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CRIMINAL CASE LAW UPDATE[1]

LAURA B. DUPAIX
CHIEF, CRIMINAL APPEALS DIVISION
UTAH ATTORNEY GENERAL'S OFFICE
lauradupaix@utah.gov

MATTHEW BATES
DEPUTY COUNTY ATTORNEY
SUMMIT COUNTY ATTORNEY'S OFFICE
mbates@summitcounty.org

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1 Thanks to Dan Schweitzer, Supreme Court Counsel, National Association of Attorneys General, for his synopses of U.S. Supreme Court decisions.

APPELLATE PROCEDURE

Motion for arrest of judgment did not preserve for appellate claim of error in prosecutors closing argument.

***State v. Larrabee*, 2013 UT 70 (Lee).** Michael David Larrabee was charged with aggravated sexual abuse of a child for allegedly molesting his step-daughter's child, B.B. The evidence of abuse consisted largely of B.B.'s testimony. Larrabee testified and denied the allegations. During closing arguments, the prosecutor referred to evidence that had been excluded by a motion in limine: that B.B.'s mother claimed to have also been molested by Larrabee. Larrabee's attorney did not object, and the jury convicted Larrabee. Two months later, Larrabee filed a motion to arrest judgment, claiming that the prosecutor's statement violated the court's order and was prejudicial. The trial court denied the motion, and Larrabee appealed.

Held: Unpreserved. Larrabee's motion, filed two months after the alleged error, was untimely and did not preserve his claim of error for appellate review. Parties may not forgo timely objections and then cure the failure to object in a motion to arrest judgment.

CIVIL RIGHTS

Police officer who injured respondent in her yard while in hot pursuit of a misdemeanant was entitled qualified immunity.

***Stanton v. Sims*, 134 S.Ct. 3 (2013) (per curiam).** Through a unanimous *per curiam* opinion, the Court summarily reversed a Ninth Circuit decision that had denied qualified immunity to a police officer who injured respondent in her yard while in hot pursuit of a misdemeanor suspect. The Court had previously approved an officer's entry into a home while in hot pursuit of a felony suspect. It held here that it has not yet addressed whether an officer may enter a home (or the curtilage of a home) while in hot pursuit of a misdemeanor suspect – and the circuits are divided on the issue. Therefore, held the Court, the officer's action here did not violate clearly established law, thus entitling him to qualified immunity from respondent's §1983 action.

CONFRONTATION

Admitting unavailable victim's preliminary hearing testimony at trial did not violate the Confrontation Clause because defendant had the opportunity—although he did not use it—to cross-examine the victim.

***State v. Garrido*, 2013 UT App 245 (Orme).** Garrido beat, stomped on, and stabbed his pregnant girlfriend. He then held her prisoner overnight. He was convicted of aggravated burglary, aggravated assault, and aggravated kidnapping. The victim skipped the first two preliminary hearing settings after Garrido told her the case would be dropped if she didn't testify. Before the third preliminary hearing, the victim told the prosecutor that she would not testify if she wasn't guaranteed Garrido would be put away for life. The victim testified at the third preliminary hearing setting that she did not remember most of the charged events

and what she did remember contradicted what she had told police. Defense counsel had the opportunity to cross-examine the victim, but chose not to. At trial, the victim appeared only long enough to shout from the galley that she would not testify; she then fled. The trial court admitted the victim's preliminary hearing testimony and her statement to the prosecutor that she would not testify unless Garrido was put away for life.

Held: Affirmed. Admitting the victim's preliminary hearing testimony did not violate the Confrontation Clause. The victim was unavailable where she repeatedly refused to testify and "was absent for all but a brief moment of the trial," when she refused to take the stand and fled. And Garrido had a prior opportunity to cross-examine the victim, although his counsel elected not to. Confrontation guarantees only the opportunity, not the exercise of that opportunity. Admitting the victim's hearsay statement to the prosecutor also did not violate confrontation because it was nontestimonial.

CRIMINAL LAW

Under federal statute making it a crime to use or carry a firearm in a drug trafficking offense, defendant had to know in advance that his confederate would use or carry a gun.

***Rosemond v. United States*, —S.Ct—, 2014 WL 839184 (March 5, 2014) (Kagen).** Federal law makes it a crime to use or carry a firearm "during and in relation to any crime of violence or drug trafficking crime." The Court held that a person can be convicted of aiding or abetting that offense only if the government proves "that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." The Court therefore vacated petitioner's conviction because the jury instructions given at his trial "failed to require that [he] knew in advance that one of his cohorts would be armed."

Under federal drug trafficking law, when "death results" requires "but for" causation: proof that the defendant's actions were an independently sufficient cause of the victim's death.

***Burrage v. United States*, 134 S.Ct. 881 (2014) (Kagen).** When "death results" from a drug trafficking crime, 21 U.S.C. §841(b)(1)(C) provides for a significantly increased sentence. The Court unanimously held that this provision requires "but for" causation, which requires the government to prove (at the very least) that the defendant's actions were an independently sufficient cause of the victim's death. The Court therefore reversed an Eighth Circuit decision that had affirmed petitioner's conviction under §841(b)(1)(C). He was convicted for distribution of heroin causing death pursuant to jury instructions that allowed conviction when the heroin merely "contributed to" death resulting from "mixed drug intoxication," but was not the sole cause of the death.

For federal firearm purposes, state domestic violence statute requiring intentional bodily injury to the victim qualified as a "misdemeanor crime of domestic violence."
United States v. Castleman, —S.Ct. — (March 26, 2014). Under 18 U.S.C. §922(g)(9), it is a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The phrase "misdemeanor crime of domestic violence" is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." Id. §921(a)(33)(A) (emphasis added). The Court unanimously held that respondent's Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a "misdemeanor crime of domestic violence." The Court reasoned that §921(a)(33)(A) incorporates the common law definition of "force," which is mere offensive touching. The Court therefore reversed the Sixth Circuit, which had held that Johnson v. United States, 559 U.S. 133 (2010), dictates that "violent force" is required.

Spouse must voluntarily relinquish possession of marital home before he may be convicted of burglary for reentering.
***State v. Machan*, 2013 UT 72 (Durham).** Machan was arrested and removed from his marital home. While he was away, his wife obtained a restraining order that prohibited him from returning to the home for 150 days. Three weeks after the restraining order expired, Machan returned to the home while his wife was away. He waited for her with a rifle and a thirst for vengeance. When his wife and children returned and discovered his presence, they called the police. Machan was arrested and cha0rged with aggravated burglary, aggravated assault, and DV in the presence of a child. At the preliminary hearing, the magistrate refused to bind Machan over on the aggravated burglary charge, ruling that he did not unlawfully enter his own home. The State sought and was granted an interlocutory appeal.

Held: Affirmed. The court held that contract principles govern the question of whether an estranged spouse's entry in the marital home is unlawful. A spouse may be guilty of burglarizing his marital home, but he must first voluntarily relinquish possession of the home. In Machan's case, he did not voluntarily relinquish possession—he was forced out. He thus retained his possessory interest and could not lawfully be excluded from the home once the restraining order expired.

Proof that a defendant occupies a "position of special trust" requires proof both that the defendant stands in a "position of authority" over the victim and that the position—even if enumerated in the statute—allowed the defendant to "exercise undue influence" over the victim.
***State v. Watkins*, 2013 UT 28 (Parrish).** Watkins lived with his niece and her husband. The husband's 11-year-old daughter often spent weekends at their home. One night, Watkins entered the girl's bedroom and kissed her head and pinched her butt. Watkins stopped and left only after the girl repeatedly told him to leave. The next day, Watkins gave the girl a $100 bill to keep her mouth shut. Apparently, it wasn't enough because the girl told her father. A

jury convicted Watkins of aggravated sexual abuse of a child. The aggravator was based on Watkin's occupying a position of special trust to the victim because he was an adult cohabitant of her parent. The court of appeals affirmed, holding that to prove a position of special trust, the State only had to prove that Watkins fit in one of the enumerated positions listed in the statute. The Utah Supreme Court granted cert.

Held: Reversed. Utah Code Ann. § 76-5-404.1 aggravates child sexual abuse if the defendant occupies a "position of special trust in relation to the victim." Subsection (4)(h) defines "position of special trust" as that "position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to," several enumerated positions such as a youth or recreational leader, a teacher, a coach, religious leader, parent, uncle, *or adult co-habitant of a parent*. The State's reading of the statute that anyone on the enumerated list is in a position of special trust is plausible. But the Court finds a more plausible reading to be that a person on the list is only a person in a "position of authority" and that the State is also required to prove that "by reason of that position," the person on the list "is able to exercise undue influence over the victim." Look for 2014 amendment to the § 76-5-404.1(4)(h) clarifying that if you're on the list, you're in a position of special trust and the State need not further prove that you're able to exercise undue influence over the victim.

Trial court's characterization that protective order statute protects both the person and the listed address was an oversimplification of the law, but harmless.

***State v. Fouse*, 2014 UT APP 29 (Orme).** Fouse's wife got a domestic violence protective order that required Fouse to not contact her in any way and to "stay away" from the listed address. The listed address was the apartment of one of the wife's sisters, where the wife and her children were staying. The apartment was one unit of a four-plex, and another of the wife's sisters lived next door. Fouse addressed and mailed several letters to his wife's sisters. The letters, although addressed to the sisters, were clearly aimed at Fouse's wife and contained veiled threats and pleas to get back together. Fouse also left a box on his wife's back doorstep that contained wedding mementos and various letters, including one addressed to his wife. Fouse was charged with stalking and six counts of violating a protective order. During deliberations, the jury sent a note to the trial court asking if a protective order protects "a person or an address or both." Over Fouse's objection, the trial court answered: "A protective order protects the named person and the listed address." Fouse argued on appeal that the court's answer was wrong because the statute did not prohibit him from writing a letter to a non-protected person who lived at the same address.

Held: The trial court's answer has some basis in the protective order statute, which says that orders may exclude a defendant from identified residences, schools, and workplaces. But, technically speaking, the answer was an oversimplification of the law. Although the statute refers to protected places which the defendant must stay away from, the focus is still on protecting the person. But even if the trial court's answer were error, it was harmless. The evidence was overwhelming that Fouse intended to contact his wife through the letters to her sisters.

Retaliating against a witness can include threatening to harm the witness's family members.

***State v. Lingmann*, 2014 UT App 45 (Roth).** Lingmann pled guilty to unlawful sex with a minor, stalking, and sexual exploitation of a minor. Lingmann offered to pay a cellmate to kill the victim, her parents, and her sisters by burning the family home down. The cellmate told police and they surreptitiously recorded two conversations in which Lingmann repeated his offer to the cellmate. Lingmann was charged with six counts of solicitation to commit aggravated murder, one count for each member of the victim's family. The charged aggravator was that Lingmann was "retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation." Lingmann challenged the sufficiency of the evidence to convict on the counts against the victim's sisters because there was no evidence that the sisters had testified or been involved in the legal proceedings against him or that he was retaliating against *them*.

Held: Affirmed. The trial evidence showed that Lingmann tried to harm the victim's sisters in retaliation for other family members' participation in the first prosecution. That Lingmann expanded the scope of his vengeance to include the victim's entire family does not vitiate the retaliatory motive that animated the entire scheme. Soliciting the murder of a witness is no different from soliciting the murder of a witness's family member in retaliation for that witness's testimony.

Defendant, as an accomplice to aggravated murder, could be convicted of reckless manslaughter.

***State v. Binkerd*, 2013 UT App 216 (Orme).** Binkerd called the shots in his gang. When it looked like Binkerd's ex-girlfriend was snitching, Binkerd put a "green light" and SOS ("shoot on sight") on her. Binkerd told his lieutenant Alvey that the only way to take care of a snitch was to "kill 'em." On Christmas Eve, Alvey put a gun to the victim's head while Binkerd whispered in her ear that "she was going to die tonight." Two days later, Binkerd learned that the victim had a tape recorder and a list of every phone number that a gang member had called that day. Binkerd told Alvey to drive the victim up a canyon and leave her there. During the drive, Binkerd called Alvey and said, "Don't bring her back." Alvey shot and killed the victim near a reservoir. Binkerd rewarded Alvey with a blue bandana, a sign of respect for "doing a good job." Binkerd was charged as an accomplice with aggravated murder and, alternatively, with depraved indifference murder. Before Binkerd's trial, Alvey pled guilty to aggravated murder and, to avoid the death penalty, agreed to testify against Binkerd. At trial, Binkerd denied telling Alvey to kill the victim or ever intending that Alvey do so. At Binkerd's request, the jury was given the option of convicting on negligent homicide as an accomplice. Over Binkerd's objection, the jury was also instructed on reckless manslaughter as an accomplice. The jury convicted on reckless manslaughter. On appeal, Binkerd argued that he could not be tried as an accomplice for a crime that was different from the conviction of the principal actor.

Held: Affirmed. The accomplice liability statute and case law make clear that an accomplice does not have to possess the same intent as that of the principal actor. An accomplice is held criminally responsible to the degree of his own mental state, not that of the principal. This

prevents someone charged as an accomplice from escaping criminal liability by arguing that the principal had a lower intent or diminished capacity. Ample evidence supported the jury's determination that Binkerd acted recklessly—i.e., that he was aware of but consciously disregarded a substantial and unjustifiable risk that the victim would be killed as a result of Binkerd's words and actions. Thus, even though Alvey acted intentionally, Binkerd—as an accomplice—could be found guilty of acting recklessly.

Shondel doctrine does not apply to Utah's domestic-violence-stalking and electronic-communication-harassment statutes.

***State v. Wolf*, 2014 UT App 18 (Voros).** Wolf was convicted of domestic violence stalking, a third degree felony. Wolf argued that under the *Shondel* doctrine, he should have been sentenced for a class B misdemeanor under Utah's electronic communication harassment statute, rather than the stalking third degree felony.

Held: The *Shondel* doctrine is based on equal protection principles. It holds that when two statutes proscribe the exact same conduct but give different penalties, the defendant is entitled to the benefit of the lesser penalty. The *Shondel* doctrine applies only when the elements of the two statutes are "wholly duplicative." Here, the domestic violence statute contains an element that the electronic communication harassment statute does not: the offender has been or is at the time of the offense a cohabitant of the victim.

CRIMINAL PROCEDURE

A defendant has the right to cross-examine witnesses, but not to present extrinsic evidence for impeachment purposes.

***Nevada v. Jackson*, 133 S.Ct. 1990 (2013) (per curiam).** Through a unanimous *per curiam* opinion, the Court summarily reversed a Ninth Circuit decision that had granted habeas relief based on a purported violation of a defendant's constitutional right to present a defense. In this rape case, the defendant sought to introduce police reports and the testimony of police officers regarding prior instances when the victim had claimed the defendant had raped or assaulted her. The Nevada Supreme Court held that the trial court properly excluded such extrinsic evidence. The U.S. Supreme Court held that that decision was not an unreasonable application of clearly established law under 28 U.S.C. §2254(d)(1). The Court's precedents clearly establish a defendant's right to *cross-examine* witnesses, not to present *extrinsic evidence* for impeachment purposes.

Aggravated murder statute does not violate the Uniform Operation of Laws clause.

***State v. Mateos-Martinez*, 2013 UT 23 (Durham).** During the aggravated robbery of a beauty salon, Miguel Mateos-Martinez shot and killed Faviola Hernandez. He fled to Mexico, but was returned Utah under an extradition agreement that barred the State from seeking the death penalty. The State charged him with aggravated murder, but did not seek the death penalty. A jury convicted Mateos-Martinez. The judge sentenced him to life without parole. Mateos-Martinez appealed, claiming that both the prosecution's decision to charge him with

aggravated murder and the aggravated murder statute itself violate the Uniform Operation of Laws clause in the Utah Constitution.

Held: Affirmed. Mateos-Martinez first argued that the prosecution had treated him disparately by charging him with aggravated murder. In support of that claim, he proffered the cases of eight other defendants who each killed another person during a robbery but were only charged with murder and aggravated robbery. The Supreme Court rejected his claim because Mateos-Martinez had not provided enough information about the other defendants for the court to determine whether they were similarly situated with him. Mateos-Martinez also claimed, citing to *State v. Mohi*, that the aggravated murder statute failed to properly constrain a prosecutor's discretion to choose between murder and aggravated murder. The court rejected that claim because unlike the juvenile direct file statute at issue in *Mohi*, the aggravated murder statute contains additional elements beyond murder that must be proved.

A suspect who is residing in another state but cooperating with a federal investigation and prosecution in Utah is still "out of the state" for purposes of tolling the state statute of limitations.

