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Case No. 20090387–CA

IN THE

UTAH COURT OF APPEALS

State of Utah,

Plaintiff/Appellee,

vs.

Bryan Featherhat,

Defendant/Appellant.

Brief of Appellee

Appeal from convictions for attempted aggravated murder and aggravated robbery in the Fifth Judicial District Court of Utah, Iron County, the Honorable G. Michael Westfall presiding.

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Case No.20090387–CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

vs.

BRYAN FEATHERHAT,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for attempted aggravated murder, in violation of Utah Code Ann. § 76-5-202 (West Supp. 2006), and aggravated robbery, in violation of Utah Code Ann. § 76-6-302 (West 2004). Because the case was transferred to this Court from the Utah Supreme Court, this Court has jurisdiction under Utah Code Ann. §78A-4-103(2)(j) (West 2009).

STATEMENT OF THE ISSUES

Issue I. (a) Whether jury instructions adequately instructed the jury regarding the burden of disproving the existence of mental illness.

(b) Whether inclusion of the victim's name in the elements instruction for attempted aggravated murder constituted reversible error?

Standard of Review. These issues involve matters of invited error and, hence, no standard of review applies.

(c) Whether Defendant was entitled to a special mitigation jury instruction?

Standard of Review. "Whether the trial court's refusal to give a proposed jury instruction constitutes error is a question of law, which we may review for correctness." *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992) (citations omitted); *see also State v. Larsen*, 876 P.2d 391, 394-95 (Utah App. 1994). This Court reviews jury instructions in their entirety and affirms when the instructions taken as a whole fairly instruct the jury on the law applicable to the case. *See State v. Marchet*, 2009 UT App 262, ¶ 23, 219 P.3d 75, *cert. denied,* 221 P.3d 837 (Utah 2009).

Issue II. Whether the trial court properly denied Defendant's motion to suppress:

(a) a pre-*Miranda* question asked by Defendant;

(b) post-*Miranda* interview statements; and

(c) the consensual search of his bedroom at his parents' home.

Standard of Review. When reviewing a trial court's denial of a motion to suppress, this Court reviews the trial court's factual findings "for clear error, and ... its conclusions of law for correctness." *State v. Tiedemann*, 2007 UT 49, ¶ 11, 162 P.3d 1106 (the ultimate conclusion that a defendant knowingly and intelligently waived his *Miranda* rights is reviewed for correctness, while the underlying factual findings are reviewed for clear error) (citation omitted).

Issue III. Whether the evidence was sufficient to support a conviction for aggravated robbery where, immediately after firing a shotgun three times at a police

officer, Defendant held the shotgun while taking an operable motor vehicle from a witness to the shooting.

Standard of Review. This issue was not preserved, so a plain error standard of review should be applied. *See State v. Schwenke*, 2009 UT App 345, ¶ 10, 222 P.3d 768.

Issue IV. Whether Defendant's trial counsel rendered ineffective assistance by failing to:

(a) raise objections to the jury instructions addressed in Issue I;

(b) develop more complete testimony from the mental health experts to establish his mental illness; and

(c) move for a directed verdict on the aggravated robbery charge.

Standard of Review. This Court determines ineffective assistance of counsel claims raised for the first time on appeal as a matter of law. *See State v. Ott*, 2010 UT 1, ¶ 22; *see also State v. Jimenez*, 2009 UT App 368, ¶ 8, 223 P.3d 461, *reh'g denied*, (Jan. 2010).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes are determinative of some of the issues raised in this appeal and are attached in **Addendum A**:

Utah Code Ann. § 76-1-502 (West 2004);
Utah Code Ann. § 76-2-305 (West 2004);
Utah Code Ann. § 76-5-205.5 (West 2004);
Utah Code Ann. § 76-6-302 (West 2004); and
Utah Code Ann. § 77-16a-102 (West 2004).

STATEMENT OF THE CASE

On January 8, 2007 Defendant Brian Featherhat was charged with aggravated attempted murder and aggravated robbery, both first degree felonies. R. 1-2. The State sought an evaluation of Defendant's competency and, following an evidentiary hearing on the issue, the trial court denied the request. R. 47-48, 76-79. Defendant was bound over on both counts following a preliminary hearing and filed a motion to suppress statements he made to police and evidence obtained during a search of his bedroom in his parents' home. R. 111-13, 171-73. After taking evidence and receiving written memoranda from the parties, the court entered a written order: (1) granting suppression of a pre-*Miranda* statement made by Defendant to police concerning the location of the shotgun; (2) denying suppression of Defendant's spontaneous, pre-*Miranda* inquiry about the shooting victim; (3) denying suppression of Defendant's post-*Miranda* statements; and (4) denying suppression of the evidence obtained pursuant to a consensual search of Defendant's bedroom. R. 180-81, 198-220, 265-87.

The parties filed, and the court granted, a stipulated petition for a competency evaluation of Defendant. R. 187-89, 192-96, 224-28, 235-42. After obtaining the necessary evaluations, the court found Defendant competent to proceed to trial. R. 244-45. Defendant later filed notice of his intent to claim diminished capacity and changed his plea to not guilty by reason of mental illness. R. 295, 300-01. The court ordered the Department of Human Services to evaluate Defendant's mental condition. R.300-04.

Jury trial began on November 17, 2008. R. 338. Two experts testified regarding Defendant's mental condition. R. 338-41; R. 504:26-113. Both agreed that Defendant was under the influence of alcohol at the time of the offenses, and that his mental condition resulted from his excessive use of alcohol and drugs. Dr. Richard Wootton's "main diagnosis was alcohol abuse" or "alcohol induced psychotic disorder[.]" R. 504:57, 65-66, 68, 76. He explained that, in essence, the diagnosis means that the person uses so much alcohol regularly that his thinking becomes flawed, which can cause a number of problems. R. 504:67. It is a voluntary problem, meaning that if alcohol or drugs were not abused, there would be no alcohol induced psychotic disorder. *Id.* Dr. Wootton noted that some of Defendant's behavior "might suggest a more serious mental illness[,]" such as delusions or schizo-affect disorder. R. 504:57, 59-60, 64. He did not have "enough opportunity to really make a diagnosis" on those issues, however, and noted that in the event additional evaluations were to occur, the evaluator should look at them and, if appropriate, rule them out. R. 504:57, 60, 65-66, 68. Dr. Wootton noted that Defendant reported hearing voices regularly and heard God talking to him, but the doctor did not testify that the voices played any part in the shooting. R. 58-59. In any event, Dr. Wootton was "quite confident" that at the time of the charged crimes, Defendant suffered from "alcohol abuse and . . . drug abuse[,]" which may have led to the alcohol-induced psychosis, and that Defendant "consum[ed] quite a bit of alcohol" before the crimes on January 5. R. 504:63-64, 68, 71-72.

Dr. Tim Kockler gave a similar assessment, having determined that Defendant suffered from "alcohol induced psychotic disorder with hallucinations with onset during intoxication." R. 504:93-94, 96-98. The doctor explained that the hallucinations were auditory and were not the same as true delusions. R. 504:93-94. The hallucination diagnosis stemmed from the voices Defendant reported hearing. R. 504:94-95. Defendant claimed that the radio and the voices told him at different times to murder people and that the voices told him that he should kill whoever pulled him over. R. 95, 104-05. Defendant also reported that after the shooting, the radio told him to kill himself, so he turned it off. R. 504:105-06. Dr. Cockler explained that Defendant's psychosis arose from "voluntary intoxication" and that if the alcohol or substance abuse stopped, the disease would improve so the hallucinations would eventually stop. R.504:99, 101. He also found that Defendant was malingering—intentionally producing false or grossly exaggerated physical or psychological symptoms for his own gain. R.504:97-98.

At the close of the evidence, the jury found Defendant guilty of both counts, and determined that he was not mentally ill when he committed either crime. R. 341; R.505:45-46. On January 20, 2009, the court sentenced Defendant to two consecutive sentences of five years to life in the state prison. R. 461-63. Defendant filed and withdrew a motion for a new trial, then filed a timely appeal. R. 498; Br. of Aplt. at 8.

STATEMENT OF FACTS[1]

On January 5th, 2007, Christine Tallman, her three children, and Christine's boyfriend, Pedro Hinojosa, were driving in Pedro's SUV when they saw a truck stuck in the snow on the side of the road. R. 506:33, 67-68, 90, 94-95, 97. Christine recognized the man standing by the truck as her cousin, Defendant. R. 506:67-70. Although she did not know Defendant well, she convinced Pedro to pull over and see if they could help. R.506:69, 85, 90, 95. Defendant said that he was out of gas and asked if they could pull his truck from the snow bank. R. 506:70. They found a chain in the back of Defendant's truck and hooked the two vehicles together. R. 506:71, 96, 99-100. They had moved the truck only a short distance when Officer Jason Thomas arrived. R.506:30, 71, 96.

