed Scott, making his reaction seem “irrational and disproportionate.”
 - “Prejudice cannot be determined here without knowing the specifics of the threat.”
- Holdings
 - “Without considering the specifics of the threat, it is impossible to determine whether Scott's trial counsel was ineffective.”
 - Reversed and remanded to the Court of Appeals to consider the 23B motion and address his claim regarding the verdict-urging instruction.

Kansas v. Garcia, 140 S. Ct. 791 (2020) (Alito, 5-2-4 (Thomas and Gorsuch both joined in the majority and in Thomas's concurrence))

- Issues:
 - The Kansas Supreme Court held an “identity theft” statute to be preempted by the Immigration Reform and Control Act of 1986 (IRCA).
 - SCOTUS rejects this reading of the provision in question, as well as respondents’ alternative arguments based on implied preemption.
- Background:
 - IRCA makes it unlawful to hire an alien knowing he or she is unauthorized to work in the U.S.
 - It requires employers to comply with a federal employment verification system, attesting they’ve verified that any new employee is not an unauthorized alien by examining approved documents.
 - Employees are also required to so attest and provide supporting documentation (I-9 forms)
 - It’s a federal crime to provide false information, but not to work without authorization, and state laws criminalizing such conduct are preempted
 - Forms and appended documentation gathered as part of this process may only be used for enforcement of federal immigration laws.
 - IRCA does not address federal and state tax-withholding forms (W-4 & K-4)
 - Kansas’s law prohibits “identity theft” or engaging in fraud to obtain a benefit
- Facts:
 - Three unauthorized aliens (Garcia, et al.) used another person’s Social Security number on the W-4’s and K-4’s they submitted upon obtaining employment. They had used the same numbers on their I-9 forms.
 - They were convicted under the Kansas law, which was affirmed by the Kansas Court of Appeals.
 - The Kansas Supreme Court reversed, concluding IRCA prohibited the use of any information “contained in” an I-9 form as the basis for a state prosecution. The court deemed irrelevant the fact that this information was also included in the W-4’s and K-4’s. One justice concurred on the basis of implied preemption.
- Appeal:
 - Preemption
 - The Supremacy Clause (Art. VI, Cl. 2)
 - “[T]he Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any ... Laws of any State to the Contrary notwithstanding.”
 - In other words, to the extent there is a conflict, federal law preempts state law
 - “IRCA’s express preemption provision applies only to employers ... and is thus plainly inapplicable.”
 - “The Kansas Supreme Court instead relied on §1324a(b)(5), which broadly restricts any use of an I-9, information ‘contained in’ an I-9, and any documents appended to an I-9.”
 - The Court finds this idea, that anything “contained in” an I-9 is forever off-limits for any other purpose, regardless of where else it might exist, “is contrary to standard English usage.”
 - There is also an argument that 1324(d)(2)(F) saves the analysis, as it “prohibits use of the federal employment verification system ‘for law enforcement purposes other than’ enforcement of IRCA and the same handful of federal statutes mentioned in §1324a(b)(5).”
 - This fails because tax-withholding documents play no part in the federal “employment verification system.”

until it was nearly dark, after which he went with people and hung out later that evening. On cross by the State, one of Carrick's witnesses testified that Carrick could not have gone to the home, and she denied having told Husband that Carrick had only gone to retrieve a memento. She said she told Husband it was probably Victim's cousin, who was known for breaking into houses during funerals.