***State v. Canton*, 2013 UT 44 (Lee).** In March 2007, Reinaldo Canton was living in New Mexico and struck up an online relationship with a police officer posing as a fifteen-year-old girl in Utah. After a series of lascivious exchanges, he agreed to meet the officer for sex at the Layton Hills Mall. On arriving at the mall, Canton was arrested and charged by federal authorities with enticement. A federal magistrate released Canton and allowed him to New Mexico to await trial. During the next fifteen months, Canton cooperated in the investigation and returned to Utah several times for court hearings. The federal district court eventually dismissed the case due to Canton's deteriorating physical health. In June 2009, the Utah charged Canton with enticement of a minor. Canton moved to dismiss, claiming that that the applicable statute of limitations, two years, had run. The State objected and asserted that Canton was residing in New Mexico and that the statute was therefore tolled. Canton responded that he had been legally present in the state by virtue of his cooperation with the federal prosecution and appearances in federal court. The trial court sided with the State, and Canton appealed.

Held: Affirmed. The phrase "out of the state" as used in Utah Code 76-1-304(1) refers only to the suspect's location outside the physical boundaries of the State. Legal presence in the State by virtue of a representative in the State or cooperation in other legal proceedings in the state is insufficient.

Trial court's failure to inquire into the reasons for Defendant's absence on day of trial and defense counsel's failure to seek a continuance were both harmless in light of court's post-trial finding that Defendant voluntarily absented himself from trial.

***State v. Gunter*, 2013 UT App 140 (McHugh).** Gunter was charged with aggravated sexual abuse of a child. On the day of trial, he did not appear. The trial court proceeded with the trial without objection from Gunter's privately retained attorney. The jury convicted Gunter, and the trial court issued a $200,000 warrant for his arrest. Gunter was later found in Mexico

and extradited. Gunter filed a motion for a new-trial, alleging that the trial court had failed to conduct an adequate inquiry into his absence and that his attorney was ineffective for not seeking a continuance of the trial. After hearing evidence the trial court concluded that Gunter had voluntarily absented him from trial. Gunter appealed.

Held: Affirmed. The trial court's inquiry was inadequate. But it's finding that Gunter voluntarily absented himself from the trial rendered any error or alleged ineffectiveness harmless.

Defendant's mid-trial suicide attempt raised a bona fide doubt as to his competency and triggered statutorily-mandated full competency hearing.

***State v. Wolf*, 2014 UT App 18 (Voros).** In the years following their break-up, Wolf stalked, harassed, and threatened his ex-girlfriend and one of her co-workers. Wolf, who had a history of mental illness, was charged with two counts of making terroristic threats and two counts of stalking. Wolf attended the first day of trial. Late that night, he called 911, identified himself, said he was going to shoot himself in the stomach. Officers found Wolf in a parked car with a gun and stomach wound. The next day, Wolf's counsel reported the suicide attempt to the trial court of the suicide attempt and that Wolf would be under psychiatric observation for 30 days. Counsel asked for a continuance and competency determination. The trial court denied the request, finding that Wolf had voluntarily absented himself and—based on Wolf's prior conduct in this case—another delay tactic. That afternoon, counsel filed a brief written petition for competency, citing Wolf's suicide attempt, his mental illness history, and a pretrial competency petition that had been withdrawn by prior counsel. The trial court refused to hold a full competency hearing and finished the trial in Wolf's absence.

Held: Reversed. Under Utah's competency statute, if a court finds that a petition raises "a bona fide doubt as to the defendant's competency to stand trial," it must hold a full hearing on the defendant's mental condition. Wolf's mental illness history, "punctuated mid-trial with a possible suicide attempt" and underscored by counsel's representations, raised a bona fide doubt as to Wolf's competency. The trial court therefore erred in not staying the proceedings and holding a full hearing. The Utah Supreme Court has held that a defendant's competency cannot be retroactively determined. The failure to hold a full competency hearing, therefore, cannot be harmless and Wolf's conviction is vacated.

Mid-trial amendment to dates in the information not a problem.

State v. Dalton, 2014 UT App 68 (Bench). Dalton was charged with two counts of rape, one as an accomplice and one as a principal. The information, probable cause statement, and preliminary hearing evidence all alleged that the offenses occurred around September 1, 2005 through January 2006. Three months before trial, the prosecution amended the information to allege the conduct was from January 2, 2005 through June 30, 2005. Mid-trial, the prosecution moved to amend the information back to the original dates to conform to the victim's trial testimony. Dalton objected, claiming that the amendment would prejudice him because in reliance on the pretrial amendment, he had stopped working on an alibi defense.

Held: Affirmed. Dalton's substantial rights were not affected by the mid-trial amendment. Given the first information, the probable cause statement, and the preliminary hearing testimony, Dalton had notice 18 months before trial that he was charged with crimes committed in late 2005. Given that, it would not have been reasonable for Dalton to simply abandon preparations for an alibi defense in response to the first amended information. And given the trial testimony it was pretty clear that Dalton would not have been able to pony up an alibi defense anyway.

A Rule 17(b) objection to the ordering of cases for trial that is raised the morning of trial is not timely and does not preserve the objection for appeal.

***State v. Johnson*, 2013 UT App 276 (Roth) (memo.).** In 2010, De Royale Johnson was charged with burglary and related offenses. He continued his proceeding several times. In 2011, he appeared in custody at a pretrial conference and set a trial date of July 6th. The court told him that he was a second or third place setting and that the first place setting would likely go. At a June 30th pretrial conference, the court again reiterated that Johnson's trial was in second place and likely would not go. Johnson asked for and was granted another pretrial conference on July 14th. On July 6th, Johnson appeared for trial and argued that his case should be heard because it had first priority under Rule 17(b). The court disagreed and heard the first place case. Johnson filed a motion to dismiss, arguing that the failure to follow the schedule in Rule 17(b) prejudiced his defense. The trial court denied the motion. Johnson was convicted at a later trial and appealed.

Held: Affirmed. Johnson failed to timely raise an objection to the court's misapplication of Rule 17(b). An objection to rule to calendaring cases for trial must be made at a time when the court can remedy the error without prejudicing the other side.

Amending judgment to reflect consecutive rather than concurrent sentences was a proper correction of a clerical error and did not violate Double Jeopardy Clause.

***State v. Perkins*, 2014 UT App 60 (Bench).** After chastising Casey Phillip Perkins for being a serial child abuser and after opining that Perkins should never be allowed to walk out of prison, the trial court imposed two prison terms of zero to five years and ordered them to run concurrent to each other and to a sentencing Perkins was currently serving. Later that day, the judge realized his mistake. He unsuccessfully to bring Perkins back to court that day. When that failed, he set a resentencing hearing on the next criminal calendar. The court's clerk then mistakenly prepared a judgment reflecting concurrent sentences, stamped the judge's signature on it, and faxed it to the prison. The next day, the clerk discovered the mistake and faxed an order to the prison instructing the prison to disregard the judgment. When the resentencing hearing was held, the judge explained the error and ordered consecutive sentences over Perkins' objection. Perkins appealed.

Held: Affirmed. The original judgment was inconsistent with the judge's intent, was not the result of judicial reasoning, and was obviously an error. The court thus properly amended the judgment to correct a clerical error. Because the court was correcting a clerical error, the amended judgment did not violate the Double Jeopardy Clause

DEFENSES

Drug dealer who uses force to defend self during drug deal may not claim self-defense.

***State v. Martinez*, 2013 UT App 154 (memo.) (Christiansen).** Angelo Noe Martinez was convicted of aggravated assault and distribution of a controlled substance. The convictions arose after Martinez stabbed Luis Torres during a drug deal. Martinez claimed that Torres had pulled a gun on him. The court instructed the jury on self-defense, including that a person may not claim self-defense if the person is attempting to commit or committing a felony at the time the force is used. Martinez appealed his conviction, claiming that the court plainly erred by not explaining the State's burden of proof with respect to his claim of self-defense.

Held: Affirmed. Any error in the jury instructions was harmless. Self-defense is not available to one who uses force during the commission of a felony. Martinez was committing a felony, distributing narcotics, when he stabbed Torres. He could not, therefore, claim self-defense.

DISCOVERY

Prosecutor violated discovery rules by failing to inform defense of last minute investigation.

***State v. Redcap*, 2014 UT App 10 (Voros).** Nathan Redcap was a prisoner when he was charged with attempted murder for donning homemade armor made from magazines and shanking a fellow inmate. Redcap presented testimony from two inmates who claimed to have seen the altercation and testified that the victim was in fact the aggressor. The State rebutted their testimony with testimony from its investigator, who had gone to the prison and taken photographs the vantage point of those inmates' cells. The investigator had done this last minute investigation only a week before trial. And the State did not disclose the photographs or the results of the investigation until after the Redcap's witnesses testified. Redcap objected to the photographs and testimony. The trial court overruled his objection, and the jury convicted him. Redcap appealed.

Held: Affirmed. A prosecutor has an ongoing to duty to disclose evidence requested under rule 16. This duty exists whether the evidence is reduced to a written report or is merely communicated to the prosecutor verbally. The prosecutor violated that duty by not disclosing his investigator's investigation a week before trial. But considering the totality of the evidence, the violation was harmless.

DOUBLE JEOPARDY

If trial court declares mistrial over parties' objection, double jeopardy bars a retrial unless the trial court explains legal necessity on the record.

***State v. Manatau*, 2014 UT 7 (Durham).** Manatau beat his wife in their apartment and pursued her when she fled to two other nearby apartments, breaking a window in one of them. Manatau was charged with aggravated burglary, aggravated assault, and bunch of other crimes.

Just before jury selection, bailiffs found a knife in the suit jacket Manatau's wife brought for him to wear in court. The trial court banished her from the courtroom for the rest of the trial. The next day, after the jury was empaneled and several witnesses had testified, the wife's attorney asked that the wife be allowed to attend the rest of the trial, subject to searches and heightened security. The trial judge agreed. But after a recess, a very emotional trial judge announced that the knife incident had rattled her more than she had thought, and that she was therefore recusing herself and declaring a mistrial. Both the defense and prosecutor objected. The case was reassigned to a new judge, who denied Manatau's double jeopardy motion to dismiss, ruling that the mistrial was legally necessary. Manatau was convicted on all counts.

Held: Reversed. Utah's double jeopardy provision barred retrial. A retrial after a mistrial may proceed only if (1) defendant consents to the mistrial or (2) "legal necessity" justifies the mistrial. To show legal necessity, the trial court must make a record of the factual basis justifying the mistrial and why there is no reasonable alternative to a mistrial. The burden to create an adequate record of legal necessity is on the trial court and the prosecution, not the defendant. Nothing in this record showed that the trial court considered any alternatives to a mistrial, such as reassigning the case to another judge. Absent findings that reassignment was impossible, the Court resolved any record gaps in defendant's favor.

No double jeopardy violation for state to prosecute defendant for same conduct that feds convicted him on.

***State v. Robertson*, 2014 UT App 51 (Pearce) (mem.).** Robertson got caught with 24,000 images and 380 videos of child pornography. Robertson pled guilty in federal court to one count of possessing child pornography. He got 2 days in jail and federal probation. The state investigator that brought the case to the feds in the first place thought 2 days wasn't nearly enough, so he took the case to a state prosecutor. The State charged Robertson with 20 counts of possessing child pornography. Robertson was convicted after a bench trial and sentenced to 20 concurrent counts of 1-to-15 years in prison.

Held: Double jeopardy did not bar Robertson's state prosecution. Under the dual sovereignty doctrine, separate sovereigns—i.e., the federal and state governments—may prosecute for the same criminal behavior. The United States Supreme Court in *Barkus* carved out a narrow exception to this rule: when one sovereign so thoroughly dominates or manipulates the prosecution of another that the latter retains little or no volition in its own proceedings. Here, the state investigator's active participation in both prosecutions was not enough to fall under the *Barkus* exception. Defendant's argument that Utah's double jeopardy clause broadened the *Bartkus* exception would require the Court to recognize a weaker dual sovereignty doctrine, something the Utah Supreme Court soundly rejected in *State v. Franklin*, 735 P.2d 34 (Utah 1987). Res judicata also did not bar Robertson's state prosecution because the state and federal governments are not in privity.

Charging thirty separate counts for multiple sex acts with did not violate double jeopardy.

***State v. Hattrich*, 2013 UT App 177 (Christiansen).** Between 1994 and 1999, Paul John Hattrich raped and sexually abused five children. The state charged him with thirty different counts of rape of a child, sodomy on a child, and sexual abuse of a child. After Hattrich was bound over, he filed a motion to dismiss several of the charges, claiming that the violated the rule against multiplicity. The trial court denied the motion, and Hattrich entered a *Sery* plea to three counts of sodomy on a child. He then appealed.

Held: Affirmed. The Double Jeopardy Clause prohibits the government from charging multiple counts for a single offense. The test is whether the statute at issue prohibits individual acts or whether it prohibits a course of conduct. Multiple charges are permissible for the former but barred for the latter. Here, the crimes at issue clearly prohibit individual acts, not a course of conduct.

DUE PROCESS – FIFTH AND FOURTEENTH AMENDMENTS

Under federal law, a district court may freeze an indicted defendant's assets *ex parte*.

***Kaley v. United States*, 134 S.Ct. 1090 (2014) (Kagen).** Under 18 U.S.C. §853(e), a district court may issue an *ex parte* order freezing an indicted defendant's assets that are subject to forfeiture upon conviction. By a 6-3 vote, the Court held that, at a hearing to consider such a seizure's legality, criminal defendants are not "constitutionally entitled . . . to contest a grand jury's prior determination of probable cause to believe they committed the charged crimes." Rejecting petitioners' due process claim, the Court found that a grand jury's finding of probable cause is "inviolable" – even if the result is freezing the funds a defendant needs to pay his lawyer.

DUE PROCESS – STATE CONSTITUTION

Victims' eyewitness identification was reliable enough under *Ramirez* and state due process clause.

Rule 702: Allowing the State's ballistics expert to testify and excluding Defendant's expert, if error, was harmless giving the other evidence of guilt.

State v. Clark, 2014 UT App 56 (Christiansen). Clark and two cohorts went to a Salt Lake apartment to settle a drug dispute. Clark executed a man there by shooting him in the head. Clark then pumped 7 to 8 bullets a piece into the two women while his cohorts fled. The two women survived and identified Clark as the shooter from a six-photo lineup. One of the women knew Clark from previous interactions. Clark moved to exclude the identifications from both women as unreliable. The trial court opined that the *Ramirez* analysis did not apply when the eyewitness knows the suspect, but applied the analysis to both women anyway. The trial court found both identifications sufficiently reliable.

Held: Affirmed. Applying each *Ramirez* factor, the Court found that both women had a sufficient opportunity to view Clark, both were paying attention at the time, both had the

capacity to observe notwithstanding some mental health and drug use issues, the identifications were spontaneous, and the photo lineup was not suggestive.

State due process did not require dismissal for evidence destroyed by a third party because defendant did not show that there was a reasonable probability that the evidence would be exculpatory.

State v. Otkovic, 2014 UT App 58 (Davis). This robbery case was reversed for an erroneous evidentiary ruling under rule 403. See below. But to give guidance on remand, the Court addressed Otkovic's claim that a lost or destroyed bank video of the forced ATM withdrawal required dismissal of his case. To prevail on this motion, Otkovic had to demonstrate as a threshold matter that there was a reasonable probability that lost or destroyed evidence would be exculpatory. Otkovic had not made that showing. The Court did not examine the extent of the State's duty, if any, to obtain evidence before it is destroyed by a third party. But it noted that other jurisdictions have declined to impose such a duty.

EVIDENCE

Rule 403: Trial court erred in excluding evidence that robbery victim was a fence and therefore had a motive to frame defendant who was one of his suppliers.

State v. Otkovic, 2014 UT App 58 (Davis). Otkovic sent the victim a text offering to sell him a TV and a computer. The victim claimed that he believed the text came from Shields and that he did not know Otkovic. The victim testified that Otkovic showed up with a woman, drew a gun and took about $1600 in cash, and then forced the victim to withdraw about $300 from an ATM. The victim reported the robbery to police, who searched Otkovic's home and found a white Blackberry and a gun matching the victim's description. The victim also gave police a phone that Shields had given him. That phone contained several text messages from Otkovic's white Blackberry telling Shields that Otkovic was robbing the victim. At trial, Otkovic wanted to present evidence that Otkovic and Shields were involved in a multi-state theft ring with the victim. Otkovic claimed that the money was for payment of stolen goods, not the ill-gotten gains of a robbery. Otkovic also wanted to use the evidence to show that the victim and Shields had the knowledge and motive to frame him. The trial court allowed Otkovic to introduce evidence of his general dealings with the victim and Shields, but it excluded the victim's criminal history suggesting that he was indeed a fence. The victim admitted at trial that he bought and resold things, but maintained that he was unaware whether the merchandise was stolen and that in 10 years he had never had a problem reselling something that turned out to be stolen. Otkovic wanted to impeach this testimony with the victim's criminal history of burglary, stealing golf carts, and receiving stolen property. But the trial court again said no. The prosecutor argued the victim's lack of "any problems" with stolen merchandise in closing.