The officer was on patrol when he happened to see taillights in the distance. R.506:27. Thinking a car may have slid off the road, he went to investigate. R. 506:28. He found the SUV and Defendant's truck just west of Kolob Regional Care Center with the truck's bed sticking into the road. R. 506:28-29. The officer turned on his vehicle's red and blue lights and got out. R. 506:29, 61, 71, 97. He noticed a beer can near the vehicles that appeared to have been dropped recently and recognized Defendant, who began to walk away. R. 506:30. Defendant returned reluctantly when Officer Thomas asked him to come back and speak with him. R. 506:31, 35. The officer asked for identification, and

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[1]The State recites "the evidence and all reasonable inferences in a light most favorable to [the jury's] verdict." *State v. Winfield*, 2006 UT 4, ¶ 2, 128 P.3d 1171 (quotations and citation omitted).

Defendant defiantly pulled his license from his wallet and pushed it into the officer's face. R. 506:31-32. The officer took the license, put it in his notebook, and put the notebook in his pocket. R. 506:55-56.

Defendant again walked away, and Officer Thomas followed him to where Christine was standing. R. 506:32. The officer recognized Christine and heard Defendant ask her to say she was driving Defendant's truck, but she refused. R. 506:33, 35, 72. Officer Thomas took Defendant to the back of the SUV where Defendant admitted that he had been drinking, but denied that the beer cans on the scene were his.[2] R. 506:33, 36.

Defendant then asked if he could hook his truck up to be towed. R. 506:33. Officer Thomas assented but retained Defendant's license because of an expired registration, the smell of alcohol, and the position of the truck. R. 506:37, 56. The officer had turned to talk with someone else when Defendant walked towards him with something in his hands. *Id.* The officer thought it might be an umbrella or a pipe until Defendant was within five or six feet and the officer realized it was a shotgun with a pistol grip. R. 506:38, 101-02; R. 504:16, 24. Defendant made an "aggressive comment" about not taking him to jail and then fired the shotgun, hitting Officer Thomas in the chest. R. 506:38, 45, 52-55, 57-58. The officer compared the impact to being hit by a sledgehammer, knocking him backward. R. 506:39, 43. Because Christine and her children were present, the officer did

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[2]It was later discovered by means of a liquor store videotape that Defendant had purchased and consumed 1/5 of Jim Beam whiskey earlier that day. R. 506:146, 159.

not return fire, but ran for cover. R. 506:39-40, 46. He heard a second shot behind him and felt the impact on his back and head. R. 506:39. He continued to run, looking for cover farther away from Christine's family. R. 506:40. He heard a third shot and believed that Defendant was pursuing him to kill him. R. 506:40. As the officer ran, he called for help on his radio, wanting to be sure he told someone what had happened and who had done it. R. 506:40-41. The officer finally found cover in a nearby subdivision but resisted falling to his knees, believing that he needed to stay on his feet to survive. R.506:41. He still feared using his own gun in self-defense because people were in the area; he yelled at those drawn out of their houses by the gunshots to get back inside. R.41-42. He could see Defendant near his police car momentarily, then Defendant moved and the officer lost sight of him. R. 506:42, 48.

Christine and Pedro heard the shots but could not see the shooter. R. 506:73, 76, 98-100. When the shooting stopped, both saw Defendant screaming and running toward the vehicles with a shotgun in his hands. R. 506:73, 76-77, 79, 85, 98-99, 101, 106-07. Pedro pulled the children from his SUV and ran for cover, afraid that Defendant might shoot him or the children. R. 506:76, 101, 103, 106, 108-09. Defendant walked up to Christine and yelled, "Let's go. Drive me[,]" indicating Pedro's SUV. R. 506:80, 86. Christine turned and ran after Pedro and the kids. R. 506:80. Defendant turned to his truck, placed his gun on the ground, and unhooked the chain connecting the vehicles. R.506:81, 101-02, 108. He then picked up the gun, got into Pedro's SUV, and fled. R.506:81-82,

87, 102-03. Defendant later abandoned the vehicle and was picked up by police as he was walking on the side of the highway before 4:00 a.m. the following morning. R. 506:147, 155, 167; R. 503:7-10, 13-14.

When Defendant arrived at the police station, he could "barely speak" and was "frozen"—very cold and "shivering very violently" from having been out in sub-zero temperatures. R. 506:155-56. Detective Mike Bleak provided him with a blanket and hot chocolate to try to warm him up. R. 506:155; R. 503:19. It took "some time" but Defendant eventually warmed enough to talk. R. 506:155-56. Detective Bleak began by asking for Defendant's name, address, and phone number. R. 503:26-27; R. 506:156. He then "explain[ed] the nature of the interview ... mak[ing] sure that the[interviewees] understand their rights before [being] ask[ed] any type of incriminating questions." R.267-69; R. 503:27; R. 506:156. During this explanation, Defendant interrupted the detective and spontaneously asked, "Is he all right?" R. 268-69; R. 503:21, 27; R.506:156, 174. Assuming Defendant was referring to Officer Thomas, the detective responded that the officer would be all right. R. 506:157, 174; R. 503:21. Bleak then read Defendant his *Miranda* rights and began the interrogation. R. 506:175; R. 503:21-22, 28. At the time of the shooting, Defendant was living at his parents' home. R. R. 503:43-44, 46-47. Before Defendant was arrested, officers obtained permission from Defendant's father to search the residence for Defendant and any pertinent evidence. R. 503:34-38, 43-47, 48-49. Defendant was not present, but officers found spent and fresh 12-gauge shotgun

shells and a 20-gauge shotgun in Defendant's bedroom. R. 503:36, 41. They showed what they had collected to Defendant's father before leaving. R. 503:36-38, 60-61. The man was very cooperative throughout the process and did not, at any time, demand to see a search warrant. R. 503:58, 61. Had anyone demanded a warrant, the officers would have sealed the area and obtained a warrant before proceeding. R. 503:61.

SUMMARY OF ARGUMENT

Issue I: Defendant challenges jury instructions 10 and 18, claiming that both instructions contain instructional errors that warrant reversal of his convictions or a new trial. Because defense counsel did not object to these instructions and affirmatively informed the court that he had no objection, the invited error doctrine prevents appellate review of the claims.

Defendant also contends that his counsel rendered ineffective assistance by failing to better scrutinize the instructions to make the objections he now raises on appeal. Specifically. he contends that jury instruction number 18, which directs the jury in deciding whether Defendant is guilty and mentally ill [GAMI], failed to inform the jury that the State carries the burden of disproving mental illness. Such an objection would have been futile, however, because the State has no such burden under Utah's GAMI provisions. The State's burden of disproving mental illness exists when mental illness is advanced as an affirmative defense. Mental illness for purposes of GAMI goes to potential treatment and places no burden on the State to prove or disprove its existence.

Consequently, defense counsel cannot be ineffective for failing to make a futile objection to the GAMI instruction (instruction 18).

Defendant's challenge to jury instruction 10, which outlines the elements of attempted aggravated murder, relates solely to inclusion of the victim's name in the instruction. Because his claim is purely speculative, lacking any meaningful analysis or support, it is inadequate to establish ineffectiveness.

Defendant also challenges the trial court's refusal to give his proposed special mitigation instruction and his counsel's failure to pursue the matter further. However, the special mitigation statute expressly provides that a defendant "may not claim mitigation" under the statute if he was under the influence of alcohol or drugs at the time of the offense and the alcohol or drugs "caused, triggered, or substantially contributed to" his mental state. Utah Code Ann. § 76-5-205.5(3). Both experts agreed that these conditions existed here. Hence, the lower court properly rejected Defendant's request for a special mitigation instruction, and his counsel was not ineffective for accepting the ruling.

Issue II: Defendant claims error in the trial court's denial of his motion to suppress statements he made to the police and evidence they obtained in a warrantless search of his bedroom. First, the fact that the interviewing officer provided a freezing Defendant with water, a blanket, and hot chocolate prior to the interview did not amount to coercion. Neither did it alter the fact that Defendant's spontaneous, pre-*Miranda* question about Officer Thomas' condition arose before the interrogation began, was not responsive to

any inquiry by the detective, and was unrelated to the detective's remarks at the time.

Second, the trial court properly considered the totality of the circumstances, including the detective's responses to Defendant's questions during the interview, and correctly found that Defendant demonstrated by his own words and conduct that his *Miranda* waiver was both knowing and intelligent. Alternatively, any error in admitting Defendant's statements is harmless because the same information was adduced through other witnesses at trial.