- On rebuttal, the State called Husband, who testified that when he talked to the witness a few days after the event, she claimed Carrick had just been looking for a memento or something sentimental. Defense counsel objected on hearsay grounds, but the court overruled the objection, saying it was "not offered for the truth" but "to impeach what [the witness] denied."
- Carrick was convicted of burglary.
- Appeal:
 - Carrick appealed, arguing ineffective assistance of counsel and moving for a 23B hearing to develop "critical facts" regarding trial counsel's perceived failures, as follows:
 - Counsel should have called an eyewitness testimony expert
 - Counsel should have investigated the officer's failure to follow certain "CSI practices"
 - Counsel should have investigated additional alibi witnesses
 - Counsel should have investigated "Cousin" as an alternative suspect
 - Counsel should have investigated the officer's relationship with one of the neighbor eyewitnesses, with whom he was "more than [a] simple acquaintance."
 - Counsel should have demonstrated that Carrick had the code to the garage
 - The Court partially granted the 23B motion, allowing for evidence on the all alibi witnesses, "Cousin" and the garage code. It was denied as to the rest.
 - On remand, the trial court found Carrick had failed to make counsel aware of additional alibi witnesses, but that he had made counsel aware of the garage code issue.
 - The defense investigator looked into cousin, and the trial court found that he couldn't put Cousin at the scene, and his only connection was his relationship to the Victim.
 - Carrick argues four things:
 - The trial court erred in denying his motion for a directed verdict
 - The trial court erroneously allowed hearsay evidence
 - The trial court (and this is unpreserved, so he must show plain error) improperly instructed the jury as to the mental states of burglary and the lesser-included criminal trespass
 - Trial counsel was ineffective in four respects:
 - He did not object to the jury instructions
 - He failed to present evidence Carrick knew the garage code
 - He did not investigate additional alibi witnesses
 - He did not adequately investigate Cousin as a possible suspect
- Analysis
 - Directed Verdict
 - Carrick argues the State failed to prove, in entering the house, that he possessed the "intent to commit ... theft."
 - The Court points out intent can be shown by circumstantial evidence, including "the manner of entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation."
 - The Court suggests there was ample evidence to submit it to the jury, including the fact of the affair, the fact that he was emotionally upset, his manner of entry and exit, leaving briskly and entering a waiting vehicle, his possible desire to secure a memento of the Victim, and using the time right after the funeral when he knew the house would be empty.

- There was at least “some evidence ... from which a reasonable jury could find that the element[] [of intent to commit a theft] had been proven.”
- Hearsay
 - The Court finds it admissible under Rule 801(d)(1)(A), as a prior inconsistent statement raised on cross which she now denies having made.
 - Carrick argues it was improper for the state to use the witness’s statement to Husband “substantively ... for its truth” during closing argument.
 - The Court says his issue with its use, as opposed to its original admissibility, should have raised an objection during closing, which he is not now asserting trial counsel should have made.
 - The trial court’s suggestion that it was not being offered for its truth was incorrect. A prior inconsistent statement is non-hearsay, and can be used for any purpose, including its truth.
- Jury Instructions
 - This was argued under plain error, since it was not preserved at the trial court
 - The Court finds this to have been invited error, where trial counsel was specifically asked if he had any objections to the jury instructions and he said, “No, Your Honor.”
 - Invited error “discourages parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal and gives the trial court the first opportunity to address the claim of error.”
 - Because his attorney stipulated to the instructions, plain error is not available to him.
- Ineffective Assistance
 - Defendant must show that counsel’s performance was deficient (i.e., that, despite a strong presumption to the contrary, it fell below an objective standard of reasonableness) and that the deficient performance prejudiced him (or that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different, undermining the court’s confidence in that outcome).
 - Jury Instructions
 - Counsel failed to object to the lack of a definition instruction for “intent,” which is the culpable mental state for burglary. While the Court finds this perplexing, it does not find it prejudicial.
 - The Court determines the definition of “intentionally” or “with intent” comports so closely with the plain meaning of the word, that the jury isn’t likely to have understood it any other way.
 - Additionally, the State argued in conformity with the appropriate definition, not citing it expressly, but talking about Carrick’s “purposes” in entering the home and the jury’s ability to “infer” his “motives.”
 - Thus, because “the evidence was presented to the jury in a manner consistent with the statutory definition of intent, and the jurors would in all reasonable probability have reached the same result had they been instructed in accordance with the statutory definition of intent.”
 - Garage Passcode
 - Carrick argues that he, knowing the code, would not have entered and exited through the window, so counsel’s failure to present that evidence was ineffective.
 - Four witnesses saw Carrick at the house that afternoon, and the Court can conceive of several reasons why he might not have used the code:
 - He didn’t want to draw more attention by opening the large garage door
 - He wanted to be able to argue what he does now, that he knew the code, so it couldn’t have been him
 - **The court doesn’t mention that he might have had concerns about use of the code showing up in the system’s history