Held: Reversed. The trial court was within its discretion to limit the testimony about the victim's alleged criminal enterprise, but the limitation went too far. Particularly with respect to the victim's criminal history. Once the victim maintained that he had never had a problem with selling stolen merchandise, the defense should have been allowed to impeach that

testimony with the victim's criminal history. This was not harmless because it went to core of the defense.

Rule 404(b): Prior domestic violence assaults against the same victim was admissible to rebut defendant's claim that he acted in self-defense.

***State v. Labrum*, 2014 UT App 5 (McHugh).** Labrum argued with and yelled at his wife for several hours because he was irritated by the smell of spackling paste she was using to repair a wall. Wife finally retired to bed with a set of keys inserted between her fingers just in case Labrum became violent. Wife testified that Labrum repeatedly beat her in the face with a full Gatorade bottle when she told him to sleep elsewhere. According to Wife, when Labrum then landed on the keys, he punched her again. Labrum testified that when he went to bed, Wife attacked him, repeatedly punching him in the back with the protruding keys. The trial court admitted evidence under rule 404(b) that Labrum had violently attacked Wife on three prior occasions. The court admitted the evidence to explain why Wife took the keys to bed with her and to rebut Labrum's claim of self-defense.

Held: Affirmed. The purpose for other bad acts evidence must go to a contested and material issue. The prior assaults in this case were relevant to rebut Labrum's self-defense claim. The State needed the evidence to explain that Wife had reason to fear Labrum and that this prompted her to take the keys to bed with her. With this explanation, the State could not effectively challenge Labrum's testimony that Wife was the aggressor and that he had merely acted in self-defense. The prior assaults also pass rule 403's balancing test. When the doctrine of chances articulated in *State v. Verde* applies, the traditional *Shickles* factors do not apply; rather, the four foundational requirements announced in *Verde* apply. Because the doctrine of chances does not apply to this case, the traditional *Shickles* factors apply. Under those factors, the prior assaults were not excluded under rule 403: evidence of the prior assault was strong, the prior assaults happened relatively close in time to the charged assault, the prior assaults were no worse than the charged conduct, the prosecutor did not use the prior assault for any impermissible purpose, and the trial court gave a limiting instruction.

Rule 404(b): Evidence that defendant committed an almost identical aggravated robbery two months after the charged offense was relevant to rebut claim that defendant did not know his companions would threaten the use of a gun.

***State v. Lomu ("Lomu I")*, 2014 UT App 41 (Orme).** Lomu and another man went into a Maverik in West Valley City at about 3:30 a.m. Lomu went to the beer cooler, while his companion stood by the door as a lookout. The store clerk told the men that he could not sell them beer because it was after 1:00 a.m. Lomu offered the clerk $100 if he would sell him the beer anyway. The clerk refused. Lomu's companion lifted his shirt, moved his hand to his hip, and told the clerk he had a gun. Lomu kept his money, grabbed the beer, and fled with his companion. At trial, Lomu admitted that he was guilty of shoplifting, but not of aggravated robbery because he did not know that his companion was going to threaten the clerk with a gun. The trial court allowed evidence under rule 404(b) that Lomu committed an almost identical aggravated robbery in another Maverick in West Valley City about two months later. Lomu claimed that he did not know his companions in both robberies until that night.

Held: Affirmed. The later robbery was relevant under rule 404(b) to help show that he was not a mere shoplifter disinclined to steal beer if threats of violence were part of the transaction. The jury could properly decide whether Lomu could have "twice unintentionally found himself at the same type of store, in the same city, with the intent to steal beer with complete strangers, and without any knowledge of his companions' plans to make a gun threat, or whether the two incidents taken together were evidence of a higher likelihood" that Lomu had the intent to commit aggravated robbery. Because the relevance of the 404(b) evidence in this case was tied to the doctrine of chances, the 403 balancing analysis should be done by resort to the four foundational requirements in *State v. Verde*, 2012 UT 60, rather than the so-called *Shickles* factors. The trial court did not abuse its discretion under rule 403. The trial court here scrupulously examined the 404(b) evidence before admitting it, even though it did not enter a specific ruling expressly identifying the factors it considered in admitting the evidence. Scrupulous examination can be inferred from the arguments for and against admitting the evidence that the trial court had before it.

Rule 404(b): Defense arguably opened the door to testimony that the minor victim's sister believed the victim's rape allegations because of defendant's subsequent uncharged misconduct against the sister; but evidence was harmless in any event. *State v. Dalton*, 2014 UT App 68 (Bench). Dalton was the self-appointed "Holy Spirit" to his church. Harmon was Dalton's first counselor. Dalton and his followers regularly had divine "impressions" that they should have sex with friends, relatives, and babysitters. Dalton confirmed Harmon's impressions that Harmon should have sex with his 15-year-old babysitter and then told the victim that it was God's will. After Harmon had sex with the victim, Dalton—having received his own divine impressions—also had sex with the victim. Dalton was charged with two counts of rape: one as an accomplice for encouraging Harmon to have sex with the victim and the other for having sex with the victim himself. Harmon and the victim both testified against Dalton. Two of Dalton's female relatives testified that Dalton had used his religious position to pressure both of them to have sex with him; one caved, but the other did not. The defense called the victim's sister to testify that victim had a drug problem and that she had not believed her sister's allegations. Over a defense objection, the prosecutor was allowed to ask whether the sister still didn't believe her sister. The sister said she now believed the victim because Dalton had since asked the sister to pose nude for photos to post on the internet. Dalton argued on appeal that the sister's testimony on cross was inadmissible under rules 404(b), 403, and 608(a).

Held: Affirmed. Even if the trial court had exceeded its discretion in allowing the testimony, there was no harm. The other evidence of Dalton's guilt was "abundant." And Dalton did not challenge the 404(b) evidence of Dalton's two female relatives. That evidence was far worse than the sister's testimony about being asked to pose nude for photos. Although the decision on this issue was based on lack of prejudice, the opinion does contain good language (albeit dicta) that while certain evidence may be excludable in the State's case-in-chief, that same evidence may not be excludable when the defendant opens the door. It's proper to allow testimony in rebuttal that tends to dispute, explain, or minimize the effect of evidence

given by one's opponent. In this case, the testimony was necessary to disabuse the jury of the false impression that the victim's sister didn't believe her.

Rule 404(b): Evidence that murder defendant had used the same gun in a shooting six weeks earlier, was admissible to rebut defendant's claim that he was not at the scene of the murder and that the gun was not his.

State v. Clark, 2014 UT App 56 (Christiansen). Clark and two cohorts went to a Salt Lake apartment to settle a drug dispute. Clark executed a man there by shooting him in the head. Clark then pumped 7 to 8 bullets a piece into the two women while his cohorts fled. The two women survived and identified Clark as the shooter. Clark was arrested a few days later during a traffic stop and the murder weapon was found at Clark's feet in the car. Clark denied being at the apartment during the murder and claimed that the gun belonged to one of his cohorts. The trial court, after an evidentiary hearing and thorough examination of the evidence, let the State introduce evidence that Clark used the same gun in a West Valley shooting six weeks before the murder.

Held: Affirmed. The evidence was relevant to a proper non-character purpose. Clark put identity at issue by denying being at the murder scene and claiming that the gun belonged to someone else. Evidence that he had used the same gun in a shooting just six weeks earlier was relevant to rebut both claims. And the evidence passed the rule 403 balancing using the *Shickles* factors. The Court affirms that the *Shickles* factors are alive and well after *Verde* when the evidence is not offered under the doctrine of chances.

Rule 404(b): Trial court properly admitted evidence of prior sexual assaults.

***State v. Denos*, 2013 UT App 192 (Davis).** Thomas Wayne Denos was charged with sexually assaulting an intoxicated friend at a party. At trial, the court admitted over Denos's objection evidence from three women that Denos had sexually assaulted them under similar circumstances. The first two happened three years earlier and involved Denos rubbing the genitals of the women while they were asleep. Both of those assaults were unreported. The third women alleged that Denos had sex with her after she passed out from drinking too much. A jury acquitted Denos of that assault. The jury in the instance case convicted Denos, and he appealed.

Held: Affirmed. The prior assaults were properly admitted to show lack of consent. Citing to *State v. Verde*, 2012 UT 60, the court noted that the probability that all four women would independently, but falsely, accuse Denos of sexual assault was sufficiently low to make the evidence relevant to show lack of consent.

Rule 404(b): Evidence in sodomy on a child case that Defendant unsuccessfully pursued anal sex with his wife was admissible to show motive.

***State v. Pullman*, 2013 UT App 168 (Voros).** Donald J Pullman was charged with sodomy on a child for attempting to have anal intercourse with a twelve year-old girl. At trial, the State introduced, over Pullman's objection, evidence that Defendant had attempted to have anal intercourse with his wife and that she had rebuffed him. A jury convicted Pullman, and he

appealed, claiming that the evidence was inadmissible under rules 403 and 404(b).

Held: Affirmed. The testimony was relevant and was offered for a proper non-character purpose: to show Pullman's motive to have anal intercourse with the victim. Pullman inadequately briefed his claim that the evidence was inadmissible under rule 403.

Rule 404(b): Evidence that defendant told police that he bought drugs from a Mexican gang associated with the drug cartel was relevant to crime of drug possession and not unfairly prejudicial.

***State v. Duran*, 2014 UT App 59 (Bench) (memo.).** Officers surveilling a motel for suspected drug activity saw Patrick F Duran and another man walk near the motel and then, upon seeing the police, suddenly turn and walk away. One of the officers followed Duran as he jaywalked and then dropped a white baggie as he was walking between two cars. The baggie contained methamphetamine. The officer arrested Duran, who told the officer that he bought the drugs from man named Jose and that Jose was a member of a Mexican gang associated with a drug cartel. Duran was charged with drug possession. And the prosecutor argued that Duran's statement demonstrated that he knew that he was in possession of drugs. Duran was convicted and appealed, claiming that the reference to a gang was irrelevant and unfairly prejudicial.

Held: Affirmed. Duran's statements were relevant to show that he knowingly possessed. And the statement was not unfairly prejudicial because nothing suggested that Duran was part of a gang.

Rule 412: Evidence that defendant and the victim had previously engaged in consensual anal sex was relevant to whether victim consented to anal sex this time.

***State v. Richardson*, 2013 UT 50 (Lee).** Richardson had an argument with his live-in girlfriend one night. He said they then had consensual oral and anal "make-up sex." She said he forced her to have oral, vaginal, and anal sex. The victim had physical injuries to back her up, although parts of her story had inconsistencies and she had a prior conviction for lying to police officers about a sexual assault. The trial court allowed evidence of the parties' prior consensual sexual relationship, but under rule 412 excluded specific evidence that the parties had previously engaged in consensual anal sex when the victim was menstruating. The trial court thought the evidence was not sufficiently relevant to the issue of consent.

Held: Reversed. The bar for relevance is "very low"; it just has to have a tendency to make a fact of consequence more or less probable. The excluded evidence made consent more probable because it contextualized the victim's sexual relationship with Richardson. If the general evidence of a sexual relationship was relevant, the more detailed evidence was as well. A person is more likely to consent to sex with a past sexual partner. If a person is more likely to consent to sex with a past sexual partner, she is more likely to consent to the kind of sexual relations she has had with that partner in the past. The exclusion of the evidence here was not harmless. The Court left open whether the evidence might be excluded under rule 403 on remand.

Rule 412: Trial court properly excluded rule 412 evidence where Defendant did not file timely pre-trial motion.

***State v. Denos*, 2013 UT App 192 (Davis).** Thomas Wayne Denos was charged with sexually assaulting an intoxicated friend at a party. At trial, the court refused to allow Denos to admit evidence that the victim had intercourse that same night with her friend's boyfriend. The jury convicted Denos, and he appealed.

Held: Affirmed. Denos failed to file a pre-trial Rule 412 motion as required by the rule. That failure operated as a waiver of his right to confront witnesses about the encounter with the boyfriend.

Rule 412: Evidence of sexual assault upon victim is not prohibited by Rule 412.

***State v. Denos*, 2013 UT App 192 (Davis).** Thomas Wayne Denos was charged with sexually assaulting an intoxicated friend at a party. At trial, the court refused to allow Denos to admit evidence that another guest at the party attempted to sexually assault the victim until Denos intervened. The jury convicted Denos, and he appealed.

Held: Affirmed. The evidence of the guest's sexual assault is not excluded by rule 412. That rule generally prohibits evidence of the victim's sexual behavior or predisposition. Evidence that the Denos intervened in a sexual assault perpetrated by another person on the victim is not evidence of the victim's behavior or predisposition. Thus the evidence should not have been excluded by Rule 412. But the exclusion was harmless.

Rule 608: It was obvious, but ultimately harmless, error for trial court to allow detective to testify that the child sex abuse victim appeared to be "genuine" and "consistent" in his interview.

State v. Bragg, 2013 UT App 282 (Billings). Bragg invited a mother and her four boys to move in with him. Mother agreed, even though Bragg disclosed that he was a registered sex offender for having sexually abused his daughter. Not long after moving in, Bragg began sexually abusing Mother's seven-year-old son. Notwithstanding red flags everywhere, the victim's reports of inappropriate contact, and Bragg's unconvincing explanations, Mother stayed put. Eventually, Bragg's daughter turned him in. At trial, the detective who interviewed the child victim testified—in response to the prosecutor's questions—that the victim's responses appeared to be "genuine," consistent, and uncoached. Defense counsel did not object to this line of questioning or the responses. On appeal, Bragg argued that it was plain error for the trial court not to sua sponte strike the testimony.

Held: Affirmed. It was obvious error for the trial court to allow the testimony. Rule 608(a), Utah Rules of Evidence, prohibits testimony as to a witness's truthfulness on a particular occasion. The detective's testimony that the child appeared to be "genuine" during his interview was a direct comment on his truthfulness. Testimony that a sex abuse victim's interview statements were consistent and appeared uncoached have also be held to be obvious error. But no prejudice here because of the ample evidence of the defendant's guilt.

Rule 702: Trial court erred in excluding defense false confession expert, but error was harmless given overwhelming evidence of defendant's guilt.

***State v. Perea*, 2013 UT 68 (Parrish).** Perea was convicted of two counts of aggravated murder and two counts of attempted aggravated murder after he fired several shots at a rival gang's wedding party. Several witnesses identified Perea as the shooter. Perea later confessed to being the shooter in a *Mirandized*, but unrecorded interrogation. The trial court excluded a defense expert on false confessions.

Held: Affirmed. The trial court erred in not allowing the expert to testify about false confessions generally. Issues relating to admissibility of expert opinion regarding the reliability of confessions are a lot like those regarding the reliability of eyewitness identification. *See State v. Clopten*, 2009 UT 84. The expert testimony here was admissible under rule 702 because (1) it would have assisted the jury in evaluating Perea's claim that he falsely confessed and (2) the proffered testimony was sufficiently supported by reliable scientific study and methodology. The Court did not address whether the trial court was right in ruling that the expert could not opine on the truthfulness of Perea's confession because any error in excluding the expert was harmless. The evidence was overwhelming that Perea was the shooter and did not falsely confess.

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Rules 702/901: Trial court should have allowed defense crime scene expert to show his computer-generated animations to the jury, but error was harmless.

***State v. Perea*, 2013 UT 68 (Parrish).** Perea was convicted of two counts of aggravated murder and two counts of attempted aggravated murder after he fired several shots from a moving SUV at a rival gang's wedding party. Several witnesses identified Perea as the shooter. Perea later confessed to being the shooter. At trial, Perea called a crime scene expert to support Perea's theory that there was a second shooter and that it would have been impossible for Perea to hit the victims from the moving SUV. The trial court let the expert testify to his

conclusions of what happened based on his crime scene investigation. But the trial court would not let the expert comment on the credibility of other witnesses. The trial court also would not let the expert use photos he took of the crime scene because they did not accurately portray the scene at the time of the crimes. The trial court also would not let the expert use a computer-generated animation that he had prepared to illustrate his testimony because he had not created it himself and did not know how it was created.