Third, Defendant challenge to the lower court's refusal to suppress evidence obtained during a consensual search of his bedroom in his parents' home is inadequately briefed and should be summarily rejected. Alternatively, any error is harmless where Defendant does not demonstrate that any of the evidence seized was admitted at trial.

Issue III: Defendant argues that the evidence does not support his aggravated robbery conviction and that the lower court committed plain error in submitting that count to the jury. To the contrary, the evidence supports a conviction based either on Defendant's possession of the shotgun in the course of stealing the SUV or on his unlawful taking of an operable motor vehicle. Hence, there was no plain error in submitting the case to the jury.

Issue IV: Defendant claims that his trial counsel was ineffective for failing to further develop the expert testimony concerning his mental illness. The record is inadequate to permit appellate review, however, where he fails to explain the content,

source, or impact of the additional testimony.

Finally, Defendant faults his counsel for failing to seek a directed verdict on the aggravated robbery charge at the end of trial. However, as provided in Point III, *supra*, there was sufficient evidence on which to rest Defendant's aggravated robbery conviction. Because a directed verdict motion would have been futile, counsel's failure to file it does not establish ineffective assistance.

ARGUMENT

POINT I

DEFENDANT DEMONSTRATES NO ERROR OR INEFFECTIVE ASSISTANCE IN THE CHALLENGED JURY INSTRUCTIONS; THE EVIDENCE PRECLUDES A SPECIAL MITIGATION INSTRUCTION

A. Introduction

Defendant's first point raises three arguments involving three jury instructions, each of which relates to mental illness. *See* Br. of Aplt. at 14-19. He later revisits two of the instructions, arguing that his trial counsel rendered ineffective assistance in failing to raise the claims he now presents to this Court. *See id.* at 25-27. Because Utah's unique mental illness provisions work in concert, it is necessary to place those provisions in context in order to understand Defendant's arguments.

Mental illness as an affirmative defense. Mental illness is a defense under Utah law only when it negates the mental state required as an element of the offense. *See* Utah Code Ann. § 76-2-305 (West 2004). It encompasses claims of "insanity" and "diminished

mental capacity." *See* Utah Code Ann. § 76-2-305(2). It includes "a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning." Utah Code Ann. § 76-2-305(4)(a). However, if a defendant asserting mental illness as an affirmative defense "is under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense, that person "is not excused from criminal responsibility on the basis of mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness." Utah Code Ann. § 76-2-305(3). The State bears the burden of proving the absence of an affirmative defense once the defense is put into issue. *See State v. Low*, 2008 UT 58, ¶ 45, 192 P.3d 867; *State v. Hill*, 727 P.2d 221, 222 (Utah 1986); Utah Code Ann. § 76-1-502 (West 2004). The jury in this case was instructed in accordance with these provisions but rejected this defense. *See* R. 404 (ji 8), 405 (ji 9), 406 (ji 10), 411-12 (ji 15), 414 (ji 17), 416 (ji 19).[3]

Guilty and Mentally Ill [GAMI]. Utah law offers juries the "inventive" alternative of finding a defendant to be guilty and mentally ill. *See State v. Herrera*, 895 P.2d 359, 367-68 (Utah 1995); Utah Code Ann. § 77-16a-102(2) (West 2004). In various qualifying situations, the jury is instructed that it must first evaluate the issue of guilt and "if it finds a defendant guilty by proof beyond a reasonable doubt of any charged offense or lesser included offense, it shall also return a special verdict indicating whether it finds

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[3]A complete copy of the instructions given the jury is attached in **Addendum B**.

that the defendant was mentally ill at the time of the offense." Utah Code Ann. § 77-16a-102(2)(a) & (b). A GAMI verdict is not an affirmative defense and does not excuse a defendant from criminal responsibility. Instead, it allows convicted offenders, who were mentally ill at the time of their crime, to receive special hospitalization and treatment if they remain mentally ill at the time of sentencing. *See* Utah Code Ann. § 77-16a-104 (West 2004); *see also State v. Mace* 921 P.2d 1372, 1378 (Utah 1996) (characterizing "the GAMI verdict as an improved and compassionate form of punishment" for legally sane but mentally ill offenders who would otherwise be entitled to no special sentencing); *see also Herrera,* 895 P.2d at 367-68 ("[T]he mens rea model coupled with this inventive verdict [GAMI] is a constitutionally valid system of dealing with an ever-adapting field . . . [and] a legitimate approach to dealing with the sometimes baffling relationship between insanity and mens rea."). Hence, it requires that the jury "find[] . . . mental illness . . . by a preponderance of the evidence[,]" but it does not require the jury to find the *absence* of mental illness, as with an affirmative defense. *Compare* Utah Code Ann. § 77-16a-102(3) *with* Utah Code Ann. § 76-1-502. The jury in this case was instructed on this option but rejected it. R. 415 (ji 18); R. 505:45-46.

Special mitigation. In 1999, the Utah Legislature enacted the special mitigation statute to address a myriad of policy concerns involving the punishing of legally sane but delusional offenders. *See* Utah Code Ann. § 76-5-205.5 (West 2004); *Herrera*, 895 P.2d at 362. The statute provides a benefit to a delusional defendant found guilty of

aggravated murder, attempted aggravated murder, murder, or attempted murder. *See* Utah Code Ann. § 76-5-205.5. It permits the level of the established crime to be reduced one degree if special mitigation is established. *See* Utah Code Ann. § 76-5-205.5(4)(a) & (b). But it is a benefit that arises only after the jury finds the defendant guilty, i.e., that the prosecution proved all elements of the charged offense beyond a reasonable doubt. *See id.* The statute necessarily places the burden on a defendant to prove by a preponderance of the evidence that when he committed the established crime, he acted "under a delusion attributable to a mental illness" and that "if the facts existed as the defendant believed them to be in his delusional state, those facts would provide a legal justification for his conduct." Utah Code Ann. § 76-5-205.5(1)(a) & (b). Special mitigation does not exist, however, when a defendant acts while under the influence of voluntarily consumed alcohol or drugs, and the alcohol or drugs "caused, triggered, or substantially contributed" to the claimed mental illness. Utah Code Ann. § 76-5-205.5(3). A finding of special mitigation does not undermine the truth or validity of the murder finding.Rather, as a matter of public policy, it mitigates the harsher consequences of the murder finding by directing the jury to return a verdict, not on the murder offense they found, but on the next lower offense. *See* Utah Code Ann. § 76-5-205.5(5).

GAMI and special mitigation are similar in that both are considered only after a jury has unanimously found the defendant guilty of a crime. *Compare* Utah Code Ann. § 76-5-205.5(4)-(7) (requiring jury to first determine by general verdict defendant's guilt of

charged murder offense and to then determine if special mitigation exists), *with* Utah Code Ann. § 77-16a-102(2)(a) (requiring jury to first determine by general verdict defendant's guilt of an offense and to then determine by special verdict if he was mentally ill at the time of the offense). In this case, Defendant submitted a proposed special mitigation instruction echoing the statutory language, but the trial judge rejected it because there were not "sufficient facts presented to justify instructing the jury" on special mitigation. R. 367; R. 505:4.

B. The Challenged Instructions

Defendant first challenges jury instructions 18 and 10. *See* Br. of Aplt. at 11-12, 14-19. He argues that jury instruction 18, the GAMI instruction, should have, but did not, inform the jury that the State bore the burden of disproving by a preponderance of the evidence that he was mentally ill. *See id.* at 14-17. Jury instruction 18 provides:

> As you have been previously instructed, you can only convict the Defendant of an offense if you find that the evidence establishes, beyond a reasonable doubt, every element of that offense. If, and only if, you determine that the evidence has proven beyond a reasonable doubt all the elements of any crime, you will be required to fill out and return a special verdict form indicating whether you find, by a preponderance of evidence, that the Defendant was mentally ill at the time of any such crime.
>
> A preponderance of the evidence simply means it is more likely than not that the Defendant was mentally ill at the time of the offense.
>
> Keep in mind that the standard of preponderance of the evidence which applies to a finding that the Defendant was mentally ill at the time of the offense is a different and lower standard than the standard that applies to establishing the Defendant's guilt, which is proof beyond a reasonable doubt. The two standards must never be confused.

As you deliberate, you will be provided with a special verdict form for your use should you find the Defendant guilty of any crime charged or guilty of the lesser offense of any crime charged. The special verdict form is designed to help guide your deliberations and to indicate the basis for your verdict.