- The Court doesn't think it would have made enough of a difference to undermine their confidence in the outcome – no prejudice
 - Alibi Witnesses
 - The trial court found Carrick had not disclosed additional witnesses, though that doesn't end the analysis.
 - “[C]ounsel are still required ‘to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’”
 - Here, trial counsel presented four solid alibi witnesses, and his job is not to interview every relative and acquaintance of the accused.
 - Investigation of Cousin
 - Based on physical features, Cousin's unknown whereabouts during the funeral and nothing else to tie Cousin to the scene of the crime, the Court assumes, without deciding, that Counsel's failure to investigate further was deficient.
 - In any event, Carrick hasn't shown a “reasonable probability” of a different outcome had he done so.
- Holdings
 - The trial court did not err (uninvited) as to the motion for a directed verdict, the hearsay objection or as to the jury instructions.
 - Carrick did not receive ineffective assistance of counsel as to the jury instructions, the passcode, the investigation of Cousin or additional alibi witnesses.
 - Affirmed.

State v. Hamilton, 2020 UT App 11 (Appleby)

- Issues:
 - Question 1: Are seemingly inconsistent verdicts on multiple offenses a sufficient basis to overturn the counts that resulted in conviction?
 - Answer 1: No
 - Issue 2: Sufficiency of the evidence on obstruction
- Facts:
 - Hamilton was the managing pharmacist at a Salt Lake City Pharmacy in which another pharmacist alternated shifts with him, and several technicians helped out.
 - In 2017, two technicians noticed shortages of phentermine, a controlled substance they rarely distributed. They also found loose phentermine pills on a shelf and, along with the other pharmacist, started tracking the comings and goings of phentermine. One night, while Hamilton was the only one working, one technician had written down how many phentermine pills were present when he ended his shift. The next morning, the other technician counted upon beginning her shift and the numbers did not match. The other pharmacist reported the issue to their asset protection district manager. Shortly thereafter, one of the technicians and the other pharmacist stopped working there.
 - The asset manager investigated, which revealed Hamilton accessing the phentermine when he was not filling a prescription and editing the inventory in the computer system to account for the loss of the pills. Hamilton was brought in for an interview, but became immediately defensive and, when he wasn't allowed to watch the surveillance footage in question, resigned and walked out.
 - Reports were made to the state pharmacy board and the DEA, and Hamilton was charged with theft, obstructing justice and possession of a controlled substance.
 - The district manager testified at trial that discrepancies sometimes arise, and pharmacists have the ability to reconcile the numbers, but adjustments have to be reported. Hamilton's credentials were shown to have been used to adjust the phentermine numbers multiple times, but no reports were ever made.

- At trial, Hamilton was convicted of obstruction of justice, but acquitted of theft and possession of a controlled substance. Hamilton moved to arrest judgment, arguing that the obstruction was so “inextricably intertwined” with the other two offenses that his two acquittals demanded a third. The District court denied the motion, concluding that sufficient evidence supported the conviction, and that a guilty verdict to theft and possession was not necessary to support the obstruction conviction.
- Appeal
 - Hamilton argues the district court erred in denying his motion to arrest, as the jury’s verdict was inconsistent where the underlying crimes he was obstructing did not result in convictions.
 - “This court will not reverse a conviction on an inconsistent verdict challenge unless reasonable minds could not rationally have arrived at the verdict of guilty beyond a reasonable doubt based on the law and evidence presented. As a result, so long as sufficient evidence supports each of the guilty verdicts, state courts have generally upheld the convictions.”
 - “But the obstruction of justice statute does not require a conviction of the underlying crime—it simply requires a finding that the defendant took certain actions ‘with [the] intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense.’”
 - “Nor does it require that a defendant cover up his own crime. ... Therefore, the verdicts the jury reached in this case are not inconsistent because it could have found that Hamilton obstructed justice even if it concluded that he had not personally committed theft or possession or use of a controlled substance.”
 - “But regardless of whether the verdict was truly inconsistent, Hamilton is entitled to relief only if the evidence was insufficient to support his obstruction of justice conviction.”
 - “Hamilton's acquittal on the charges of theft and possession or use of a controlled substance does not necessarily mean the jury found that the State failed to meet its burden of proof for those crimes. It is equally possible that the jury, convinced of guilt, properly reached its conclusion and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the other offense[s].”
 - As to obstruction, “[n]othing in the record indicates that reasonable minds could not rationally have arrived at a verdict of guilty beyond a reasonable doubt.”
- Holding
 - Hamilton’s acquittals do not undermine his conviction, for which there was sufficient evidence.
 - Affirmed.