Held: Affirmed. The trial court was right to not let the expert comment on the credibility of other witnesses. It was also right to exclude the expert's crime scene photos because, by the expert's own admissions, they did not accurately portray the crime scene on the night of the crimes. But the trial court should have let the expert use his computer-generated animation to illustrate his testimony. The animation was demonstrative as opposed to substantive evidence. Under rule 901(a), demonstrative evidence need only accurately illustrate the testimony given. The expert, therefore, need not know how the animation was created; only that it accurately illustrated his testimony. The Court drew a distinction between computer-generated *simulations*, which are usually substantive evidence. Simulations typically re-create events or experiments based on scientific principles and data. In simulations, data is entered into a computer, which is programmed to analyze and draw conclusions from the data. In that case, an expert would have to understand the underlying scientific principles. Excluding the animation was harmless, however, where it was short, the expert clearly explained his theories using other exhibits, and the evidence overwhelmingly pegged Perea as the sole shooter.

Rule 702: Allowing the State's ballistics expert to testify and excluding Defendant's expert, if error, was harmless giving the other evidence of guilt.

State v. Clark, 2014 UT App 56 (Christiansen). Clark and two cohorts went to a Salt Lake apartment to settle a drug dispute. Clark executed a man there by shooting him in the head. Clark then pumped 7 to 8 bullets a piece into the two women while his cohorts fled. The two women survived and identified Clark as the shooter. Clark was arrested a few days later during a traffic stop and the murder weapon was found at Clark's feet in the car. The same gun had been used by Clark in a shooting in West Valley about six weeks earlier. Clark moved exclude the State's expert testimony on the ballistics tying the gun to both shootings as scientifically unreliable. Clark also sought to call his own expert challenging the State's expert's methodology. The trial court decided the State's expert's methodology was reliable, but excluded the defense expert as unqualified.

Held: Affirmed. The Court assumed without deciding that the trial court abused its discretion both in allowing the State's ballistics expert to testify and in excluding the defense expert. Neither testimony could have significantly altered the outcome. The purpose of the evidence was to rebut Clark's claim that he wasn't at the scene of the murder and that the gun belonged to one of his cohorts. But two eyewitnesses and Clark's cohort put him at the scene and identified him as the shooter. Clark admitted that he used the gun in the West Valley shooting. It was undisputed that ammo used in both shootings and found in the gun was identical. And Clark's expert hadn't even examined the evidence and therefore couldn't rebut

the State's expert's conclusions.

Rule 801: Hearsay objection is timely if made immediately after the hearsay is testified to.

***State v. McNeil*, 2013 UT App 134 (Voros), cert. granted.** McNeil had a falling out with a co-worker and enlisted his son to assault the co-worker at the co-worker's apartment. During the assault, the son said that the victim's daughter and son-in-law were into drugs and owed the son $10,000. Later, the victim asked his daughter what she was into. She replied, "Dad, if you don't know me by now, you never will." At trial, the victim testified to his daughter's response. The defense immediately objected to the testimony as hearsay. The trial court overruled the objection, because the victim was already "done answering it." McNeil appealed asserting that failure to sustain the objection and strike the testimony was reversible error. (McNeil raised several other claims, but they were all disposed of as being invited or unpreserved. The Utah Supreme Court has granted cert on some of the other claims.).

Held: Affirmed. First, the hearsay objection was timely, even though it came after the statement had come in. An objection is timely if it give the court an opportunity to address the claimed error and correct it. Because counsel immediately objected, the trial court could have corrected any error by striking the remark and giving a curative instruction. Second, the statement was hearsay because it was offered and used for the proof of the matter stated. Third, the hearsay was harmless. It was not central to the State's case. Also, the statement was ambiguous and both the prosecution and the defense used it to argue their respective positions. Finally, the remaining evidence against McNeil was strong.

Rule 901: Foundational requirements for introducing text messages are easy.

State v. Otkovic, 2014 UT App 58 (Davis). This robbery case was reversed for an erroneous evidentiary ruling under rule 403. See above. But to give guidance on remand, the Court affirmed the admission of text messages on remand. The foundational requirements for admitting text messages can be met with circumstantial evidence. Here, it was enough to show that the text messages came from the defendant's phone and that there was enough evidence to support a finding that the defendant possessed the phone when the messages were sent. Although the defendant denied sending the texts or that he possessed the phone when they were sent, this went to the weight of the evidence, not its admissibility.

Detective's testimony that it is not uncommon for victims of child abuse to delay reporting okay; detective's testimony that a third of her cases involved delayed reporting may or may not be okay, but it was harmless.

***State v. Wright*, 2013 UT App 142 (Roth).** Victim testified that Wright—her father—sexually abused her beginning when she was 6- or 7-years old until she was 9. She waited almost a year before reporting the abuse to an 11-year-old cousin and then her mother. At trial, the investigating detective testified—without objection—that it was not uncommon for a child abuse victim to delay reporting. The detective was the allowed to testify—over Defendant's objection—that about 1/3 of hundreds of cases that the detective had investigated involved significantly delayed reporting.

Held: Affirmed. Utah courts have recognized that delayed discovery and reporting are common in child sex abuse cases. The detective's testimony that delayed reporting is not uncommon simply conveyed a common fact to the jury and did not convey any information about how the jury should view that testimony or other evidence in the case. But the detective's testimony that 1/3 of her cases involved delayed reporting went a step beyond that principle. The court of appeals sidestepped whether that testimony was inadmissible, however, because it found the testimony harmless. Indeed, 1/3 was a relatively low percentage that could be seen as helpful to the defense by eliminating any speculation that "not uncommon" might be a significantly higher percentage.

Trial court did not abuse its discretion in refusing to allow Defendant to cover his facial tattoos.

***State v. Ortiz*, 2013 UT App 100 (memo.) (Davis).** Daniel Martinez Ortiz was charged with aggravated robbery. Before trial, he filed a motion to be allowed to cover his facial tattoos, claiming that they were inadmissible as evidence under Rules 401, 402, and 403 of the Utah Rules of Evidence. The tattoos were not used for identification at trial or for any other purpose. The trial court denied the motion, and Ortiz was convicted.

Held: Affirmed. The tattoos were not "evidence" in the trial and were not, therefore subject to analysis under the rules of evidence.

EX POST FACTO

Ex post facto prohibits applying federal sentencing guidelines promulgated after defendant committed his crimes.

***Peugh v. United States*, 133 S.Ct. 2072 (2013) (Sotomayor).** By a 5-4 vote, the Court held that the *Ex Post Facto* Clause is violated "when a defendant is sentenced under [U.S. Sentencing] Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." Although the Guidelines are no longer mandatory, see *United States v. Booker*, 543 U.S. 220 (2005), they "cabin the exercise of [ ] discretion" by district courts. As a result, held the Court, the higher range "creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation."

FIFTH AMENDMENT—SELF INCRIMINATION

Privilege against self-incrimination does not prohibit prosecution from introducing evidence from a court-ordered mental evaluation to rebut expert testimony in support of a voluntary intoxication defense.

***Kansas v. Cheever*, 134 S.Ct. 596 (2013) (Sotomayor).** The Court unanimously held that the Fifth Amendment's self-incrimination clause does not "prohibit[ ] the government from introducing evidence from a court-ordered mental evaluation of a criminal defendant to rebut the defendant's presentation of expert testimony in support of a defense of voluntary intoxication." The Court concluded that, just as a defendant who testifies opens himself up to

cross-examination, so too does a defendant who "presents evidence through a psychological expert who has examined him" open the door to "the only effective means" the government has to "challeng[e] that evidence: testimony from an expert who has also examined him."

It did not violate the Fifth Amendment for prosecutor to argue that a failure to answer a question during a police interview suggested defendant's guilt.

***Salinas v. Texas*, 133 S.Ct. 2174 (2013) (Alito).** During a voluntary interview with a police officer regarding a murder, petitioner answered many questions but declined to answer a specific accusatory question; the prosecution argued at trial that petitioner's failure to answer suggested he was guilty. The Court held that the Fifth Amendment's Self-Incrimination Clause did not bar the prosecution from using petitioner's silence against him. A three-Justice plurality reasoned that, as a general matter, a person who wishes to rely on the privilege against self-incrimination must expressly invoke it; and neither of the exceptions to that general rule applied here. Two Justices (Scalia and Thomas) concurred in the judgment based on their view that *Griffin v. California*, 380 U.S. 609 (1965), was wrongly decided and that prosecutors and judges are entitled to comment on defendants' exercise of their Fifth Amendment privilege.

Discussing suspect's children during interrogation did not render confession involuntary.

***State v. Arriaga-Luna*, 2013 UT 56 (Durham).** Police suspected Delfino Arriaga-Luna of drug-related murder. They interviewed him from one to three in the morning about the murder. During the interview, they told him that if he did not inculpate his brother or claim that the killing was an accident, he would go to prison and never see his children again. Two days later, Arriaga-Luna was interviewed again. In that interview, the detective encouraged him to confess and accept responsibility so that he would retain his dignity and his children would respect him. The detective also offered to help locate community resources to break the poverty cycle for the children. An hour into the second interview, Arriaga-Luna confessed. Before trial, he moved to suppress the confession, claiming that the statements about his children rendered his confession involuntary. The district court agreed and suppressed the confession. The State appealed.

Held: Reversed. Threats from police regarding a suspect's children can render a confession involuntary. No per se rule exists, however. Courts must look at the totality of the circumstances and determine whether the circumstances indicate that the suspect's will was overcome. The court held that the first interview was not coercive because the police were trying to get Arriaga-Luna to implicate his brother, not to confess. And the detectives never said that Arriaga-Luna could see his children only if he confessed. The statement about seeking resources for Arriaga-Luna's children was not coercive because the detective never said that the children would get resources only if he confessed. Lastly, the detective never made any threats about Arriaga-Luna's children, the detective only appealed to his sense of morality, which is not coercive.

Out-of-custody suspect's anticipatory invocation of right to counsel was subject to waiver two days later when he was arrested and interrogated.

***State v. Perea*, 2013 UT 68 (Parrish).** Perea was convicted of two counts of aggravated murder and two counts of attempted aggravated murder after he fired several shots at a rival gang's wedding party. After the shooting, police called Perea on his cell phone and asked him to come to the police station to talk. Perea said he needed to talk to a lawyer first. Two days later, Perea was arrested. Officers read Perea his *Miranda* rights and Perea waived them and confessed. Perea moved to suppress his confession under *Miranda*, arguing that he had anticipatorily invoked his right to counsel when police called him two days earlier. The trial court denied the motion to suppress.

Held: Affirmed. Under *Miranda* and *Edwards*, a custodial suspect who has expressed his desire to deal with police only through counsel, cannot be subject to further interrogation until counsel has been provided or the suspect himself initiates further communication. But *Miranda* is all about *custodial* interrogations. It applies only when the defendant is in custody. Perea was not in custody when police called him. And his statement that he wanted to talk to a lawyer was made two days before he was in custody. Even assuming that Perea's statement constitutes a request for a lawyer, it was subject to waiver once the police arrested him and read him his *Miranda* rights.

FOURTH AMENDMENT

Absent co-occupant cannot object to present co-occupant's consent to search.

***Fernandez v. California*, 134 S.Ct. 1126 (2014) (Alito).** In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court held that when one occupant of a premises consents to a warrantless search by police, "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." By a 7-2 vote, the Court held that the same result does not obtain when an occupant objects to police entry into the premises, is later arrested and removed from the premises, and then a co-occupant consents to the police's entry. The Court concluded that *Randolph* "went to great lengths to make clear that its holding was limited to situations in which the objecting tenant is present," and that (unlike the situation in *Randolph*) consensual entry by the police here was not contrary to "widely shared social expectations."

Fourth Amendment not violated by collecting and analyzing DNA from people arrested and charged with serious crimes.

***Maryland v. King*, 133 S.Ct. 1958 (2013) (Kennedy).** By a 5-4 vote, the Court held that the Fourth Amendment allows a state to collect and analyze DNA from people arrested and charged with serious crimes. The Court ruled that because arrestees are already in valid police custody and charged with serious crimes, the proper inquiry is the reasonableness of the intrusion. And the Court concluded that intrusion is reasonable because the governmental interests – in processing and identifying persons in their custody, ensuring the safety of jail staff, ensuring that the accused show up at trial, and assessing the danger to the public when

making bail determinations– outweigh the minimal intrusion of taking a cheek swab to obtain the DNA.

Natural dissipation of blood alcohol alone does not an exigency make.
***Missouri v. McNeely*, 133 S.Ct. 1552 (2013) (Kennedy).** The Court held "that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." Instead, the Court will continue to look at the totality of the circumstances to determine whether the facts of the case merit an exception to the warrant requirement, although the "metabolization of alcohol in the bloodstream and ensuing loss of evidence are among the factors" that should be considered.

Anonymous tip about drug deal, unspecific drug involvement, and furtive movements while pulling over do not create reasonable suspicion to investigate driver for drugs.
***State v. Gurule*, 2013 UT 58 (Parrish).** Police received an anonymous tip that two Hispanic men, one with a grey truck, had exchanged money and baggies in the parking lot of the grocery store. Two detectives responded and saw one Hispanic man exit the store and leave in a black truck. Officers recognized the driver as Craig Gurule, a parolee whom citizens and other officers had mentioned was involved in drug activity. Detectives followed the truck and eventually stopped it for leaving its left blinker on for three blocks and for riding the white fog line. When detectives activated their lights, the truck did not immediately pull over. And as it did, the driver was glancing and making furtive movements to his left side. When detectives asked Gurule why he did not pull over immediately, he responded that he was on his phone and did not see them. They had Gurule exit the vehicle and noticed a suspicious bulge in his pants. They frisked Gurule and conducted a plain-view search of the interior of his truck. Detectives then called his parole agent, who asked them to conduct a search of the car. The search turned up 2.9 grams of methamphetamine and drug paraphernalia. Gurule unsuccessfully challenged the basis for the search. He then entered a *Sery* plea to possession in a drug-free zone and appealed.

Held: Reversed. Gurule's delay in pulling over, his furtive glancing and movements, and the bulge in his pants gave the detectives reasonable suspicion to conduct a *Terry* frisk of Gurule's person. But any suspicion that they had that Gurule possessed weapons or drugs was dissipated by the *Terry* frisk. Moreover, "the officers' actions bespoke an utter lack of diligence in pursing the original purpose of the traffic stop."

Transporting DUI suspect two blocks to station to perform FSTs during blinding snowstorm was a reasonable investigatory detention.
***State v. Beckstrom*, 2013 UT App 104 (Orme).** Officers respond to a head-on collision in a blinding snow storm. The at-fault driver, Tanga Beckstrom, has glossy, glazed eyes and slow, slurred speech. Officers suspect that Beckstrom is impaired and want to do FSTs, but because of the storm there is no good location near the accident. Officers ask and Beckstrom consents to traveling to the police station a few blocks away to perform the tests. They put her in a patrol car and drive two blocks to the station where they administrator FSTs on a dry, level

surface. The officers expressly tell Beckstrom that she is not under arrest and is only detained. She fails the FSTs, and blows a .228. She files an unsuccessful motion to suppress, claiming that her Fourth Amendment rights were violated when she was driven the police station. She then entered a *Sery* plea and appealed.

Held: Affirmed. Transporting a suspect can increase the intrusiveness of an investigatory detention and potentially escalate it to an arrest. But given the harsh weather and Beckstrom's consent, the additional intrusion occasioned by a trip to the station house was permissible.

Statute authorizing merchants to detain suspected shoplifters does not make merchants government agents.

***Orem City v. Santos*, 2013 UT App 155 (memo) (Christiansen).** Employees at a Costco suspected Elba Virginia Santos of shoplifting. They detained her in the manager's office, questioned her about shoplifting, and searched her purse and stroller. Santos was later charged with shoplifting. She sought to suppress the evidence seized by Costco, claiming that the employees who detained her under Utah Code 77-7-12 were acting as agents of the government. The trial court disagreed, and Santos appealed.

Held: Affirmed. To be deemed a government agent, a private party's conduct must be encouraged or directed by the government. The private party must have no other intent than to aid the government. Santos's claim failed on both counts. Legal authorization does not amount to knowledge of or acquiescence in a search. And Costco had independent reasons to seize Santos, including protecting its assets.

Hand-to-hand transaction observed by experienced narcotics detective created reasonable suspicion to stop suspect and investigate for drug trafficking.

***State v. Anderson*, 2013 UT App 272 (Roth).** A narcotics detective with extensive experience in observing hand-to-hand drug transactions was watching a gas station know for drug activity. A car pulled up and parked in the furthest spot from the entrance to the store even though closer spots were open. Ten minutes later, another car pulled up and parked a few stalls away from the first. The driver of the first car, Cassandra Anderson, walked to the second car and leaned into the driver's open window. The detective saw a hand-to-hand exchange in which Anderson took something from the second driver and put it in her right front pocket. After both cars left, the detective followed and stopped Anderson. She consented to empty her pockets, and the detective found meth and several pills in her front pocket. Anderson moved to suppress the evidence taken from her pocket, claiming that the detective lacked a lawful basis to detain her. The trial court denied the motion. Anderson appealed.