R. 415.

He also argues that jury instruction 10, the elements instruction for attempted aggravated murder, erroneously included the name of the victim, impermissibly allowing the possibility that the deliberations would be influenced by inappropriate factors. *See* Br. of Aplt. at 17-18. That instruction provides:

> Before you may find Defendant BRYAN FEATHERHAT guilty of the offense of Attempted Aggravated Murder as charged in Count 1 of the Amended Information, the State must prove and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements:
>
> 1. That the Defendant intentionally or knowingly attempted to cause the death of *Jason Thomas*; and
>
> 2. That the attempted homicide was committed:
>
> A. Incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery; or
>
> B. For the purpose of avoiding or preventing an arrest of the Defendant or another by a peace officer acting under color of legal authority; or
>
> C. Against a peace officer, or law enforcement officer, and the officer was either on duty or the attempted homicide was based on, or was related to, that official position, and the actor knew, or reasonably should have known, that the officer held that official position;
>
> 3. The absence of an affirmative defense which the Defendant has put into issue; and
>
> 4. That such acts occurred on or about January 5, 2007, in Iron County, State of Utah.

> If the State of Utah has failed to prove any one or more of the previously described elements, you must find the Defendant not guilty of the offense of Attempted Aggravated Murder as charged in Count 1 of the Amended Information. If the State has proved, however, each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to find the Defendant guilty of Attempted Aggravated Murder as charged in Count 1of the Amended Information.

R. 406 (emphasis added).

C. Invited Error Doctrine Prevents Appellate Review of Instructions 18 and 10

Defendant acknowledges that his trial counsel failed to object to either instruction 18 or instruction 10. *See* Br. of Aplt. at 11-12, 15, 17. Consequently, he argues both under the plain error doctrine. *See id.* Plain error review is unavailable, however, because Defendant invited any alleged error in the instructions.

The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Perdue*, 813 P.2d 1201, 1205 (Utah App. 1991) (quotations omitted); *see also State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742. Accordingly, "a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'" *Geukgeuzian*, 2004 UT 16, ¶ 9 (quoting *State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111); *see also State v. Harmon*, 956 P.2d 262, 269 (Utah 1998) (noting that defense counsel waives any right to challenge an instruction on appeal if he approves it below).

Here, the trial judge met with both counsel on the last day of trial prior to closing

arguments. R. 505:3-6 (attached in **Addendum C**). When he asked if there were any objections to instructions 9 through 23, both counsel affirmatively answered, "No, Your Honor." R. 505:3. Hence, the invited error doctrine prevents appellate review of Defendant's challenge to both instructions. *See Hamilton*, 2003 UT 22, ¶ 55 (finding invited error where defense counsel confirmed on the record that he had no objection to the instructions below).

The invited error doctrine also prevents review of instruction 10 for the additional reason that Defendant's proposed elements instruction for attempted aggravated murder also included the victim's name. R. 358 (attached in **Addendum D**). Having requested the language to which he now objects and having made no effort to correct the lower court's use of the same language in the final instruction, Defendant essentially endorsed its use and cannot now argue that inclusion of that language was error. *See Perdue*, 813 P.2d at 1205 ("a party may not appeal a jury instruction that the same party submitted or requested.").

D. Defense Counsel did not Render Ineffective Assistance in his Treatment of Instructions 18 and 10

Defendant also challenges as ineffective assistance his trial counsel's handling of both instruction 10 and 18. *See* Br. of Aplt. at 14, 25-27. He argues that counsel's performance was ineffective because he failed to "scrutinize[] the proposed jury instructions more closely" so that he could make the objections outlined above. *Id.* at 26; Subsection B, *supra*. Defendant summarily contends that the oversights were not the

result of any strategy and that absent such failure, "it is probable that . . . the outcome of the trial would have been different." Br. of Aplt. at 26-27.

1. Ineffective assistance of counsel analysis

To establish that he received ineffective assistance of counsel, Defendant must show that his counsel rendered deficient performance "in that it fell below an objective standard of reasonable professional judgment" and "that counsel's deficient performance was prejudicial[.]" *State v. Jimenez*, 2010 UT App 368, ¶ 8 (citations and quotations omitted); *see also State v. Cruz*, 2005 UT 45, ¶ 38, 122 P.3d 543. To satisfy the first part of the two-prong test, a defendant must overcome the "strong presumption that counsel's conduct [falls] within the wide range of reasonable professional assistance" and that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052 (1984) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *Cruz*, 2005 UT 45, ¶ 38; *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92. Prejudice is established by a showing "that there exists a reasonable probability that absent the deficient conduct, [he] would have obtained a more favorable outcome at trial." *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996); *see also Cruz*, 2005 UT 45, ¶ 38.

"[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *Nicholls v. State*, 2009 UT 12, ¶ 36, 203 P.3d 976 (internal quotation marks omitted). Moreover, failure to establish either prong is fatal to

Defendant's ineffectiveness claim. *See State v. Pedersen*, 2010 UT App 38, ¶ 13; *State v. Diaz*, 2002 UT App 288, ¶ 38, 55 P.3d 1131, *cert. denied,* 63 P.3d 104 (Utah 2003).

2. Counsel was not ineffective for agreeing to instruction 18

Defendant argues that his counsel was ineffective for failing to scrutinize jury instruction 18, the GAMI instruction, closely enough to have objected because the instruction does not expressly provide that "the State ha[s] the burden" of proving "by a preponderance of evidence that the Defendant was not mentally ill." *See* Br. of Aplt. at 14-17, 26. He concedes that the jury was adequately informed of the State's burden of proving him guilty beyond a reasonable doubt, but that the jury was "left to speculate" about who had the "burden to prove no mental illness." *Id.* at 15-16.

Defendant's argument inappropriately collapses two of Utah's mental illness provisions, making no distinction between proof of mental illness as an affirmative defense and proof of mental illness under the GAMI alternative. On one hand, he focuses exclusively on instruction 18, explaining that it instructs the jury according to the provisions of section 77-16a-102(2)(a). *See* Br. of Aplt. at 14-15. That part of the statute deals exclusively with Utah's GAMI provision. *See* Subpoint A, *supra*. As established above, that provision directs the jury's deliberations only *after* it has considered the evidence and the affirmative defenses and determined that the State has established Defendant's guilt beyond a reasonable doubt. *See* Utah Code Ann. § 77-16a-102(2)(a). GAMI deals only with mental illness as it relates to treatment and sentencing, and

Defendant neither challenges his sentence nor demonstrates that the burden of establishing his entitlement to those benefits is not his to bear.

On the other hand, Defendant faults instruction 18 for failing to inform the jury of the State's burden of "establish[ing] by a preponderance of evidence that the Defendant was not mentally ill." Br. of Aplt. at 15. While the preponderance of evidence standard applies to a GAMI verdict and, hence, to establishing a mental illness for purposes of treatment and sentencing, the burden of proof he recites relates to the State's burden to disprove mental illness advanced as an affirmative defense–i.e., when its existence would defeat the intent element of the charged crime. *Compare* Utah Code Ann. § 77-16a-102(3) *and* § 76-1-502 (state's burden to disprove affirmative defenses); *see also Low*, 2008 UT 58, ¶ 45 (state's burden relative to mental illness as an affirmative defense). Here, as Defendant concedes, instruction 10 properly instructed the jury concerning the State's burden to prove intent, which included disproving Defendant's affirmative defense of diminished capacity. *See* R. 406-07 (ji 10).

Further, Defendant relies on *State v. Garcia* to support his claim that the State bears the burden of disproving mental illness. *See* Br. of Aplt. at 15-16 (citing *State v. Garcia*, 2001 UT App 19, 18 P.3d 1123). *Garcia*, however, was an affirmative defense case, involving a plain error challenge to jury instructions concerning a claim of self-defense. *See Garcia*, 2001 UT App 19, ¶ 6. It directs that trial courts "separately instruct each jury clearly that the State must disprove . . . affirmative defenses[] beyond a reasonable

doubt." *Id.* at ¶ 16. Again, instruction 10 did so. *See* R. 406-07 (ji 10).

Defendant's argument not only fails to distinguish between GAMI and an affirmative defense, but it presupposes, without authority, that the State bears the burden of disproving mental illness in both situations. *See* Br. of Aplt. at 14-17. As discussed, it does not. *See* Utah Code Ann. §§ 77-16a-102 and 76-5-205.5.

In this case, the elements jury instruction for each offense explained that "the State must prove and you must find, unanimously and beyond a reasonable doubt . . . [t]he absence of an affirmative defense which the Defendant has put into issue . . ." R. 406 (ji 10); *see also* R. 405 (ji 9), 407 (ji 11), 408 (ji 12), 409 (ji 13), 410 (ji 14); R. 505:17-18; *see, e.g., Garcia*, 2001 UT App 19, ¶ 16. Further, jury instruction 18 properly explained that if the jury found Defendant guilty beyond a reasonable doubt, it could "find, by a preponderance of evidence, that the Defendant was mentally ill" at the time of the crime. R. 415; Utah Code Ann. § 77-16a-102. Hence, the instructions adequately informed the jury that no GAMI verdict was permissible unless a preponderance of the evidence established mental illness. The special verdict, thus, required proof of mental illness, not its disproof. The fact that the jury undertook and completed their deliberations without any evidence of confusion or hesitation in following or implementing the instructions demonstrates their understanding of the respective burdens outlined in the instructions as a whole.