State v. Hutchinson, 2020 UT App 10 (Harris)

- Issue: Does JRI prevent a court from revoking probation and imposing statute on repeated drug offenses?
 - Answer: No, revocation is always within a court’s discretion
- Facts:
 - “At least since 2012, Jordan Keith Hutchinson has had a drug problem. He pled guilty to his first drug-related offense in 2013, and then spent the next five years on probation, during which time Hutchinson was given the opportunity to participate in drug court and several other addiction treatment programs. None seemed to work, though, and Hutchinson racked up twenty-four probation violations, including the commission of several new drug offenses, even two for distribution. By 2018, the district court had seen enough, and revoked Hutchinson's probation and imposed his original prison sentences.”
- Appeal
 - Hutchinson’s arguments are twofold:
 - He challenges the District court’s decision to revoke in light of JRI

- He contends the District court failed to make adequate findings in support of his probation violations
 - Revocation vs. JRI
 - Hutchinson’s revocation also has two parts:
 - Legally, the District court erred in its application of the current statutory scheme
 - Factually, revocation and prison was too harsh for drug offenses
 - The Statutory Scheme
 - “Significantly, the JRI amendments to the probation statute preserved a district court's authority to completely revoke probation in appropriate cases, even without applying the new graduated sanctions.”
 - The statute “commands courts to apply the new graduated probation sanctions only if ‘a period of incarceration is imposed for a violation’ of probation, but specifically not in cases where ‘the judge determines that . . . the sentence previously imposed shall be executed.’”
 - “[U]nder the post-JRI statutory scheme, a court—as opposed to, say, AP&P, see id.—is required to implement the graduated sanctions only if two conditions are met: (a) the court elects to impose "a period of incarceration . . . for a [probation] violation," and (b) the court determines not to revoke probation (and thereby impose the original sentence). Neither condition is met here.”
 - “Harsh” Punishment for “Minor” Violations
 - “The decision to grant, modify, or revoke probation is in the discretion of the [district] court. However, although the district court is afforded wide latitude in sentencing, this discretion is not limitless, and an appellate court may reverse a sentencing decision upon a finding that the district court abused its discretion.”
 - “An abuse of discretion occurs if no reasonable person would take the view adopted by the [district] court or if the sentence is clearly excessive, inherently unfair, or exceeds statutory or constitutional limits” and “a single violation of probation is legally sufficient to support a probation revocation.”
 - “Here, the court did not revoke Hutchinson's probation for a single probation violation, or for "minor" probation violations. Over the years, Hutchinson had committed a total of twenty-four probation violations, including three fresh ones, some of which were anything but minor.”
 - “The court noted that it had given Hutchinson every chance . . . lamenting the fact that Hutchinson had not taken advantage of the opportunities.”
 - “Under these circumstances, we cannot conclude that the court exceeded its discretion by revoking Hutchinson's probation.”
- Factual Findings
 - “Hutchinson contends that the record needs to be clear as to the specific violation(s) upon which the court was relying to support its decision, especially here, where the court's decision was based on his performance on probation in its totality.”
 - This issue was not preserved, so he must show plain error – that the error was obvious and fundamental, and the court should have stopped on its own, without being asked. Also, he must demonstrate that the error was harmful.
 - Hutchinson says the court failed to make findings as to two of the allegations, even though he admitted at least three others
 - The Court says he can’t show harm where there were plenty of other violations upon which the court could have relied
 - Hutchinson also argues the court needed to specify which allegations it was relying on in determining to revoke his probation

- The Court says where there's plenty to rely on, they're not going to require the court to be more specific, especially where "it is entirely appropriate for a district court to rest its decision on the totality of the probationer's supervision history."
 - Hutchinson has failed to carry his burden demonstrating plain error
 - Holding
 - Hutchinson has failed to show either error in the District court's interpretation of the post-JRI statutes or an abuse of discretion in revoking his probation.
 - He has also failed to demonstrate plain error in the court's findings in support thereof
 - Affirmed