Held: Affirmed. The court of appeals relied heavily on the detective's training and extensive experience in observing hand-to-hand drug transactions. It held that the high incident of drug traffic at the gas station, Anderson's unusual parking spot-selection, the fact that the transaction occurred at the window, and the fact that Anderson appeared to try to conceal the

transaction all gave the detective reasonable suspicion that Anderson had just completed a drug transaction. Anderson's detention was therefore lawful.

Covering peephole during knock and talk did not unlawfully coerce occupants to open door; informants tip and plain odor of marijuana when door was opened provided probable cause for search warrant.

***State v. Hoffman*, 2013 UT App 290 (Voros).** Officers received a tip from an informant that two males, Sam and Rocky, were selling marijuana from their apartment and always have 4-5 pounds of weed. The informant provided the information in exchange for a reduction in his charges. Officers conducted a knock and talk on the apartment. When they first approached the door, one officer smelled a faint odor of marijuana. He covered the peephole and knocked loudly. The occupants replied, "Who is it?" The officer did not respond. He then heard the interior door latch being secured. The occupants refused to open the door, so the officer continued to pound on the door for a few minutes until somebody finally opened it. The officer immediately smelled an overwhelming odor of burnt marijuana. He asked whether he could come in. Somebody yelled, "Yeah, come on in." The detective entered and asked the occupants if he could search the apartment for drugs and paraphernalia. They refused, so he obtained a warrant and found Samuel Joseph Hoffman, five bags of marijuana, and a handgun in the apartment. Hoffman moved to suppress the evidence, claiming that covering the peephole coerced him to open the door and that without the evidence obtained after the door opened that the warrant lacked probable cause. The trial court denied the motion, and Hoffman appealed.

Held: Affirmed. Covering the peephole involved no misrepresentation or deceit and was in fact less coercive than most police tactics used to investigate drug crimes. And once the door was open, the informants tip coupled with the plain smell of marijuana provided ample probable cause for a magistrate to issue a warrant.

Inevitable discovery doctrine cured allegedly illegal arrest.

***State v. Mitchell*, 2013 UT App 289 (Voros).** An ICAC agent discovered child pornography on a computer using a peer-to-peer file sharing network. The service provider told the agent that the IP address of the computer belonged to Donald Mitchell and that his address was 50 North 100 East. But other databases had Mitchell living at 70 North 100 East. The agent had local law enforcement photograph Mitchell's home and write a physical description of it. He then obtained a warrant that listed 70 North as the situs address and 50 North as the physical address. When the agent executed the warrant, he first went to Mitchell's place of work and detained him. The two drove to Mitchell's home, and Mitchell confirmed that the home they arrived at was his. The agent searched the home and found a computer. A search of that computer revealed child pornography. Mitchell sought to suppress the evidence, claiming that his detention/arrest was illegal and that the agent would not have found his computer without detaining him because he would not have found Mitchell's house without Mitchell's assistance. The trial court disagreed, and Mitchel appealed.

Held: Affirmed. Although the address in the warrant were ambiguous, the photograph and

written description from local law enforcement provided sufficient detail that the agent was able to find the house without Mitchell's assistance. The inevitable discovery doctrine thus cured any illegality in Mitchell's arrest.

Detective's frisk for weapons was within scope of consent.

***State v. Burdick*, 2014 UT App 34 (Christiansen).** Detectives stopped at Phillip Don Burdick's home to look for a suspect in another case. While they were at the home, Burdick was fidgety and could not hold still despite the detectives' request to sit down and hold still. A detective asked Burdick if he could frisk him "just for weapons to make sure you don't have nothing that's going to hurt me." Defendant consented. Before searching, the detective asked, "Do you have anything that's going to poke me, stick me, or hurt me?" Defendant said, "No." The detective patted him down and felt an object that he immediately recognized as a syringe. When the detective asked Burdick why he didn't tell him about the syringe, Burdick became upset and yelled, "I didn't f'ing say you could search me for syringes!" Burdick was charged with possession of paraphernalia. After an unsuccessful motion to suppress, a jury convicted him. Burdick appealed.

Held: Affirmed. The scope of a consensual search is governed by an objective standard of what a reasonable person would have understood by the exchange between the officer and the suspect. Here, the search conformed with both an objectively reasonable person's expectations and the limits of a *Terry* frisk. The detective immediately recognized the object as a syringe, and the trial court found that the syringe was a dangerous weapon. Thus the detective did not exceed the scope of the consent in seizing the syringe.

Dissent: Judge Davis dissented, opining that the syringe was not a dangerous weapons because there was no evidence that it had a needle.

Suspect who jaywalked and littered in officer's presence was lawfully detained, even though officer's true purpose was to investigate him for drugs.

***State v. Duran*, 2014 UT App 59 (Bench) (memo.).** Officers surveilling a motel for suspected drug activity saw Patrick F Duran and another man walk near the motel and then, upon seeing the police, suddenly turn and walk away. One of the officers followed Duran as he jaywalked and then dropped a white baggie as he was walking between two cars. The officer told Duran to stop while he retrieved the baggie. He discovered that the baggie contained methamphetamine. Duran moved to suppress, arguing that the officer unconstitutionally detained him. The trial court disagreed, and Duran appealed.

Held: Affirmed. Duran's jaywalking and littering gave the officer a lawful basis to briefly detain Duran. Whether the officer had reasonable suspicion of drug activity is therefore a moot point.

GUILTY PLEAS

Violation of federal rule barring judicial participation in plea negotiations was subject to harmless-error review.

***United States v. Davila*, 133 S.Ct. 2139 (2013) (Ginsberg).** The Court unanimously held that a magistrate judge's violation of Federal Rule of Criminal Procedure 11(c)(1), which bars judicial participation in plea negotiations, is subject to harmless-error review. The Court therefore reversed an Eleventh Circuit decision which held that a violation of Rule 11(c)(1) requires automatic vacatur of a guilty plea entered after the violation.

Plea colloquy and affidavit provided constitutionally adequate notice of the nature of the charges and limit rights of appeal.

***State v. Candland*, 2013 UT 55 (Durham).** Damien Candland pled guilty to aggravated murder after killing his aunt in retaliation for her testifying against him in previous case. The factual basis in the written plea affidavit included stated that Candland had assaulted his aunt, bound her hands with duct tape, and brutally murdered her. It further stated that he had done so in retaliation for her testimony against him in two previous criminal cases. The plea affidavit also described the elements of aggravated murder and cautioned Candland that by pleading guilty that he was giving his right to appeal the judge's conclusion that the factual basis was adequate. The next day, Candland had a change of heart and sought to withdraw his plea, claiming that he was confused at the plea hearing. The trial court denied the motion, and Candland appealed.

Held: Affirmed. The plea affidavit and plea colloquy in this case adequately informed Candland of the nature of the charges and the limitations on his appellate rights.

JURY INSTRUCTIONS

An instruction impermissibly shifts the burden of proof if it says that the law "presumes" possession of recently-stolen property is prima facie evidence that the person stole it.

***State v. Crowley*, 2014 UT App 33 (Christiansen).** Crowley pawned an iPod that had been stolen from a car two weeks earlier. Crowley was charged with theft by receiving stolen property and theft by deception. The jury was told that the "law presumes that possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property."

Held: Reversed and remanded. The instruction unconstitutionally shifted the burden of proof from the State to defendant. The Utah Supreme Court has long held that language in a nearly identical instruction created a mandatory presumption. The instruction would have been okay if it had instead made clear that the possession of property recently stolen merely allows the jury to draw an *inference* that the possessor stole the property.

Accomplice liability instructions giving statutory language, accompanied by another instruction clearly laying out the correct mental state for the underlying crime, was correct statement of law.

***State v. Lomu ("Lomu II")*, 2014 UT App 42 (Orme).** Lomu and two other men entered a Maverick store about 2 a.m. Lomu and one man grabbed two cases of beer while the third man held the door open. Surveillance video showed Lomu rushing out the door while the man holding the door begins to point at and speak to the store clerk. According to the video, after Lomu got through the doors, the man says "shoot you." Lomu was charged with aggravated robbery as an accomplice, but the jury convicted him only of robbery. Lomu claimed that the accomplice liability instructions did not adequately explain that the jury had to determine that Lomu acted with both the intent that the underlying offense be committed and the intent to aid the principal in the robber.

Held: Affirmed. The accomplice liability instructions were sufficiently clear. One instruction quoted the accomplice liability statute verbatim. A subsequent instruction clearly set forth the intent necessary for the underlying crime. The court of appeals previously upheld the same instructions in *State v. Augustine*, 2013 UT App 61. **Voros (concurring, joined by Roth).** Judges Voros and Roth agree with the lead opinion's holding, but encourages the Legislature to amend the accomplice liability statute to make crystal clear that each actor's mental state determines that actor's liability. Judges Voros and Roth also encourage trial courts in the meantime to make this clear in their jury instructions.

Accomplice liability instruction mirroring statutory language was A-okay and no prejudice from omitting uncontested elements in the instructions.

State v. Clark, 2014 UT App 56 (Christiansen). Clark and two cohorts went to a Salt Lake apartment to settle a drug dispute. Clark executed a man there by shooting him in the head. He also killed a service dog. Clark then pumped 7 to 8 bullets a piece into the two women while his cohorts fled. The two women survived and identified Clark as the shooter. Clark was arrested a few days later during a traffic stop and the murder weapon was found at Clark's feet in the car. Clark denied being present and claimed that the gun actually belonged to someone else. Clark was charged with a host of crimes, including aggravated murder, attempted aggravated murder, aggravated robbery, aggravated burglary, and aggravated cruelty to animals. The jury was given an accomplice liability instruction. Clark complained that the instruction allowed for the possibility that he would be found guilty if the jury found that he was present without regard to whether he intended that the underlying offense be committed. He also complained that several of the instructions did not include some of the statutory elements.

Held: Affirmed. The accomplice liability instruction was nearly verbatim to the statute. Reading the instructions as a whole, the jury was more than adequately instruction on the intent required to convict Clark as an accomplice. And it was no problem to omit the complained-of elements here because they were uncontested. Indeed, defense counsel told the jury that if they found beyond a reasonable doubt that Clark was there and the shooter,

they didn't need to even consider the other charges because defendant would concede that the other crimes were all there.

No prejudice in omitting uncontested elements from the jury instructions. Accomplice liability instruction mirroring statutory language was A-okay.
State v. Clark, 2014 UT App 56 (Christiansen). Clark and two cohorts went to a Salt Lake apartment to settle a drug dispute. Clark executed a man there by shooting him in the head. Clark then pumped 7 to 8 bullets a piece into the two women while his cohorts fled. The two women survived and identified Clark as the shooter. Clark was arrested a few days later during a traffic stop and the murder weapon was found at Clark's feet in the car. Clark denied being present and claimed that the gun actually belonged to someone else. The jury was given an accomplice liability instruction. Clark complained that the instruction allowed for the possibility that he would be found guilty if the jury found that he was present without regard to whether he intended that the underlying offense be committed.

Held: Affirmed. The accomplice liability instruction was nearly verbatim to the statute. Reading the instructions as a whole, the jury was more than adequately instruction on the intent required to convict Clark as an accomplice.

***Allen* instruction given to jury deadlocked 7-1 in favor of guilt was coercive.**
***State v. Ginter*, 2013 UT App 92 (Davis).** After deliberating for two hours, the jury in Ginter Thomas Ginter's communications fraud trial told a bailiff that they were at a stalemate. The court responded by sending the jury dinner order forms, an implicit suggestion that the judge was not going to let the jury go. Two hours later, the jury sent the judge a note stating that they had been split 7-1 since the start of deliberations and were even fact even farther apart than when they started. The judge then read the jury an *Allen* instruction that stated that the jurors in the minority should reconsider whether their doubt was reasonable in light of the fact that evidence had not raised such doubt in the minds of the majority. The jury then retired and, twenty-six minutes later, rendered a guilty verdict. Ginter appealed, claiming that the *Allen* instruction had been coercive.

Held: Reversed. Under the circumstances, the instruction was coercive. The trial court knew the jury was split 7-1, so the instruction clearly focused on the holdout juror. And after the instruction, that jury changed his mind almost instantly.

Concurrence: Judge Voros wrote a short concurrence in which he suggested that the time has come to rewrite the *Allen* instruction.

***Allen* instruction need not strictly adhere to ABA model instruction, although using it might be a safe harbor.**
State v. Dalton, 2014 UT App 68 (Bench). Dalton was charged with two counts of rape, one as an accomplice and one as the principal. The jury began deliberations at 1:40. Two hours later, the jury submitted a question to the court regarding accomplice liability. About an hour later, the jury sent a message that it had a verdict on the accomplice liability count, but not a

unanimous verdict on the other count. The jury asked what it should do. The trial court gave a modified *Allen* instruction. The defense objected to some but not all of the language. The jury found Dalton guilty on both counts about an hour and a half later. Dalton argued on appeal that the *Allen* instruction was coercive, in part because it did not use the approved language from *State v. Harry*, 2008 UT App 224 and the ABA model instruction.

Held: Affirmed. *Harry* expressed a preference that trial judges use the ABA model *Allen* instruction because it was unlikely that such an instruction would be deemed coercive. But *Harry* did not mandate the ABA model. There is no set language for an *Allen* instruction. And the language Dalton complained about it was not coercive in this case.

Robber was not entitled to instruction on lesser-included offense of retail theft.
***State v. Reynolds*, 2013 UT App 112 (memo.) (Roth).** Dale Edwards Reynolds exited a Kmart through the emergency exit without paying for his merchandise. A store clerk chased him across the street. When Reynolds was on the other side of the street and approximately 100 feet from the store, he turned and pulled a gun on the clerk and said, "I'll [flipping] kill you!" At his trial for aggravated robbery, Reynolds requested a lesser-included offense instruction on retail theft, arguing that a jury could find that once he left store property he was no longer "in the immediate flight" from the commission of the robbery. The trial court disagreed, and the jury convicted Reynolds of aggravated robbery. Reynolds appealed.

Held: Affirmed. The facts were not ambiguous or susceptible to alternative explanations. Reynolds was only 100 feet from the store and had been pursued for less than ten seconds when he pulled the gun on the clerk.

Jury instructions properly allowed defendant, as an accomplice to aggravated murder, to be convicted of reckless manslaughter.
***State v. Binkerd*, 2013 UT App 216 (Orme).** Binkerd called the shots in his gang. When it looked like his ex-girlfriend was snitching, Binkerd put a "green light" and SOS ("shoot on sight") on her. Binkerd told his lieutenant Alvey that the only way to take care of a snitch was to "kill 'em." On Christmas Eve, Alvey put a gun to the victim's head while Binkerd whispered in her ear that "she was going to die tonight." Two days later, Binkerd learned that the victim had a tape recorder and a list of every phone number that a gang member had called that day. Binkerd told Alvey to drive the victim up a canyon and leave her there. During the drive, Binkerd called Alvey and said, "Don't bring her back." Alvey shot and killed the victim near a reservoir. Binkerd rewarded Alvey with a blue bandana, a sign of respect for "doing a good job." Binkerd was charged as an accomplice with aggravated murder and, alternatively, with depraved indifference murder. At trial, Binkerd denied telling Alvey to kill the victim or ever intending that Alvey do so. At Binkerd's request, the jury was given the option of convicting on negligent homicide as an accomplice. Over Binkerd's objection, the jury was also instructed on reckless manslaughter as an accomplice. The jury convicted on reckless manslaughter. On appeal, Binkerd argued that counsel was ineffective for seeking a negligent homicide conviction and for not arguing that the State's reckless manslaughter conviction was improper under *State v. Baker.*

Held: Affirmed. Counsel was not ineffective for requesting the negligent homicide instruction, even though it opened the door to the reckless manslaughter instruction. Giving the jury an advantageous alternative was a reasonable strategic decision. By asking for the negligent homicide instruction, Defendant expanded the scope to include criminal homicide in all its pertinent variations. The reckless manslaughter instruction also did not violate *Baker*. The State is entitled to a lesser included offense instruction when the elements of the lesser included offense are necessarily included within the original charged offense. Here, Defendant could not have committed depraved indifference murder—an original charged offense—without having also committed reckless manslaughter.

Defense counsel was ineffective for not objecting to verdict form that misallocated burden of proving affirmative defense.