Properly viewed in light of Utah's distinct mental illness provisions, instruction 18

does not contain the deficiency claimed by Defendant. Accordingly, defense counsel was not ineffective for failing to more carefully scrutinize and object to the instruction, as claimed by Defendant. *See Pedersen*, 2010 UT App 38, ¶¶ 19, 24 (no ineffectiveness in failing to make futile motions or objections); *State v. Whittle*, 1999 UT 96, ¶ 34, 989 P.2d 52 (same).

3. Defendant's claim of ineffectiveness involving instruction 10 fails because it is wholly speculative

Defendant doesn't challenge instruction 10, the murder elements instruction, as an improper statement of the law. He claims only that his counsel was ineffective for failing to object to the instruction because it included the victim's name. *See* Br. of Aplt. at 17-18, 26. His claim fails, however, because it is entirely speculative and, hence, inadequate to establish ineffective assistance. *See State v. Marchet*, 2009 UT App 262, ¶ 24, 219 P.3d 75, *cert. denied,* 221 P.2d 837 (Ut; *see also State v. Tyler*, 850 P.2d 1250, 1254 (Utah 1993) ("[P]roof of counsel's ineffectiveness must be a demonstrable reality, not mere speculation.").

Defendant argues that "[i]t was not necessary" to include the Officer Thomas' name, that doing so allowed the deliberations to be influenced by sympathy, and that it "cannot be presumed" that use of the name was not prejudicial. Br. of Aplt. at 17-18. He fails, however, to cite supporting authority and does not acknowledge that use of a victim's name in a jury instruction is not necessarily erroneous. *See, e.g., State v. Irvin*, 2007 UT App 319, ¶¶ 7, 21, 169 P.3d 798(affirming a criminal conviction where the victim was

identified by name in the elements instruction). He also ignores that it was uncontroverted that he targeted and attempted to kill only Officer Thomas. Further, both counsel linked the charge and Officer Thomas in closing arguments, and Defendant did not otherwise dispute that he shot the officer. R. 503:38-39, 139, 143; R. 504:10, 24; R.505:28-29.

Neither does Defendant offer any explanation or support for his claim that mere use of the victim's name in this case would render the jury unable to follow the court's instruction to base its verdict "on the evidence[,]" "to act conscientiously and calmly in weighing the evidence and applying [the] legal instructions[,]" and to avoid being "influenced by sympathy for the defendant or by prejudice against the defendant." R. 398 (ji no. 2). *See State v. Menzies*, 889 P.2d 393, 401 (Utah 1994) ("We generally presume that a jury will follow the instructions given it."); *State v. Devey*, 2006 UT App 219, ¶ 16, 138 P.3d 90; *State v. Burk*, 839 P.2d 880, 883 (Utah App.1992) ("In the absence of the appearance of something persuasive to the contrary, we assume that the jurors were conscientious in performing to their duty, and that they followed the instructions of the court." (quotations and citation omitted)), *cert. denied,* 853 P.2d 897 (Utah 1993).

Where Defendant offers nothing more than his own belief that the inclusion of the name was inappropriate and prejudicial, his argument is entirely speculative and does not establish ineffectiveness. *See Marchet*, 2009 UT App 262, ¶ 24.

E. The Trial Court Properly Rejected the Proposed Special Mitigation Instruction Where the Evidence Precluded it

Defendant argues that the lower court erroneously refused to give an instruction on special mitigation and that his trial counsel was ineffective for not aggressively seeking a contrary ruling. *See* Br. of Aplt. at 14, 18-19, 26. The proposed instruction provided

> A person who would otherwise be guilty of attempted aggravated murder may only be guilty of attempted murder if the evidence establishes special mitigation.
>
> Special mitigation applies when a person causes the death of another under circumstances that are not legally justified, but the person acts under a delusion attributable to a mental illness, and the nature of the delusion is such that, if the facts existed as the defendant believed them to be in his delusional state, those facts would provide a legal justification for his conduct.
>
> Special mitigation only applies if the defendant's actions in light of his delusion, were reasonable from the objective viewpoint of a reasonable person.
>
> A person who was under the influence of voluntarily consumed, injected or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not avail himself of special mitigation based on mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

R. 367 (attached in **Addendum E**). The trial court properly rejected a special mitigation instruction because Defendant failed to establish that he was entitled to it. R. 505:3-4 (Add. C). On appeal, Defendant claims that he has no obligation to present any evidence to support special mitigation and that testimony from the experts established that he "suffered from delusion among other forms of mental illness[,]" which entitled him to the special mitigation instruction. *See* Br. of Aplt. at 11-12, 18.

While Defendant has no burden to affirmatively establish his innocence, he cites no authority holding that he is automatically entitled to have the jury instructed about special mitigation. To the contrary, the statute's plain language outlines the conditions under which the instruction may be given. Those conditions were not met here.

To be eligible for special mitigation, Defendant must prove that, in attempting to commit the murder, he "act[ed] under a delusion attributable to a mental illness as defined in section 76-2-305," and that "the nature of the delusion is such that, if the facts existed as the defendant believed them to be in his delusional state, those facts would provide legal justification for his conduct." Utah Code Ann. § 76-5-205.5(1)(a)(I)-(ii). Defendant argues that the experts testified that he "suffered from delusion" and asserts that he had no burden to present additional facts to receive the instruction. *See* Br. of Aplt. at 18.

Even assuming, as he claims, that the evidence established that he suffered from a delusion,[4] there was no evidence that if the facts existed as Defendant delusionally believed them to at the time of the shooting that those facts would provide a legal justification for the killing. *See* Utah Code Ann. § 76-5-205.5(1)(b) & (2). The experts noted that Defendant reported hearing voices, that the voices and the radio told him to

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[4]There was no evidence that Defendant suffered from a delusion, but only testimony that the "possibility of delusions" ought to be further explored and, if appropriate, ruled out. R. 504:57-65; *see* Statement of the Case, *supra*. The experts opined only that Defendant's chronic abuse of alcohol led him to hear voices which directed him to kill. *See* Statement of the Case, *supra*.

murder people, and that the voices told him to flee the scene and to kill himself. R.504:72-73, 94-96, 105. Simply hearing voices, however, does not establish what facts Defendant believed or whether they would, if true, "provide a legal justification for [Defendant's] conduct." Utah Code Ann. § 76-5-205.5(1) (a) & (b). The record contains nothing to fill this evidentiary void. Consequently, the lower court properly determined that the evidence of Defendant's psychotic beliefs, even if true, did not establish a justification for the attempted murder. R. 505:3-4. Defendant, therefore, was not entitled to a special mitigation instruction.

Moreover, the plain language of the statute provides that if Defendant acted under the influence of voluntarily consumed alcohol or controlled substances and the substance "caused, triggered, or substantially contributed to the mental illness[,]" he "*may not claim* mitigation of the offense under this section[.]" Utah Code Ann. § 76-5-205.5(3) (emphasis added). In other words, special mitigation does not exist if the evidence establishes that Defendant's voluntary consumption of alcohol and/or drugs the day of the offense caused or contributed to his mental illness. *See id.*

Both experts in this case agreed that Defendant's mental condition was caused by his excessive use of alcohol and drugs, and Defendant admitted that he had been drinking heavily when he shot Officer Thomas. *See* Statement of the Case, *supra*; R. 504:63-65, 68, 71, 93-94, 96-98, 101. Dr. Wootton's "main diagnosis was alcohol abuse" or "alcohol induced psychotic disorder[,]" while Dr. Cockler opined that on the date of the charged

offenses, Defendant "suffer[ed] from an alcohol induced psychosis" that resulted from "voluntary intoxication." R. 504:57, 65-66, 68, 76, 93-94, 96-98, 101. Both testified that Defendant's mental problems were caused or triggered by alcohol use and that absent the use of alcohol, there would be no alcohol-induced psychotic disorder. R. 504:67, 99, 101.