State v. Boysza, 2020 UT App 8 (Christiansen Forster)

- Issue: Is termination from inpatient treatment, to which Boysza committed as a zero-tolerance term of his probation, a sufficiently willful violation to justify revocation of probation?
 - Answer: Yes
- Facts:
 - Defendant was charged with multiple counts for sexually abusing his teenage stepdaughter. He pled guilty to one count of rape, and the State agreed to dismiss the remaining charges. As part of the plea agreement, Boysza agreed to complete an out-of-state inpatient sex offender treatment program and complete ten years of probation with standard conditions applicable to sex offenders.
 - Boysza completed the first four phases of the treatment program but was "adversely terminated" due to "his lack of compliance with the rules, repeated dishonesty and his unwillingness to take treatment seriously." Specifically, he had contraband photographs of his daughter and other minors, he violated rules of intimacy with his dating partner and failed to make necessary disclosures to her, he lied about the ages of her children, communicated with a minor and deleted photos from his phone without permission.
 - The State argued he was possessing photos that acted as a stimulus for his deviancy, failed to complete treatment and had contact with minors. Boysza said he didn't use the photos as a stimulus, and that he thought he was done with treatment. A representative of his treatment provider testified about the transition from inpatient to outpatient treatment, belying Boysza's claimed misunderstanding of his status relative to full completion.
 - The District court acknowledged all three violations, but emphasized the failure to complete treatment as "[t]he key to the probation in this entire arrangement ... I don't believe that could have been made any more clear the day of sentencing how important that was for you and you failed." The Court then imposed the original sentence of five years to life.
- Appeal
 - Boysza argues that the District court erred in finding his failure to complete treatment a willful violation of the terms and conditions of his probation.
- Analysis
 - To revoke probation, the District court must find, by a preponderance of the evidence, that the probationer violated and that "the violation was willful, and not merely the result of circumstances beyond the probationer's control."
 - "A determination that Boysza willfully failed to complete the inpatient therapy program required a finding that the probationer did not make bona fide efforts to meet the conditions of his probation."
 - "[H]ere, we cannot conclude that there was any error in the district court's determination that Boysza resisted the benefits of treatment by intentionally engaging in a pattern of dishonesty and an unwillingness to take treatment seriously."
 - "We also cannot perceive any error in the court's finding that Boysza repeatedly broke the rules."

- “His failure to follow the rules was not accidental, the product of coercion, or the result of an honest mistake. Rather, his failure to complete the program represented a willful violation of the terms of his probation.”
- Holding
 - The District court did not abuse its discretion in concluding Boysza willfully violated the terms and conditions of his probation, resulting in revocation.
 - Affirmed.

State v. Gilliard, 2020 UT App 7 (Mortensen)