***State v. Campos*, 2013UT App 213 (Voros).** Reginald Campos was charged with attempted murder and aggravated assault arising from the shooting of David Serbeck. Campos requested and was given an instruction on imperfect self-defense. The jury instructions properly directed the jury that the State must disprove beyond a reasonable doubt Campos's claim of imperfect self-defense. But the verdict form contained a check-box that stated, "We find, beyond a reasonable doubt, that the defense of Imperfect Self Defense applies in this case." Campos's attorney did not object to the instruction. The jury convicted him. Campos appealed, claiming that his counsel was ineffective for not objecting to the instruction.

Held: Reversed. Once a defendant makes an initial showing of evidence to support an affirmative defense, the State must disprove the defense beyond a reasonable doubt. Because this burden of proof requirement is counter-intuitive, the State's responsibility must be made plain to the jury.

Counsel performed deficiently by not objecting to jury instruction that incorrectly placed burden on defendant to prove that he reasonably but incorrectly believed that he was entitled to self-defense; but defendant was not prejudiced by error.

***State v. Lee*, 2014 UT App 4 (Christiansen).** Joseph Logan Lee was charged with murder for killing a friend during an argument over a drug debt. Lee claimed that he acted in self-defense. Based on Lee's testimony, the State requested and was granted a lesser-included offense instruction on imperfect self-defense manslaughter. The instruction stated that to convict the Lee of manslaughter, the jury had to find beyond reasonable doubt that he acted under a reasonable belief that the circumstances provided a legal justification but that his conduct was not, in fact, legally justified. Defense counsel did not object to the instruction. The jury convicted Lee of murder, and he appealed, claiming that he counsel was ineffective for not objecting to the instruction.

Held: Affirmed. The instruction was erroneous. Although the State may request that the court instruct the jury on defenses, it always has the burden to disprove affirmative defenses beyond a reasonable doubt. The State's manslaughter instruction incorrectly put the burden on the Lee to prove imperfect self-defense beyond a reasonable doubt. Lee's counsel thus performed deficiently by not objecting to the instruction. But Lee was not prejudiced by his

counsel's failure to object. Imperfect self-defense manslaughter is only available to a person who reasonably but incorrectly believes that his conduct is justified. Lee testified that he shot his friend because he believed that his friend was pulling a gun on him. If the jury believed Lee, it would have acquitted him under a theory of self-defense.

Concurrence: Judge Voros wrote a concurrence that clarified the standard for imperfect-self-defense. In his view, the defense is available to the person who makes a reasonable mistake of law.

Rape-as-an-accomplice defendant not entitled to mistake-of-fact instruction, where instructions as a whole allowed the jury to consider and acquit if they believed that defendant was honestly mistaken.

State v. Dalton, 2014 UT App 68 (Bench). Dalton was the self-appointed "Holy Spirit" to his church. Harmon was Dalton's first counselor. Dalton and his followers regularly had divine "impressions" that they should have sex with friends, relatives, and babysitters. Dalton confirmed Harmon's impressions that Harmon should have sex with his 15-year-old babysitter and then told the victim that it was God's will. After Harmon had sex with the victim, Dalton—having received his own divine impressions—also had sex with the victim. Dalton was charged with two counts of rape: one as an accomplice for encouraging Harmon to have sex with the victim and the other for having sex with the victim himself. Harmon and the victim both testified against Dalton. The trial court turned down Dalton's proposed mistake-of-fact instruction that the prosecution had to prove beyond a reasonable doubt that Dalton did not have "an honest belief" that Harmon and the victim were not engaging in non-consensual sex.

Held: Affirmed. The court of appeals rejected a similar argument in *State v. Marchet*, 2012 UT App 197. The instructions here, like in *Marchet*, adequately instructed the jury that the prosecution had to prove that Dalton acted with the requisite mental state for rape as an accomplice—intentionally, knowingly, or recklessly. If the jury believed that Dalton had an "honest belief" that Harmon and the victim were not engaging in non-consensual sex, it could find that the prosecution had not met its burden of proof on the mental state. The instructions and argument as given allowed the jury to fully consider and buy the defense theory without the proposed mistake-of-fact instruction.

Failing to define serious bodily injury in aggravated assault case was reversible error.

State v. Ekstrom, 2013 UT App 271 (McHugh). A driver-by saw Ekstrom take what looked like an irrigation or sprinkler pipe to her boyfriend. The witness saw Ekstrom land numerous blows to the victims legs, hand, and torso. In a final blow, the pipe broke on the victim's back. Responding officers took pictures of the victim's injuries, but never found the item used to strike him. Ekstrom was convicted of aggravated assault under the theory that she used a dangerous weapon "or other means or force likely to produce death or serious bodily injury." The jury was told what bodily injury meant, but not what serious bodily injury meant. On appeal, Ekstrom argued that the evidence was insufficient to show that the victim actually

suffered serious bodily injury and that counsel was ineffective for not seeing that the jury was instructed on the definition of serious bodily injury.

Held: Reversed. The evidence was sufficient, albeit minimally so, to support the aggravated assault conviction. The provision Ekstrom was prosecuted under did not require the State to prove that the victim actually suffered serious bodily injury. Rather, the State only had to prove that Ekstrom used an item that was *capable of* producing serious bodily injury. While none of the witnesses could say whether the pipe was metal or plastic, the jury could have reasonably found that it was capable of causing serious bodily injury when used to repeatedly strike the victim. But the failure to tell the jury what serious bodily injury meant warranted reversal. Serious bodily injury is a term of art, defined by statute. Given that the pipe broke during the attack, the jury—if told what serious bodily injury meant—might also have found that it was not capable of inflicting serious bodily injury. This is particularly so where both parties agreed that the victim did not suffer serious physical injury.

JURY SELECTION

In context, judge's musings during jury selection about her own experience of being called but not selected as a juror did not mislead or confuse the jury.

***State v. Fouse*, 2014 UT APP 29 (Orme).** Fouse was on trial for stalking and violating a protective order. During jury selection, while counsel exercised their peremptory challenges, the trial judge told jurors that she herself had once been called as a potential juror and—as a prosecutor at the time—wondered if she could be fair. She decided that she could be fair, but was sure that the defense attorney—who ultimately struck her—doubted her ability to be fair.

Held: The judge's musings did not improperly comment on the evidence or bolster the prosecutor's credibility during jury selection. In context, the judge's comments were nothing more than an anecdote aimed at explaining to potential jurors that they could be stricken from the jury pool by either side for "whatever reason," even if they had indicated that they could be fair and unbiased. But it's "best to avoid such personalized trips down memory lane" to fill downtime during jury selection. Safer topics include the history of the jury system, the benefits of jury service, and the importance of jury in our justice system.

PRELIMINARY HEARINGS

Lower courts erred in applying bindover standard to evidence of obstruction of justice.

***State v. Maughn*, 2013 UT 37 (Lee).** In 1984, somebody murdered Brad Perry. In 2005, DNA evidence led investigators to Glenn Griffin. Police interviewed one of Griffin's friends, Wade Maughn, and Maughn confessed to helping Griffin murder Perry. The State gave Maughn use immunity for his testimony and sought to have him testify against Griffin. Maughn balked, invoking his privilege against self-incrimination and citing concerns with the Utah Immunity Act and the scope of the immunity. A district court judge overruled his objections and ordered Maughn to testify. Maughn persisted in refusing, so the State charged him with obstruction of justice. After a preliminary hearing, the magistrate refused to bind Maughn over, finding that

Maughn had not acted with the specific intent to hinder or delay the prosecution of Griffin. The only reasonable inference from the evidence, the magistrate ruled, was that Maughn was trying to protect his constitutional rights.

The State appealed, and the court of appeals affirmed. It noted that Maughn and Griffin's prior friendship provided a plausible basis to infer that Maughn intended to prevent Griffin from being convicted. But the overwhelming evidence to the contrary suggested that Maughn was merely trying to protect his own rights. The State sought and was granted a writ of certiorari to the Utah Supreme Court.

Held: Reversed. The bindover standard requires the magistrate and reviewing courts to view the evidence in the light most favorable to the state and to draw all reasonable inferences in the State's favor. When the court of appeals held that an intent to obstruct was plausible but outweighed by evidence of an innocent intent, it rendered its own assessment of which of two competing inferences should be drawn. It also ignored the likely possibility that Maughn had both the intent to obstruct and the intent to protect his constitutional rights.

At bindover stage, magistrate must resolve conflicting evidence in favor of the prosecution.

***State v. Graham*, 2013 UT App 110 (Christiansen).** Graham co-owned a business. He took his family to vacation on the sunny beaches of Mexico and ran up a $7500 rental car tab on the company debit card. When his partner confronted him, Graham said that he was forced to use the company card because his family had been caught in a hurricane, he had left his personal card at home, and he was desperate. Graham promised to repay the money, but never did. As it turned out, there was no hurricane when Graham was in Mexico. At preliminary hearing, the office manager testified that before the Mexico vacation, she, Graham, and the other business partner discussed the impropriety of using the company debit card for personal expenses. The partner testified that he could not recall that discussion and believed they had never discussed the matter. The magistrate refused to bind over on theft because there was no evidence that Graham knew of the company policy before the vacation. The State appealed.

Held: Reversed. The magistrate was required to accept the office manager's testimony that Graham knew the company's debit-card policy over the partner's conflicting testimony that he did not. The magistrate also erred in overlooking other testimony that showing Graham knew that using the debit card was wrong. For example, Graham lied about the hurricane. If Graham had truly been unaware of the policy, there would have been no reason to lie. It was also telling that Graham never repaid the money.

PROSECUTORIAL MISCONDUCT

It's okay to call "asinine" closing defense argument "asinine."

***State v. Fouse*, 2014 UT APP 29 (Orme).** Fouse's wife got a domestic violence protective order against him. Fouse addressed and mailed several letters to his wife's sisters, who lived

in adjoining apartments to his wife. The letters, although addressed to the sisters, were clearly aimed at Fouse's wife and contained veiled threats and pleas to get back together. Fouse also left a box on his wife's back doorstep that contained wedding mementos and various letters, including one addressed to his wife. Fouse was charged with stalking and six counts of violating a protective order. In closing, the defense argued that the State didn't buy its own theory because it had not charged the wife's sister as an accomplice for delivering Fouse's letters. The prosecutor responded in rebuttal by calling that argument "asinine" and "a huge red herring."

Held: While using terms like "asinine" and "red herring" can be "unwise and hyperbolic," "colloquial, vigorous, and colorful" comments often fall "within the wide latitude" permitted counsel in closing argument. In this case, the defense argument "was asinine and the State's characterization of it as such during rebuttal did not rise to the level of prosecutorial misconduct." And it's okay to call defense counsel's *theory* a "red herring"; but it's not okay to accuse "opposing counsel of using such a distraction as part of a purposeful scheme to mislead the jury."

Prosecutor's final closing remark that jury had "the power to make" the abuse stop was improper, but harmless.

***State v. Wright*, 2013 UT App 142 (Roth).** In child sex abuse case, prosecutor argued in rebuttal closing that the jury had no reason not to believe the victim: The victim "doesn't want to hurt her father. She loved him even after he did horrible things to her. She just wants him to stop hurting her. *You have the power to make that stop.*"

Held: Affirmed. Most of the prosecutor's argument was a fair response to defense counsel's closing that the victim was motivated to lie so that she would not have to go live with her father. But the last sentence was improper because it appealed to the jurors' emotions by contending that they had a duty to protect the alleged victim. But this single sentence in a closing and rebuttal argument that filled 15 transcript pages of otherwise appropriate remarks was harmless, particularly where trial court immediately reminded jury that counsel's arguments were not evidence.

Prosecutor's use of red herring idiom and reference to Defendant's story as a ploy and tactic to distract was improper; appealing to jurors' passions by arguing that the victim would never walk his daughter down the aisle was also improper.

***State v. Campos*, 2013UT App 213 (Voros).** Reginald Campos was charged with attempted murder and aggravated assault arising from the shooting of David Serbeck. In his rebuttal closing, the prosecutor discussed the red herring idiom and told the jury that Campos's story was unbelievable and was just a tactic to confuse and distract them. The prosecutor also reminded the jury that Campos had stolen Serbeck's ability to run, bike, and walk his daughter down the aisle. He added, "[W]hen you do something like that on the streets of our community then you should be held accountable." Campos's attorney did not object to the statements. The jury convicted Campos. Campos appealed, claiming that his attorney was ineffective for not objecting.

Held: Reversed. The prosecutor's statements called to the jury's attention matters that they would not be justified in considering in determining their verdict. The statements about the consequences of Serbeck's physical injuries appealed to the passions of the jury rather than the evidence. And the statements about the red herring amounted to an unfounded and inflammatory attack on defense counsel.

Prosecution's discussion of witness credibility and analogizing prison to a zoo and inmates to predators and prey was not improper.

***State v. Redcap*, 2014 UT App 10 (Voros).** Nathan Redcap was a prisoner when he was charged with attempted murder for donning homemade armor made from magazines and shanking a fellow inmate. Redcap presented testimony from two inmates who claimed to have seen the altercation and testified that the victim was in fact the aggressor. In closing, defense counsel suggested that the prison guards who had testified were not credible and that the inmates who had testified were heroes. In rebuttal, the prosecutor argued that the guards had no bias and had an obligation to protect all inmates. The prosecutor also pointed to the inmate witnesses' many convictions and stated that one more perjury conviction would not bother them. Lastly, he compared the prison to a zoo and argued that the law ought to equally protect all prisoners, regardless of the harsh conditions in the prison.

Held: Affirmed. The prosecutor's statements were proper in light of defense counsel's attack on the guards' credibility and counsel's suggestion that the inmate witnesses were heroes.

Sarcastic comments, accusing defendant of lying, asking defendant whether another witness was lying, minimizing the burden of proof, and suggesting that there was no evidence to support the defense did not warrant reversal was either not error or was harmless beyond reasonable doubt.

***State v. Davis*, 2013 UT App 228 (Voros).** Eric Joseph Davis was charged with various sexual offenses after he raped and sodomized his wife using a XXL dildo. During her cross-examination of Davis, the prosecutor made several sarcastic comments about his testimony. On two of the three occasions, the court admonished the prosecutor. The prosecutor also accused Davis of lying and asked him to opine on the credibility of another witness. Then during closing, she minimized the burden of proof. Davis immediately objected, and both the court and the prosecutor directed the jury to look at the instruction. She also suggested that there was no evidence in support of Davis's defense that his wife was falsely accusing him of rape and that Davis had made his defense up. The jury convicted Davis, and he appealed.

Held: Affirmed. While the prosecutor's sarcastic comments were disrespectful and represented her opinion of the evidence, the court's admonition was sufficient to cure the error. Accusing Davis of lying was permissible because it was based in the evidence and not on the prosecutor's personal opinion. But asking Davis to opine about another witness's veracity was improper. The error was harmless, however, because defense counsel objected and the trial court intervened and prevented Davis from answering the question. Likewise,

minimizing of the reasonable doubt standard did not warrant reversal because the court cured any error with a cautionary instruction. Lastly, the prosecutor's arguments about the lack of evidence did not improperly shift the burden of proof. Prosecutors may comment on the paucity of the evidence so long as they do not overtly refer to a defendant's failure to testify.

Prosecutor's statements warranted reversal.

***State v. Thompson*, 2014, UT App 14 (McHugh).** In 2002, Michael W Thompson, a long-haul trucker, and a friend passed through Salt Lake and stayed at the home of A.T., a sixteen year-old girl. A year and a half later, A.T. came forward with allegations that she and Thompson had engaged in acts of oral sex. A jury convicted Thomson of two counts of forcible sodomy. Thompson appealed his conviction, claiming that his counsel had been ineffective for not objecting to numerous inappropriate statements by the prosecutor. The statements allegedly included asking Thompson to opine on the credibility of another witness, personally vouching for A.T.'s credibility, personally vouching for the credibility of the State's expert, rendering a personal opinion about a defense witness's credibility, calling Thompson a liar, giving his expert opinion about how to interpret body language, and asking the jury to send a message to Thompson for the people of the State of Utah.