Because the evidence established that Defendant's consumption of alcohol "caused, triggered, or substantially contributed" to his mental problem, and that he "was under the influence of voluntarily consumed . . . alcohol . . . at the time of the alleged offense[,]" the statute precluded Defendant from "claim[ing] mitigation of the offense . . . on the basis of mental illness[.]" *See* Utah Code Ann. §76-5-205.5(3); *see also State v. Jones*, 2002 UT 01, ¶ 14, 444 P.3d 658 (holding that defendant is "precluded from mitigation of his offense" under the special mitigation statute where alcohol "motivated him to shoot his victims"), *reh'g. denied* (Mar. 2002). Hence, the trial court properly denied the proposed instruction, and Defendant's trial counsel was not ineffective for failing to "press[]" the judge to rule otherwise. *See Pedersen*, 2010 UT App 38, ¶¶ 19, 24 (no ineffectiveness in failing to make a futile motion or objection).

POINT II

THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS DEFENDANT'S PRE-*MIRANDA* QUESTION, HIS POST-*MIRANDA* STATEMENTS, AND THE RESULTS OF THE CONSENSUAL SEARCH OF HIS BEDROOM

Defendant challenges the trial court's denial of his pre-trial motion to suppress, claiming that, although the court acknowledged the appropriate legal standard for the issue, it did not properly apply it. *See* Br. of Aplt. at 19. In particular, he challenges: (1) the ruling on the admissibility of his pre- and post-*Miranda* statements to the police; and (2) the decision that the warrantless search of his bedroom occurred with the consent of the homeowner, Defendant's father. *See id.* at 20-23; Decision and Order Granting in Part and Denying in Part Defendant's Motion to Suppress (attached in **Addendum F**).

A. The Pre-*Miranda* Question was Admissible

Defendant first challenges the trial court's refusal to suppress his pre-*Miranda* question to Detective Mike Bleak: "Is he alright?" *See id.* at 12-13, 20-21. He argues that his volunteered remark violated his *Miranda* rights because the officer's gestures of concern for Defendant's comfort immediately preceding it were pretextual and coercive.[5] *See id.* at 21.

Following his early morning arrest, a frozen Defendant was taken to an interrogation room at the police department where Detective Mike Bleak provided him with a blanket

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[5]The trial court suppressed an earlier statement by Defendant concerning the whereabouts of his shotgun. Add. F at 10-11. Defendant does not challenge that ruling.

and hot chocolate to try to warm him up. Add. F at 3; R. 506:155-56; R.503:19. After "some time[,]" Defendant eventually warmed enough to talk. R.506:155-56. The detective then asked for identifying and contact information, which Defendant gave, before starting to explain the "nature of the interview[.]" Add. F at 3-5; R. 503:27; R. 506:156. Defendant interrupted the explanation, spontaneously asking, "Is he all right?" Add. F at 4-5; R. 503:21, 27. The trial court found that Defendant was referring to Officer Jason Thomas. Add. F at 4, n.4.

Defendant claimed below that the statement should be suppressed because it was made during interrogation and was neither voluntary nor spontaneous. Add. F at 12-13. The trial court determined that the statement was not made during interrogation, that it was both "spontaneous and voluntary," and that it was therefore admissible under *Miranda*.[6] Add. F at 13-14.

Defendant now argues that the lower court failed to properly consider what he characterizes as the detective's deceptive interview tactics. *See* Br. of Aplt. at 12-13, 20-21. In so doing, however, he repeatedly refers to his "interrogation." *Id.* His reference is inaccurate with respect to the pre-*Miranda* remark. The term "interrogation" under *Miranda* includes both express questioning as well as "'its functional equivalent.'" *State*

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[6]The court also determined that the Detective's inquiries before the challenged statement were not "reasonably likely to elicit an incriminating response." Add. F at 12; *see also Rhode Island v. Innis*, 446 U.S. 291, 301-02, 100 S. Ct. 1682 (1980).

v. Ferry, 2007 UT App 128, ¶ 13, 163 P.3d 647 (quoting *State v. Kooyman*, 2005 UT App 222, ¶ 31, 112 P.3d 1252, *cert. denied*, 25 P.3d 102 (Utah 2005)). That is, "'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response[.]'" *Kooyman*, 2005 UT App 222, ¶ 32 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682 (1980)).

In this case, the trial court's determination that Defendant was subjected to neither express questioning nor its functional equivalent was based on the judge's findings that Defendant "had only been in custody for about an hour" before he asked about the officer and "had only been asked questions (all of which were permissible) for a couple of minutes."[7] Add. F at 12-13 (footnote omitted). Defendant fails to challenge these findings. Hence, they remain undisturbed and supportive of the fact that the statement was not the result of interrogation or its functional equivalent. *See State v. Hurt*, 2010 UT App 33, ¶ 16, 227 P.3d 271 (a trial court's factual findings will remain undisturbed absent a cognizable appellate challenge).

The trial court dropped a footnote summarily rejecting any claim that the officer's conduct rendered the question involuntary. Add. F at 13, n. 13. In fact, the court stated

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[7]The officer had asked some identifying questions "to make sure ... that [he] had his information correct: Name, date of birth, current address, things like that." R. 503:21. He described them as "[j]ust the standard questions" to "make sure that [he] get[s] everything correct in the name [sic] file." R. 503:27. In other words, he was asking questions "normally attendant to arrest and custody." *Innis*, 446 U.S. at 301.

that it had "no difficulty finding, under the totality of the circumstances, that Defendant's question about Officer Thomas was indeed spontaneous and voluntary[.]" Add. F at 14.

Defendant claims the court failed to "adequately address" the detective's tactics—providing him with water, a blanket, and hot chocolate before launching immediately into questioning and coercing him into asking the pre-*Miranda* question. Br. of Aplt. at 12-13, 20-21. However, nothing in these circumstances demonstrates error in the lower court's ruling.

> To determine whether a suspect's statements were coerced, courts look to the totality of circumstances. Factors to consider in examining the totality of the circumstances include not only the crucial element of police coercion, the length of the interrogation, its location, its continuity, defendant's maturity, education, physical condition, and mental health. They also include the failure of police to advise defendant of his rights under *Miranda*.

State v. Barrett, 2006 UT App 417, ¶ 7, 147 P.3d 491.

Here, the Detective's preliminary gestures of providing a blanket, water, and hot chocolate to Defendant were a natural, empathetic response where Defendant had been arrested at 4:00 a.m. in the middle of winter after being outdoors during a large part of the night, wearing clothes that were wet and "frozen and covered with snow[.]" Add. F at 2-3; R. 506:155-56. Defendant had not warmed up by the time he reached the police station, he "was shivering very violently," and his teeth continued to chatter. *Id.* After having provided the basic comforts, the detective did not immediately launch into the interrogation, said nothing that would prompt Defendant to inquire about Officer Thomas,

and limited his remarks to preliminary housekeeping matters. He had not yet even begun to speak about the events of the previous night when Defendant interrupted and asked about Officer Thomas. *Id.*

These circumstances strongly indicate that Defendant's question was internally motivated by his own emotions and concerns, not externally prompted by the detective's statements or actions. *See, e.g., People v. Logan*, 797 N.Y.S.2d 634, 636 (N.Y. App. Div 2005) (defendant who was given a blanket, water, and a cigarette was not coerced or intimidated into making a statement). Hence, the record supports the lower court's determination of voluntariness and demonstrates an absence of "actual coercion or other circumstances calculated to undermine [Defendant's] ability to exercise his free will" at the time Defendant asked his pre-*Miranda* question. *Barrett*, 2006 UT App 417, ¶ 9 (quoting *Oregon v. Elstad*, 470 U.S. 298, 309, 105 S. Ct. 1285 (1985)) (alteration added).

B. Defendant's Waiver of his *Miranda* Rights Rendered his Post-*Miranda* Statements Admissible

Defendant also challenges the admission of statements that he made to Detective Bleak after receiving his *Miranda* warning. *See* Br. of Aplt. at 20-21. Such statements are admissible at trial if Defendant knowingly and intelligently waived his *Miranda* rights. *See State v. Leyva*, 951 P.2d 738, 743 (Utah 1997).

Defendant argues that there was no clear waiver of his *Miranda* rights because he gave only unspecified equivocal responses instead of voicing a clear, unequivocal waiver. *See* Br. of Aplt. at 20-21. Such responses, he argues, do not amount to "a knowing and

intelligent waiver of [his] *Miranda* rights" in light of the surrounding circumstances, which included his physical and emotional condition, the speed with which the interrogation occurred, and the alleged coercion that resulted from the officer's solicitous treatment of him. *See id.* at 12-13, 20-21.

Defendant's claim that the Detective's allegedly coercive words and actions prior to the interview rendered his *Miranda* waiver involuntary is raised for the first time on appeal and should be summarily rejected inasmuch as he argues neither plain error nor exceptional circumstances. *See* Br. of Aplt. at 20-21; Add. F at 17, n.15 (noting that Defendant did not raise an issue "as to the voluntariness of Defendant's post-*Miranda* statements). *See also State v. Rhinehart,* 2007 UT 61, ¶ 21, 167 P.3d 1046 (refusing to consider unpreserved constitutional claims where the defendant failed "to present an argument to support the application of either exception").