- Issues:
 - Sufficiency of the evidence as to identity and constructive possession
 - Abuse of discretion in postponing and evidentiary ruling
- Facts:
 - Gilliard was the driver of a vehicle with two occupants that was stopped for seatbelt violations and speeding. The officer took his license and observed his general appearance before running his information and finding that his license was denied and the car was rented. The officer called for backup.
 - A second officer arrived as the original officer approached the car again and smelled marijuana. He asked Gilliard if there was marijuana in the car, and Gilliard responded that there was. The officer asked Gilliard to turn the car off and step out. Gilliard turned the car off but left the key in the ignition and refused to get out. The second officer approached, also getting a good look at Gilliard and the passenger, after which Gilliard fired up the car and sped away.
 - A high-speed chase ensued, during which a black backpack was thrown from the vehicle and retrieved by officers, who called off the chase when speeds got too high for the area. The backpack contained heroin and methamphetamine. Shortly thereafter, the car was found abandoned a few blocks away with the windshield smashed in, having collided with a train-crossing arm. In the trunk, officers found a second backpack, this one containing marijuana, methamphetamine and heroin. The drugs in both backpacks were packaged the same way – inserted into the toe of some socks with the socks rolled up.
 - Gilliard was charged with two counts of possession with intent, as well as simple possession and traffic offenses. Immediately before opening statements at trial, defense counsel objected based on hearsay to proposed testimony of an unavailable officer who had seen the backpack thrown from the car. Counsel argued this would also violate Gilliard’s right to confrontation.
 - The State argued the statements were non-hearsay, as they were offered to show why the backpack was collected, not for their truth. Alternatively, the State argued they were admissible hearsay as either present sense impressions or excited utterances. The State countered the confrontation argument by suggesting the statements were non-testimonial.
 - The court agreed that the statements were present sense impressions but wanted time to research the confrontation issue. Defense counsel asked for a ruling before opening statements, but in a one-day trial, the court didn’t want to delay, denying counsel’s request, but admonishing the parties to only present evidence in opening they had “a good faith belief [would] come in during trial.” The court also instructed the jury the lawyers’ statements are not evidence.
 - During opening, the State talked about the unavailable officer’s statements. The parties researched the issued over the lunch hour, after which the court determined the statements were testimonial and, therefore, inadmissible. The court allowed another officer to say he’d retrieved the bag due to information he’d been given by the unavailable officer.
 - The officers testified, identifying Gilliard and saying rental cars are commonly used by drug dealers. Gilliard presented evidence that he’d never been issued a driver’s license. The original officer clarified that it could have been a state identification card, and that a “skeleton record” existed for Gilliard to which the officer would have had access.

- Gilliard moved for a directed verdict, based on evidence of his identity, and that the quantity of drugs did not support a distribution charge. He also argued (awesomely) that he did stop originally, contrary to his charge for failure to respond to an officer's signal. The court denied the motion, and the jury convicted Gilliard of all but one distribution charge.
- Appeal
 - Gilliard raises two primary issues:
 - Sufficiency of the evidence
 - Abuse of discretion on postponing the court's ruling on hearsay
- Analysis
 - Sufficiency of the Evidence
 - Identity
 - Officers identified Gilliard based on physical characteristics, including a unique facial tattoo
 - An officer also testified about pulling up Gilliard's skeletal record and seeing that his driver's license was denied, confirmed by a state records manager
 - Gilliard says the inconsistency of the type of ID card and no mention of his name makes the evidence insufficient
 - The Court is not going to take this decision from the jury based on inconsistent evidence, when they had all of that information in making their decision
 - Two Backpacks
 - Gilliard suggests there was insufficient evidence connecting him to the backpacks
 - This was never argued below, so it's analyzed under plain error
 - He says it's preserved because he argued identification, quantity of drugs for distribution and that the driver of the vehicle did initially stop – the Court says this is not merely “fleshing out the issues below” – it's “transforming them completely”
 - Gilliard argues that his mere occupancy of the vehicle with another is not enough to tie him to the drugs (relying on *Lucero* and *Salas*)
 - Both of those cases were both on direct review, not plain error
 - The backpack in the road was in the middle of the road, indicating the driver had thrown it, and Gilliard had admitted to having marijuana in the car – the backpacks in the trunk was the only place drugs were found in the car – suggesting he knew it was there
 - Gilliard also fled both in and out of the rental car
 - While the evidence linking Gilliard to the drugs is not overwhelming, the Court concludes it was sufficient to survive plain error review
 - Delaying the Ruling
 - Gilliard doesn't challenge the court's ruling, as it went in his favor. However, he argues that the delay, without a prophylactic preclusion of any mention of the testimony pending the ruling, was prejudicial
 - The Court applauds the trial court's prudence in making a concerted effort to come to an informed decision, avoiding an erroneous conclusion of law.
 - This makes this an issue of the trial court's management of the trial proceeding, where courts are given a large measure of deference.
 - The trial court mitigated any prejudice by emphasizing in its instructions to the jury that what the attorneys say is not evidence for their consideration.
 - Accordingly, the decision to delay the ruling was no unreasonable, and did not exceed the trial court's discretion.
- Holdings

- There was sufficient evidence to support the identity of Gilliard as the perpetrator
- It was not plain error to submit the drug charges to the jury
- The trial court did not abuse its discretion in delaying its ruling on the officer's statements
- Affirmed