Held: Reversed. Not all of the alleged misstatements were improper. But the cumulative effect of those that were prejudiced Thompson and warrant a new trial. The prosecutor did not improperly question Thompson about another witness's veracity. Parties may not ask a witness to speculate about whether another witness is being truthful. But parties may, on cross-examination, draw out distinctions between the testimony of two witnesses. The prosecutor's questions, "You think [the witness] was wrong about that?" and "One of those wasn't true. Which one was the truth?" were appropriate questions to highlight discrepancies in defense witnesses' testimony. The prosecutor also did not improperly vouch for A.T.'s credibility. Expressing a personal belief about a witness's veracity during closing is improper. But a prosecutor may make statements about a witness's veracity that are based in evidence. The prosecutor's statements about A.T.'s testimony fell into the latter category and were not improper. The prosecutor's statement that Thompson was lying was also properly based in evidence. But the prosecutor did improperly comment on two witnesses' veracity when he told the jury, "I think [my expert] was credible . . . ." and "I don't think [the defense witness] was credible. I think he was being dishonest with you." He also improperly offered expert testimony. The prosecutor pointed out in closing that when asked about improper acts with A.T. Thompson would often shut his eyes and shake his head "no." The prosecutor then stated, "To me, that's a classic sign of dishonesty." Lastly, the prosecutor improperly appealed to the jury's passions and prejudices in closing when he argued that a guilty verdict would send a message that the people of Utah would not stand for such crimes.

Prosecutor can't accuse the defense of trying to "confuse" the jury or of not believing their own defense, but he can be mildly sarcastic and call the defendant a "liar."

State v. Clark, 2014 UT App 56 (Christiansen). In murder prosecution, prosecutor argued in closing that the defense had introduced out-of-court witness statements to "A: Confuse you.

Or B: They don't believe their defense." The prosecutor also basically called the defendant a liar and used sarcasm in argument.

Held: Affirmed. Telling the jury that the defense was trying to confuse the jury that and that the defense didn't believe their own defense was improper because it cast "uncalled for aspersions on defense counsel." (*See State v. Campos*). But the comments in context were harmless beyond a reasonable doubt. And it's okay to call the defendant a liar so long as doing so only discloses what the jury could have already reasonably inferred from the evidence. The prosecutor's few, isolated "sarcastic" statements were not so "unrelenting and pervasive" that they amounted to an attempt to "inflame" the jury.

Prosecutor should not have asked defendant if it would "surprise him" that the prosecutor did not believe "a word" he had just said.

State v. Bragg, 2013 UT App 282 (Billings). Bragg invited a mother and her four boys to move in with him. Mother agreed, even though Bragg disclosed that he was a registered sex offender for having sexually abused his daughter. Not long after moving in, Bragg began sexually abusing Mother's seven-year-old son. Notwithstanding red flags everywhere, the victim's reports of inappropriate contact, and Bragg's unconvincing explanations, Mother stayed put. Eventually, Bragg's daughter turned him in. Bragg testified and after he proffered a lame explanation for one of the alleged instances of abuse, the prosecutor asked, "Would it surprise you that I don't believe a word you just told me?" Before Bragg's attorney could get out of his seat, the trial court sustained the anticipated objection on the grounds that the prosecutor's comment was "argumentative." The prosecutor apologized and withdrew the comment and continued with cross-examination.

Held: Affirmed. The prosecutor's comment was clearly improper. But it was harmless. The exchange following the comment made it clear to the jury that the remark was inappropriate and should not be considered. The trial court didn't even wait to hear counsel's objection before sustaining it and condemning the comment as argumentative. The prosecutor immediately apologized and withdrew the remark. The jury was also instructed that counsel's comments were not evidence. Also, the evidence of guilt in this case was pretty overwhelming.

Prosecutor who knowingly proffered tainted witness testimony and did not correct record when it was discovered was properly fired.

***Larsen v. Davis County*, 2014 UT 74 (Voros).** Before an aggravated robbery trial in which identification was the key issue, Tyler James Larsen, a Davis County prosecutor, visited with two eyewitnesses and showed them a photograph of the defendant. At trial, defense counsel asked one of eyewitnesses whether he had been shown a photograph of the defendant. The witness responded no. Larsen made no effort to correct the record. Defense counsel later asked the second eyewitness whether she had been shown a photograph of the defendant. She replied yes. Counsel moved for and was granted a mistrial. The Davis County Attorney gave Larsen a pre-termination letter accusing him of misconduct at the trial and placing him on administrative leave. The County Attorney then held a pre-disciplinary hearing at which

confronted the Larsen about the misconduct and also confronted him about past instances of misconduct. The County ultimately found that the misconduct at trial warranted termination and fired Larsen. Larsen appealed, claiming that the pre-termination letter did not give him adequate notice of the allegations against him. The district court agreed and set aside the county's termination decision. The County appealed.

Held: Reversed. Using tainted testimony at trial and not fully disclosing the facts once the scheme was revealed were sufficient grounds to warrant termination. Larsen was thus not denied due process by the discussion of his past misconduct at the pre-termination hearing and in his termination letter.

RESTITUTION

Defendant's failure to pay restitution was willful.

***State v. Brady*, 2013 UT App 102 (memo.) (Davis).** Hoyt Brady pled guilty to communications fraud and was ordered to pay restitution of $479,123. A year later, the State filed for an order to show cause, alleging that Defendant had failed to pay anything towards his restitution. Brady admitted so, but claimed that 75% of his paycheck was being garnished for child support and another restitution obligation. He then explained that his brother had offered to loan him $200 to pay restitution until he could find a second job. The trial court ruled that his efforts did not evince a good faith effort to pay restitution and revoked his probation. Brady appealed.

Held: Affirmed. The trial courts order bore an implicit findings of willfulness that was apparent in the facts. Brady had not even made token payments during the year, nor had he begun looking for a second job or taken his brother's offer of a loan.

Concurrence: Thorne wrote a concurring opinion in which he opined that in cases where restitution was large and prison was clearly warranted, a judge could, with the Defendant's consent, impose probation and a strict liability restitution obligation.

Trial court findings for complete restitution determination were insufficient.

***State v. Ruiz*, 213 UT App 166 (Davis).** Twenty-one year old Jonathan Ruiz had sexual intercourse with a fifteen year-old girl at her home. Immediately after the incident, the victim became suicidal and was placed in a residential treatment facility. The victim had a prior history of mental health issues that included depression, anxiety, self-harm, substance abuse, lying, arguing, stealing, sexually acting out, and attempted suicide. Ruiz sexual abuse was thus only the proverbial straw that broke the camel's back. Ruiz pleaded guilty to two counts of unlawful sexual activity with a minor. The trial court determined that the treatment costs were reasonable and were necessitated by Ruiz's criminal acts. It thus imposed a restitution amount of $51,000 for the residential treatment and $995 for additional outpatient treatment. Ruiz appealed, challenging the trial courts calculation of complete restitution.

Held: Reversed. The trial court failed to adequately explain the causal nexus between Ruiz's criminal conduct and the nine months of residential therapy that the victim received and failed

to explain how the victim's pre-existing conditions impacted her need for residential therapy. The Courts findings were thus insufficient to support its judgment. The court of appeals remanded the case for the trial court to make more detailed findings.

Concurrence (McHugh): Remand should be limited to determining whether the counseling fees for the victim's preexisting conditions are too factually or temporally attenuated to meet Utah's modified "but for" test for determining complete restitution.

Dissent (Christiansen): The trial court findings were adequate. The Crime Victim's Reparation Act should be liberally construed to accomplish the purpose of making crime victim's whole. Here, while the victim had several preexisting conditions, it was Ruiz's criminal conduct that necessitated residential treatment for those preexisting conditions.

RETROACTIVITY

Congress could apply SORNA to a federal offender who completed his sentence before SORNA's enactment.

***United States v. Kebodeaux*, 133 S.Ct. 2496 (2013) (Breyer).** By a 7-2 vote, the Court held that Congress had the power under the Necessary and Proper Clause to enact the Sex Offender Registration and Notification Act (SORNA) and apply it to a federal offender who completed his sentence prior to SORNA's enactment. The Court found that the federal government has a special relationship with federal prisoners and that "Congress could reasonably conclude that registration requirements applied to federal sex offenders after their release can help protect the public from those federal sex offenders and alleviate public safety concerns." In the course of its opinion, the Court rejected the Fifth Circuit's conclusion that the federal government no longer had a special relationship with respondent once he completed his prior sentence; even then respondent was subject to registration requirements similar to those imposed by SORNA.

State v. Clopten does not apply retroactively, unless your attorney's incompetence delays your appeal for four years.

***State v. Guard*, 2013 UT App 270 (Roth).** In 2006, the same year Deon Lomax Clopten was convicted, Jimmy D Guard was convicted of child kidnapping. At his trial, the court, like the court in *Clopten*, denied his request for an expert to testify about eye witness identification and instead gave the jury a *Long* instruction. Guard appealed, but his attorney failed to file a docketing statement. So his appealed was dismissed. Four years later, his appeal rights were reinstated.

Held: Reversed. Changes to procedural rules that present a clear break with past practice are not applied retroactively unless the rule change has constitutional dimensions. The rule announced in *Clopten* was a clear break from past practice and does not have constitutional dimensions. Thus, *Clopten* does not apply retroactively. But had Guard's appeal proceeded in a timely manner, his case would have been decided with the *Clopten* case. So the court of appeals decided that he should get the benefit of the *Clopten* rule and reversed his case.

RIGHT TO COUNSEL

If defendant wants to fire his attorney on the morning of trial, he has to show up at court to say so.

***State v. Williams*, 2013 UT App 101 (memo.) (Davis).** Williams went through 5 attorneys, filed several pro se motions, and skipped a trial setting. Just before his second trial date, Williams fired his latest attorney and then skipped trial again. The trial court denied counsel's motion to withdraw on the morning of trial because Williams wasn't there and this looked like just another delay tactic.

Held: Affirmed. Defendant's absence from court was reason enough to deny counsel's motion to withdraw. *See* Utah R. Crim. P. 36. The trial court also rightly denied the motion in light of Williams' history of delay tactics.

SENTENCING

Under *Apprendi*, a jury must find beyond a reasonable doubt any fact that increases the mandatory minimum sentence for a crime.

***Alleyne v. United States*, 133 S.Ct. 2151 (2013) (Thomas).** By a 5-4 vote, the Court overruled *Harris v. United States*, 536 U.S. 545 (2002), and held that a jury must find beyond a reasonable doubt any fact that increases the mandatory minimum sentence for a crime. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that "[o]ther than the fact of prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Court here concluded that mandatory minimums increase the penalty for a crime and are therefore subject to the *Apprendi* rule.

Victim impact testimony at a non-death penalty aggravated murder sentencing does not violate the Eighth Amendment prohibition on cruel and unusual punishment.

***State v. Mateos-Martinez*, 2013 UT 23 (Durham).** During the aggravated robbery of a beauty salon, Miguel Mateos-Martinez shot and killed Faviola Hernandez. He fled to Mexico, but was returned Utah under an extradition agreement that barred the State from seeking the death penalty. The State charged him with aggravated murder, but did not seek the death penalty. A jury convicted Mateos-Martinez. At sentencing, the judge heard victim impact testimony from Hernandez's mother and sister. The judge then sentenced him to life without parole. Mateos-Martinez appealed, claiming that relying on victim impact testimony at an aggravated murder sentencing violated the prohibition on cruel and unusual punishment.

Held: Affirmed. Both the United States Supreme Court and the Utah Supreme Court have previously held that testimony about a defendant's character or the victim's opinion of the appropriate sentence is inadmissible at a capital sentencing hearing. But those cases all involved sentencings by juries where the death penalty was an option. The instant case involved a judge sentencing the defendant without the option of death. The concerns that

justify prohibiting victim impact testimony at death penalty sentencings do not, therefore, apply, and the Eighth Amendment is not violated by admitting victim impact testimony.

Utah's LWOP statute is not unconstitutionally vague and its application to two aggravated murders did not violate uniform operations of laws or constitute unnecessary rigor or cruel and unusual punishment.

***State v. Perea*, 2013 UT 68 (Parrish).** Perea was convicted of two counts of aggravated murder and two counts of attempted aggravated murder after he fired several shots from a moving SUV at a rival gang's wedding party. The State initially filed, but then withdrew, a notice of intent to seek the death penalty. After Perea's convictions, the trial court sentenced him to life without the possibility of parole (LWOP) on the aggravated murder counts. Perea mounted several constitutional challenges to Utah's LWOP statute both facially and as applied to his circumstances.

Held: Affirmed. (1) Utah's LWOP statute is not unconstitutionally vague. It clearly states that a defendant convicted of non-capital aggravated murder may be sentenced to LWOP. The statute's failure to specify the particular factors a sentencing court must consider in deciding whether to impose LWOP or 25-years-to-life does not render the statute vague. It is only in death cases that the Court has required an explicit weighing of aggravating and mitigating factors. In all other cases, sentencing judges have broad discretion to consider the totality of the circumstances in reaching a fair and appropriate sentence. The trial court properly did so here. (2) The LWOP statute also does not violate Utah's uniform operation of laws provision. Not all aggravated murderers are similarly situated. It is therefore permissible to give sentencing courts discretion to decide whether LWOP is appropriate based on the unique circumstances of each case. (3) Utah's unnecessary rigor provision does not apply. That provision speaks only to a prisoner's conditions of confinement; it does not speak to the proportionality of the particular sentence imposed. (4) LWOP in this case did not constitute cruel and unusual punishment.

Failure to substantially comply, not willfulness, is the standard for finding a violation of a plea in abeyance agreement.

***State v. Wimberly*, 2013 UT App 160 (Voros).** Elbert Clint Wimberly entered into a plea in abeyance agreement for one count of aggravated assault. A year and a half later, AP&P filed a violation report alleging several violations of the agreement, including that Wimberly had failed to report, failed to complete treatment, and failed to obtain full-time employment. The court held an evidentiary hearing after which it found that Wimberly had violated his plea in abeyance agreement. It entered the conviction and sentenced Wimberly to prison. Wimberly appealed, claiming that the trial court erred by revoking his agreement without finding that the violation was willful.

Held: Affirmed. Pleas in abeyance are governed by a different statute and a different standard than probation. Violations need not be willful, as is required in probation cases by *Bearden v. Georgia*, 461 U.S. 660 (1983). Rather, courts follow the standard articulated in Utah Code § 77-2a-4(1): that the defendant failed to substantially comply with the agreement.

SIXTH AMENDMENT – COMPULSORY PROCESS

Right to compulsory process did not require trial court to allow defendant to call "anonymous" witnesses without first disclosing their identities to the State.

***State v. Perea*, 2013 UT 68 (Parrish).** Perea was convicted of two counts of aggravated murder and two counts of attempted aggravated murder after he fired several shots from a moving SUV at a rival gang's wedding party. Several witnesses identified Perea as the shooter. Perea later confessed to being the shooter. Before trial, Perea sought to call potentially exculpatory witnesses without having to disclose their names to the prosecution. The defense argued that anonymity was critical because these potential witnesses would not come forward or would change their stories if their names were revealed outside the courtroom. The State objected because without knowing the witnesses' identities, it could not properly investigate their stories. The trial court barred the witnesses unless they were willing to be identified so that the prosecution could follow up on their stories.

Held: Affirmed. The Sixth Amendment right to compulsory process is not unfettered. The right is subject to, among other things, discovery rules, which prevents last minute surprises and enables the prosecution to thoroughly investigate the merits of the defense. The trial court here was well within its discretion when it determined that fairness afforded the State the opportunity to fully investigate the witnesses' stories.

SIXTH AMENDMENT - INEFFECTIVE ASSISTANCE OF COUNSEL

Indigent defense counsel, who was misinformed about the resources available to him, performed deficiently by not seeking additional funds to hire an adequate ballistics expert.

***Hinton v. Alabama*, 134 S.Ct. 1081 (2014) (per curiam).** Through a *per curiam* opinion, the Court unanimously reversed an Alabama Court of Criminal Appeals decision that had rejected a capital defendant's (Hinton's) claim that he had received ineffective assistance of counsel. The key issue at trial was whether the bullets recovered from the crime scenes had been fired from Hinton's gun. The state presented two experts on "toolmark evidence" who testified that they had. The trial court mistakenly told defense counsel that Alabama law capped at $1000 the amount it could provide the defense to hire its own expert witness. Defense counsel did not object or request more funding; he instead hired what he admitted was an inadequate expert. Hinton was convicted and sentenced to death. The U.S. Supreme Court held that "the inexcusable mistake of law – the unreasonable failure to understand the resources that state law made available to him" – constituted inadequate assistance of counsel. The Court remanded so that the lower courts could address the prejudice prong: whether "there is a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt had the attorney known that the statutory funding limit had been lifted."

Absence of evidence cannot overcome strong presumption that counsel's performance was reasonable.

***Burt v. Titlow*, 134 S.Ct. 10 (2013) (Alito).** The Court unanimously reversed a Sixth Circuit decision that had granted habeas relief based on defense counsel's purported ineffectiveness in advising rejection of a plea offer. The Court held that the Sixth Circuit erred by "refus[ing] to credit a state court's reasonable factual finding and by assuming that counsel was ineffective where the record was silent." The Court found particularly "troubling" the "Sixth Circuit's conclusion that [defense counsel] was ineffective because the 'record in this case contains no evidence that' he gave constitutionally adequate advice on whether to withdraw the guilty plea." Stated the Court, "It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance" (internal quotation marks omitted).