Defendant also points to Detective Bleak's convoluted responses to some of Defendant's questions, which urged Defendant to be honest and suggested that his cooperation would garner favorable treatment. *See* Br. of Aplt. at 10-21. Defendant argues that the responses demonstrate the detective's use of deception and render his waiver neither knowing nor intelligent. *See id.* at 20-21.

The record demonstrates that the trial court considered the entirety of the interview, including the detective's lengthy responses to Defendant's questions. Add. F at 14-20 & n.17. The judge even recognized that the detective's responses were "troubl[ing]"

because they were not "simply . . . straightforward[.]" *Id.* at 19, n.17. However, the judge was persuaded by the totality of the remaining circumstances that even if the detective's responses were not helpful, they did not render Defendant's waiver either unknowing or involuntary. *Id.* Those circumstances were anchored by Defendant's own actions and statements during the interview. *Id.* at 3-8, 14-20. Some of his remarks suggested less than a full understanding of his *Miranda* rights and the consequences of waiving them—e.g., not explicitly stating "yes" or "no" when asked if he understood his *Miranda* rights, asking if the questions would help him or the State in court, and wondering whether his statements amounted to a confession. *Id.* at 16-19. Others spoke volumes about his knowledge and the voluntary nature of his waiver, including:

> 1) his indication that he understood that "his statements would be used against him in court";
>
> 2) his acknowledgment that he understood his rights, followed immediately by his recitation of his side of the story;
>
> 3) his continued responsiveness after being "reminded [during the interview] that whatever he said would be shared with both the judge and the prosecutor";
>
> 4) his selective silence in the face of many of Detective Bleak's questions, "signifying his awareness of his right to speak only when he chose to do so, and of the fact that speaking might not be in his best interest"; and
>
> 5) the lack of surprise at the end of the interview when Defendant was told that his information would be given to the prosecutor, demonstrating his awareness of the fact that the statements could be used against him.

Id. at 15-16, 19-20. After considering and weighing the words and conduct of both Defendant and the interviewer, the court determined that Defendant "'understood that he

had the right to remain silent and that anything he said could be used as evidence against him.'" *Id.* at 20 (quoting *Colorado v. Spring*, 479 U.S. 564, 574, 107 S. Ct. 851 (1987)).

Defendant's disagreement with the lower court's assessment of the detective's responses does not demonstrate error in that assessment. Urging cooperation, even in a rambling manner, does not necessarily amount to coercion. *See State v. Strain*, 779 P.2d 221, 225 (Utah 1989) (urging cooperation as the best course of action is not necessarily coercive). The lower court factored the officer's comments into its review of the totality of the circumstances, assessed the impact of those circumstances on Defendant by his own words and conduct, and determined that Defendant's *Miranda* waiver was knowing and intelligent. Add. F at 19-20 & n.17. Defendant's differing assessment of the circumstances fails to demonstrate any error in this conclusion.

Even assuming, *arguendo*, that the trial court erred in refusing to suppress Defendant's post-*Miranda* statements, the error was harmless under the facts at hand. *See State v. Velarde*, 734 P.2d 440, 444 (Utah 1986) ("It is well established that the admission of statements obtained in violation of *Miranda* can be harmless error.") (footnote omitted); *see also State v. Gallegos*, 2009 UT 42, ¶ 33, n.5, 220 P.3d 136 (finding any error in admission of incriminating statements obtained in violation of *Miranda* to be harmless beyond a reasonable doubt), *reh'g. denied* (Nov. 2009).

At trial, only Detective Bleak offered testimony concerning Defendant's interview statements. He testified that Defendant described the pump-action shotgun that he had

purchased a few weeks prior to the shooting (R. 506:164, 171), and that he discussed driving Pedro's car and abandoning it (R. 506:166-167, 183). This evidence was cumulative of eyewitness testimony that put a shotgun in Defendant's hands at the time of the shooting (R. 506:37-38, 77, 79, 83-84, 99, 101-02, 108), put Defendant in the driver's seat of Pedro's SUV as it drove away (R. 506:81-83, 87, 90), and put Defendant's footprints at the scene of the abandoned SUV (R. 506:141-42). Moreover, Defense counsel admitted that Defendant "took the vehicle and then abandoned it." R. 505:34.

Detective Bleak also explained that Defendant talked extensively in the interview about having been drinking, having used methamphetamine, and having been directed by voices from a "higher power." R. 506:157, 159-160, 162, 165-166, 176-177, 180, 182-184, 186-188. This information was cumulative of the testimony from the experts and was beneficial to Defendant's diminished capacity defense. R. 504:58-59, 61 (voices), 63-64, 68 (drug and alcohol abuse the day of the crime), 71-73 (drinking the day of the crime and voices), 94-95 (voices), 102 (substance abuse), 105 (voices), 110-11 (substances abuse); R. 505:29.

Finally, Detective Bleak explained that Defendant admitted shooting Officer Thomas multiple times. R. 506:164. This testimony, as well as the remainder of the interview-related evidence, was harmless beyond a reasonable doubt because Defendant conceded at trial that he shot the victim. R. 506:24; *see Barrett*, 2006 UT App 417, ¶ 16 (admission of pre-*Miranda* statements would be harmless in light of Defendant's post-*Miranda*

confession). His defense strategy was one of mental illness and diminished capacity, not identity. Where the interview evidence was merely cumulative and did not adversely impact the defense strategy, any error in its admission was harmless beyond a reasonable doubt. *See State v. Vinanti*, 2005 UT App 478U (even if defendant's incriminating statements were erroneously admitted in violation of *Miranda*, they were not prejudicial where defendant conceded at trial that he killed the victim and argued only that he lacked the necessary criminal intent), *cert. denied*, 133 P.3d 437 (Utah 2006).

C. The Challenge to the Warrantless Search of Defendant's Bedroom Fails due to Inadequate Briefing and Lack of Prejudice

Defendant asserts that the trial judge erred in denying his motion to suppress evidence obtained by police during a consensual search of his bedroom at his parents' home. *See* Br. of Aplt. at 21-23. While he provides legal analysis for his claim, he fails to identify any evidence obtained from his parents' home or demonstrate that it was admitted at trial. *See id.* at 10, 13, 21-23. Consequently, this Court should disregard his claim as being inadequately briefed. *See State v. Sloan*, 2003 UT App 170, ¶ 13, 72 P.3d 138 ("'An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'") (quoting *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14, *cert. denied*, 4 P.3d 1289 (Utah 2000)) (quotations and citations omitted); *see also* Utah R. App. P. 24.

Further, it appears from the State's review of the record that none of the evidence used at trial derived from the search of Defendant's bedroom. Consequently, even

assuming error in failing to suppress the evidence, the error would be harmless beyond a reasonable doubt. *See State v. Genovesi*, 909 P.2d 916, 922-23 (Utah App. 1995) (for claims involving a failure to suppress evidence under the Fourth Amendment, the State must establish that any error would be harmless beyond a reasonable doubt).

POINT III

THE EVIDENCE IS SUFFICIENT TO CONVICT DEFENDANT OF AGGRAVATED ROBBERY

Defendant argues that there is insufficient evidence to support his conviction of aggravated robbery because the charge does not fit the circumstances established at trial. *See* Br. of Aplt. at 13-14, 23-25.

> Robbery occurs when:
> . . .
>
> (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or
>
> (b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

Utah Code Ann. § 76-6-301(1) (West 2004). The aggravated robbery statute provides:

> (1) A person commits aggravated robbery if, *in the course of committing robbery*, he:
>
> (a) uses or threatens to use a dangerous weapon as defined in section 76-1-601;
>
> (b) causes serious bodily injury upon another; or

(c) takes or attempts to take an operable motor vehicle.

Utah Code Ann. § 76-6-302(1) (West 2004) (emphasis added).[8]

Defendant contends that the evidence at trial did not establish any of the statutory aggravators. *See* Br. of Aplt. at 23-25. He argues that the taking of an operable motor vehicle necessarily constitutes the underlying robbery, which prevents the jurors from relying on subsection (1)(c) as the aggravating factor. *See id.* at 23-24. Neither, he claims, could they have used his possession of the shotgun during the robbery as the aggravator under subsection (1)(a) because he simply held, but did not use, the gun when he stole the SUV. *See id.* at 24. Consequently, he argues, the jury necessarily convicted him of aggravated robbery based either on his use of the gun against the officer [subsection (1)(a)] or on the bodily injury he caused the officer [subsection (1)(b)]. *See id.* Neither alternative supports his conviction, he claims, because he "was not in the course of committing robbery" when he shot the officer. *See id.* at 24-25.