Defense counsel not ineffective allowing rule 404(b) evidence, where counsel used the evidence to undermine the veracity of the victim and the validity of the police investigation.

***State v. Bedell*, 2014 UT 1 (Nehring).** Dr. Bedell freely prescribed the victim all the pain meds she wanted after she let him feel her up. While the victim was in jail on prescription fraud charges, she learned from her cellmate that several other local women had accused Dr. Bedell of sexually abusing them. At her cellmate's encouragement, the victim reported Dr. Bedell's abuse of her. Before trial, defense counsel successfully moved to exclude evidence of the other abuse cases under rule 404(b), although the trial court warned that it would be admissible if the defense opened the door. At trial, from opening through closing, defense counsel repeatedly referenced the rule 404(b) evidence to suggest that the victim had gleaned facts from the public allegations of the other woman to fabricate her own allegations in order to get out of jail. Defense counsel also used the rule 404(b) evidence to suggest that the police did not thoroughly investigate this case. The jury acquitted Bedell of two second degree felonies and convicted him of misdemeanor sexual battery. The court of appeals reversed, finding that the trial court plainly erred and counsel was ineffective for allowing the rule 404(b) evidence. The court of appeals could find nothing in the record to suggest that the trial court had revised its earlier pretrial ruling excluding the evidence.

Held: Reversed. The record shows that defense counsel affirmatively decided from the outset to use the 404(b) evidence to attack the State's case and the victim's credibility. Counsel has wide latitude to make tactical decisions; a reviewing court will not question those decisions unless there is no reasonable basis to support them. And counsel's strategy here was likely effective where Bedell was acquitted of more serious charges and only convicted of a misdemeanor. The court of appeals also erred in finding plain error. Trial courts should avoid interfering with potential legal strategy or creating an impression of the lack of neutrality. Plain error does not exist when a conceivable strategic purpose supports the use of the evidence.

In trial for sexual abuse of a child, Defense counsel's failure to object to statement by prosecutor in closing argument that Defendant had also molested his step-daughter was ineffective assistance of counsel.

***State v. Larrabee*, 2013 UT 70 (Lee).** Michael David Larrabee was charged with aggravated sexual abuse of a child for allegedly molesting his step-daughter's child, B.B. The evidence of abuse consisted largely of B.B.'s testimony. Larrabee testified and denied the allegations. During closing arguments, the prosecutor referred to evidence that had been excluded by a motion in limine: that B.B.'s mother claimed to have also been molested by Larrabee. Larrabee's attorney did not object, and the jury convicted Larrabee. Larrabee appealed claiming that he counsel was ineffective for not objecting.

Held: Reversed. Given the highly prejudicial effect of other allegations of sex abuse in a trial for sexual abuse of a child, there could be no sound strategic reason not to object. And because the verdict turned largely on B.B.'s word against Larrabee's word, the prosecutor's statement most likely influenced the jury's verdict, and was therefore prejudicial.

Dissent: Justice Lee dissented. He noted that in the context in which it was made, the remark was less inflammatory than the majority claimed. He then opined that not objecting was a sound trial strategy to avoid highlighting the improper remark.

In an appropriate case, strategic concessions of guilt can represent not just reasonable professional assistance, but astute advocacy.

***State v. Lingmann*, 2014 UT App 45 (Roth).** Lingmann pled guilty to unlawful sex with a minor, stalking, and sexual exploitation of a minor. Lingmann offered to pay a cellmate to kill the victim, her parents, and her sisters by burning the family home down. The cellmate told police and they surreptitiously recorded two conversations in which Lingmann repeated his offer to the cellmate. Lingmann was charged with six counts of solicitation to commit aggravated murder. The cellmate and detectives testified at trial and the recordings were played for the jury. Lingmann testified that he had changed his mind and had voluntarily terminated the offers by expressly telling his cellmate to forget the whole thing. In closing, defense counsel argued that there was enough evidence to convict Lingmann if the jury did not believe that he had called off the cellmate. Counsel then argued that the evidence showed the Lingmann had voluntarily terminated the solicitation. Lingmann appealed, arguing that his counsel was ineffective for conceding his guilt because voluntary termination is not a defense to criminal solicitation.

Held: Affirmed. Counsel was not ineffective for conceding defendant's guilt if the jury did not buy his story. First, whether voluntary termination is a defense to criminal solicitation is an open question in Utah. Without clearer law, counsel's decision to raise the defense was not objectively unreasonable. Second, evidence of Lingmann's guilt was strong enough that conceding the elements of solicitation and pursuing a voluntary-termination defense was a reasonable trial strategy. While such a strategy has its risks, in an appropriate case, concessions of guilt can strengthen a defendant's position. Indeed, such a strategy can represent not just reasonable professional assistance, but astute advocacy.

SIXTH AMENDMENT - SPEEDY TRIAL

Nine-year delay in bringing rape defendant to trial did not violate speedy trial where defendant spent several of those years in custody awaiting trial on serial murder charges in another state.

***State v. Younge*, 2013 UT 71 (Nehring).** In 1996, an unknown assailant brutally raped and assaulted a 23-year-old U student on her way home from school. The rapist left his DNA, but not a name. In 2000, as the 4-year statute of limitations neared, the State filed a John Doe information, identifying the accused by the DNA profile. Two years later, the DNA was matched to Younge, who was then being held in Illinois on charges that he had murdered 3 woman and tried to kill a 4th. The State promptly amended the information to name Younge and an arrest warrant was issued the same day. Seven years later, in 2009, Younge's pending Illinois charges were dismissed and he was promptly extradited to Utah. He was tried 9 months later. Younge appealed, arguing that he was denied his speedy trial right.

Held: Affirmed. Although the delay between information and trial was extraordinary—9 years—all other *Barker v. Wingo* factors weighed against Younge. The primary reasons for the delay were: (1) it took the State two years to discover Younge's identity; (2) the next several years were spent by the State waiting "at the prosecutorial turnstile" for Illinois to complete its murder prosecutions. The 9-month delay once Younge was in Utah was reasonable where Younge filed 4 motions and the court had to balance genuine scheduling conflicts, adequate time for motion practice, and a delay to hedge against a potential ineffective assistance of counsel claim. The State complied with Younge's speedy trial demands to the extent possible and Younge was not prejudiced by the delay. Given the DNA evidence, Younge could not show that any lost potential evidence, if available, would have resulted in an acquittal.

STATUTE OF LIMITATIONS

Filing of John Doe information identifying the accused by his DNA, tolled the statute of limitations.

***State v. Younge*, 2013 UT 71 (Nehring).** In 1996, an unknown assailant brutally raped and assaulted a 23-year-old U student on her way home from school. The rapist left his DNA, but police not a name. In 2000, as the 4-year statute of limitations neared, the State filed a John Doe information, identifying the accused by the DNA profile. Two years later, the DNA was matched to Younge, who was then being held in Illinois on charges that he had murdered 3 woman and tried to kill a 4th. The State promptly amended the information to name Younge and an arrest warrant was issued the same day. Seven years later, in 2009, Younge's pending Illinois charges were dismissed and he was promptly extradited to Utah, where he was tried 9 months later. Younge appealed, arguing that the John Doe information was invalid and therefore did not toll the statute of limitations.

Held: Affirmed. Although Utah's statutes and rules require the State to charge "a person," nothing requires that the "person" be charged by name. A DNA profile "is as close to an infallible measure of identity as science can presently obtain." Therefore, the initial

information was valid and timely filed. (In 2003, after the filing of the information in this case, the Utah Legislature enacted Utah Code Ann. § 76-1-302(3), which expressly allows for filing an information charging a defendant by DNA profile.)

SUFFICIENCY OF THE EVIDENCE

Lewdness and sexual exploitation require more than just deplorable or anti-social behavior.

***State v. Bagnes*, 2014 UT 4 (Lee).** Barton Bagnes was charged with lewdness involving a child and sexual exploitation of a minor after he dropped his pants in front of two nine-year-old girls to reveal that he was wearing only a toddler-sized diaper. He also gave the girls a flyer showing children and adolescents wearing diapers in suggestive poses and advertising URLs to pornographic websites. Neither Bagnes nor the children in the photograph exposed their private parts. A jury convicted Bagnes as charged. Bagnes appealed, claiming that the evidence was insufficient to sustain the convictions.

Held: Reversed. Lewdness is not merely behavior that is socially inappropriate. It is an irregular indulgence of lust similar to the other acts described in the statute such as masturbation or exhibition of the genitals. Wearing nothing but a diaper that otherwise covers the private parts is not lewd as that term is used in the statute. And exhibition, as used in the sexual exploitation of a minor statute, requires actual exposure of the genitals or pubic area. Merely highlighting or flaunting otherwise covered genitals by dressing a child in a diaper is insufficient.

A jury could reasonably conclude that bruising and swelling around the eyes and face that lasted for over two weeks amounted to "substantial bodily injury."

***State v. Labrum*, 2014 UT App 5 (McHugh).** Labrum repeatedly beat his wife's face with a full Gatorade bottle. Her eyes and face were bruised and swollen for over two weeks, which prevented her from opening her eyes for long periods of time. Labrum argued that the evidence was insufficient to show that he inflicted "substantial bodily injury."

Held: Affirmed. "Substantial bodily injury" is "bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement . . . ." A jury could reasonably conclude that bruising and swelling around the eyes and face that lasted for over two weeks and prevented the victim from opening her eyes for long periods of time amounted to "temporary disfigurement" or to "protracted physical pain."

Evidence was sufficient to show that beer-run defendant committed aggravated robbery as an accomplice where he continued in taking the beer after his companion threatened the use of a gun.

***State v. Lomu ("Lomu I")*, 2014 UT App 41 (Orme).** Lomu and another man went into a West Valley City Maverik store at about 3:30 a.m. Lomu went to the beer cooler, while his companion stood by the door as a lookout. The store clerk told the men that he could not sell them beer because it was after 1:00 a.m. Lomu offered the clerk $100 if he would sell him the

beer anyway. The clerk refused. Lomu's companion lifted his shirt, moved his hand to his hip, and told the clerk he had a gun. Lomu kept his money, grabbed the beer, and fled with his companion. Security footage showed the companion lifting his shirt slightly and placing his hand on his hip where a holstered pistol would customarily be located. The footage did not show a weapon and it had no audio to verify that a threat was made. The trial court allowed evidence under rule 404(b) that Lomu committed an almost identical aggravated robbery in another West Valley City Maverick about two months later. At trial, Lomu admitted that he was guilty of shoplifting, but not of aggravated robbery because he did not know beforehand that his companion was going to threaten the clerk with a gun. Lomu challenged the sufficiency of the evidence to convict him as an accomplice because: (1) the clerk's testimony was so inconsistent as to render his testimony "inherently improbable"; and (2) he did not have prior knowledge of the threat his companion uttered.

Held: Affirmed. (1) Any inconsistencies in the clerk's testimony were minor and not enough to render it "inherently improbable." Although the video did not show that threats were uttered, it corroborated the clerk's testimony in other respects, i.e., showing the companion lifted his shirt and put his hand on his hip. (2) A robbery accomplice does not have to know beforehand that his cohort will threaten the use of a weapon. It is enough to continue assisting in the robbery after the threat is made. Here, Lomu actively participated in the "elevated crime by choosing to remove the beer from the store after the threat was made rather than leaving the beer behind and exiting the store or remaining without participating."

Evidence was sufficient to show that beer-run defendant took committed robbery as an accomplice where security footage showed defendant running off with the beer while still in earshot of his cohort's threat to shoot the store clerk.

State v. Lomu ("Lomu II"), 2014 UT App 42 (Orme). This case stems from Lomu's conviction on his second robbery. Lomu and two other men entered a Maverick store about 2 a.m. Lomu and one man grabbed two cases of beer while the third man held the door open. Surveillance video showed Lomu rushing out the door while the man holding the door begins to point at and speak to the store clerk. According to the video, after Lomu got through the doors, the man says "shoot you." Lomu was charged with aggravated robbery as an accomplice, but the jury convicted him only of robbery. Lomu claimed he was guilty—at most—of retail theft because he unaware of the threat made by his cohort and nothing more than his mere presence connected him to the threat.

Held: Affirmed. The evidence was sufficient to convict Lomu of robbery. There was no dispute that Lomu committed theft when he took the beer without paying for it. The only question was whether Lomu took the beer "by means of force or fear." Surveillance video played for the jury shows Lomu was still in the store and well within earshot of his associate at the door when the associate raised his arm and, according to the clerk, began to threaten the clerk.

Testimony that Defendant tried to sodomize victim but that she pushed him away was insufficient to convict of sodomy on a child but sufficient for attempted sodomy on a child.

***State v. Pullman*, 2013 UT App 168 (Voros).** Donald J Pullman was charged with sodomy on a child. At trial, the twelve year-old victim testified that Pullman tried to take her underwear off and "stick his dick into [her] butt." The prosecutor then asked whether Pullman's penis went inside her bum. The victim replied, "No. I pushed him away before it did." But she also stated that she could feel it "there" and that "it hurt." The jury convicted Pullman, and he appealed.

Held: Reversed. Sex crimes are defined with great specificity and require similar specificity of proof. The victim's statement that Pullman tried to "stick his dick into her butt" is inconclusive as to whether Pullman's penis touched the victim's anus. Such testimony is sufficient, however, to support a verdict attempted sodomy on a child.

Evidence that Defendant "had the big balls enough" to put a gun to his friend's head and pull the trigger is sufficient to sustain a conviction for depraved indifference murder.

***State v. Ricks*, 2013 UT App 238 (Voros).** Brad R Ricks was charged with murder under a depraved indifference theory after shooting Maurice Lee. After consuming alcohol, Ricks and Lee got into a "pissing match about who had the balls big enough to do something." At Lee's urging, Ricks fetched his semiautomatic handgun, placed it against Lee's forehead, and pulled the trigger. Ricks testified that he knew a loaded clip was in the gun, but while walking down a darkened hallway, he pulled the slide back and verified that no round was in the chamber. Pulling the slide back actually loaded a round into the chamber. So when Ricks pulled the trigger, the gun discharged, killing Lee. A jury convicted Ricks, and he appealed, claiming that the evidence was insufficient for murder and that he should have only been convicted of manslaughter.

Held: Affirmed. Depraved indifference murder requires higher probability of the risk of death than manslaughter. Manslaughter requires only a substantial and unjustifiable risk of death whereas depraved indifference murder requires a highly likely probability that death will result. Here, the evidence was sufficient for a reasonable jury to find beyond reasonable doubt that the risk of death was highly likely.

Evidence was sufficient to prove defendant constructively possessed drugs when he said, "God, damn it" after detectives found baggie of meth at his feet.

***State v. Burdick*, 2014 UT App 34 (Christiansen).** Detectives stopped at Phillip Don Burdick's home to look for a suspect in another case. While they were at the home, Burdick was fidgety and could not hold still despite the detectives' request to sit down and hold still. Detectives ultimately frisked Burdick and found a syringe. They placed him in handcuffs and sat him in a chair. Burdick continued to fidget. A few minutes later, detectives moved Burdick and discovered a baggie of methamphetamine at his feet. As one detective picked up the baggie, Burdick exclaimed, "God, damn it." He then admitted that he was a meth user but claimed

that was not his meth. When the detective suggested that he might ask one of the other resident's to whom the bag belonged, Burdick protested, "Well don't go do that." Burdick was charged and convicted of drug possession. He appealed, claiming that the evidence was insufficient to prove a nexus between him and the bag.

Held: Affirmed. Viewed in their totality, the facts amount to "some evidence" from which a reasonable jury could conclude that the Burdick constructively possessed the bag.

Evidence that Defendant robbed convenience store was sufficient.

***State v. Cristobal*, 2014 UT App 55 (Christiansen) (memo.).** In November 2010, two masked men robbed a convenience store at knife point. While reviewing video surveillance, one of the detectives saw the knife-wielding robber look at his hand and bring it to his mouth shortly after threatening the clerk with the knife. The detective opined that the robber may have cut himself on his own knife. So he searched the areas of the store where the robbers had been and found three separate blood spatters. The clerk testified that he had mopped the floors only a half hour before the robbery. So the detectives took samples of the spatter and submitted them to the crime lab. The DNA profile matched Luis Miguel Cristobal. Cristobal was charged and convicted of aggravated robbery. He appealed, claiming that the evidence was insufficient to identify him as the robber.

Held: Affirmed. The video, the clerk's testimony, and the DNA evidence all combine to create sufficient evidence that Cristobal was the robber who cut his hand.