Defendant did not preserve this issue below, but argues plain error on appeal. *See id.* at 25. *See also Diaz*, 2002 UT App 288, ¶ 12 (generally, this Court will not consider a claim of insufficient evidence "if the defendant has failed to raise it before the trial court absent . . . a demonstration by the defendant that the trial court committed plain error by submitting the case to the jury."). In judging the plain error claim, this Court first

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[8]The elements instruction for aggravated robbery does not contain subsection (1)(b). R. 408 (ji 12) (in Add. B).

examines "the evidence and all inferences drawn therefrom in a light most favorable to the jury's verdict" to determine whether "the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crimes for which he or she was convicted." *Id.* at ¶ 33 (citation and internal quotations omitted). Only then will the Court "undertake an examination of the record to determine 'whether the evidentiary defect was so obvious and fundamental that it was plain error to submit the case to the jury.'" *Id.* (citation omitted); s*ee also State v. Holgate*, 2000 UT 74, ¶¶16-17, 10 P.3d 346.

In this case, Defendant's argument involves erroneous assumptions. A proper review of the evidence reveals no obvious evidentiary defect amounting to plain error The jury was instructed that aggravated robbery was established if they found that in the course of a robbery, Defendant either "(a) used or threatened to use a dangerous weapon; or (b) took or attempted to take an operable motor vehicle[.]" R. 408 (ji 12) (in Add. B); *see* Utah Code Ann. § 76-6-302(1)(a) & (c). Defendant contends that the jury could not find the first alternative—that he "use[d] or threaten[ed] to use a dangerous weapon" in the course of committing robbery—because the evidence established that during the robbery, he "never pointed the gun" at either Christine or Pedro, but simply had it in his hands. Utah Code Ann. §76-6-302(1)(a); Br. of Aplt. at 14 n.1, 24. It is well-established, however, that "[i]f merely exhibiting the gun creates fear in the victim, it constitutes 'use of a firearm'" for purposes of the aggravated robbery statute. *See In the Interest of*

R.G.B., 597 P.2d 1333, 1335 (Utah 1979) ("the robber [need not] actually point[] a gun at the victim" if "merely exhibiting the gun creates fear in the victim"); *see also State v. Weisberg*, 2002 UT App 434, ¶ 16, 62 P.3d 457 ("a weapon is used even if it is never actually pointed at a victim, so long as 'exhibiting the [weapon] creates fear in the victim.'") (quoting *In re R.G.B.*, 597 P.2d at 1334)(alteration in *Weisberg*).

In this case, Pedro testified that he ran away from his car because he "was afraid that [Defendant] would do something to . . . the children" or would shoot at him. R.506:103, 108-09. Christine ran from Defendant when he demanded that she drive him away, saying that while she didn't think he'd shoot her, she was "just scared" because he was still holding the gun he had just shot. R. 506:87. Both events occurred immediately after Defendant had fired the gun three times at a police officer. Pedro and Christine both heard those shots, then saw Defendant with the shotgun in his hands. R. 506:38-40, 76-79, 85, 98-100. Considered in a light most favorable to the jury's verdict, the evidence was sufficient to establish that Defendant used the gun in the course of taking the SUV from Pedro and Christine under the first alternative contained in jury instruction 12. *See Weisberg*, 2002 UT App 434, ¶ 16.

The evidence was equally sufficient to permit a conviction for aggravated robbery based on the second alternative: Defendant's taking of an operable motor vehicle. *See* Utah Code Ann. § 76-6-302(1)(c); R. 408 (ji 12) (in Add. B). Defendant contends that while there is sufficient evidence establishing that he took the SUV, his taking of the

vehicle is the underlying robbery and therefore cannot be an aggravator as well. *See* Br. of Aplt. at 13, 24. However, the law is clear that when the subject of the robbery is an operable motor vehicle, aggravated robbery occurs when the vehicle is taken from the immediate presence of the victim. *See Irvin*, 2007 UT App 319, ¶ 20, n.4. In this case, the taking occurred with the threat of force or fear.

Because the evidence was sufficient to permit the jury to convict Defendant of aggravated robbery under either of the two alternative aggravators used in the relevant jury instruction, Defendant's plain error claim necessarily fails.

POINT IV

DEFENDANT'S REMAINING CLAIMS OF INEFFECTIVE ASSISTANCE FAIL

In addition to the ineffective assistance claims involving the jury instructions discussed in Issue I, *supra*, Defendant argues that his trial counsel was ineffective for: (1) failing to develop additional unspecified testimony from the experts regarding his delusional mental state to support his claim of mental illness; and (2) failing to move for a directed verdict on the aggravated robbery charge. *See* Br. of Aplt. at 14, 26-27. Defendant summarily contends that these oversights are not the result of any strategy and that absent such failures, "it is probable that . . . the outcome of the trial would have been different." *Id.* at 26-27.

A. The Record is Inadequate to Permit Review of Defendant's Speculative Challenge to his Counsel's Use of Expert Testimony

Defendant claims that his counsel was ineffective for failing to adduce additional expert evidence regarding his mental illness.[9] *See id.* at 26. Review of the claim is not warranted because his argument is entirely speculative and the record is inadequate. *See Marchet*, 2009 UT App 262, ¶24; *see also Nicholls*, 2009 UT 12, ¶ 36 (proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality); *Litherland*, 2000 UT 76, ¶ 19.

Where an ineffectiveness claim is based on defense counsel's alleged failure to call certain witnesses or present certain testimony, defendant's failure to identify the excluded witnesses or their testimony renders the record inadequate for review. *See State v. Bradley*, 2002 UT App 348, ¶ 65, 57 P.3d 1139.

Here, Defendant fails to identify what additional evidence could or should have been provided, whether the experts could have provided it, and how it would have been favorable to Defendant. His cursory, two-sentence argument simply asks this Court to speculate as to the substance of the evidence and its possible affect on the jury's verdict. Absent the additional information, the record is inadequate to permit appellate review of Defendant's wholly speculative argument. *See Litherland*, 2000 UT 76, ¶ 17 ("Where the

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[9]In support, he claims that both experts found that his "mental illness included delusions[.]" Br. of Aplt. at 26. Neither made such a diagnosis. *See* Statement of the Case, *supra*.

record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively."); *see also Parsons v. Barnes*, 871 P.2d 516, 526 (Utah 1994) (mere "[s]peculation that [exculpatory evidence] exists is not sufficient to meet the prejudice component of the [ineffective assistance of counsel] test.").

B. Defense Counsel was Not Ineffective for Failing to Make a Futile Motion

Finally, Defendant faults his trial counsel for failing to move for a directed verdict as to the aggravated robbery charge or to otherwise object so that the Court would review the elements of the charge following presentation of the evidence. *See* Br. of Aplt. at 14, 26. He offers no further elaboration on his claim, but simply implies that the review would have prompted the trial court to determine that the evidence was insufficient to send the charge to the jury. *See id.*

Because defense counsel in fact moved for a directed verdict at the end of the State's case[10] (R. 504:88-90), the State assumes Defendant's argument relates to the close of the evidence and the argument in Point III, *supra*, that there was insufficient evidence to send the aggravated robbery charge to the jury. *See* Br. of Aplt. at 14. The claim should be rejected.

As set forth in Point III, *supra*, the evidence was sufficient to permit the jury to

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[10]The directed verdict motion argued that there was no evidence that Defendant used force directed at the two robbery victims where he simply held the gun during the robbery without actually using it. R. 504:88-90. The trial court denied the motion. *Id.*

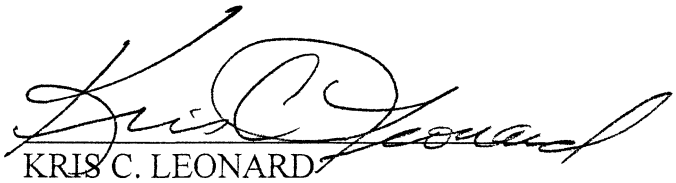
convict Defendant of aggravated robbery under either of the two alternative aggravators provided in the relevant jury instruction. Consequently, a motion for a directed verdict would have been rejected. Where the motion would have been futile, defense counsel was not ineffective for failing to file it. *See Pedersen*, 2010 UT App 38, ¶ 19 (no ineffective assistance for failing to make a futile motion); *Whittle*, 1999 UT 96, ¶ 34.

CONCLUSION

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

Respectfully submitted 26 April, 2010.

MARK L. SHURTLEFF
Utah Attorney General



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CERTIFICATE OF SERVICE

I certify that on 26 April, 2010, two copies of the foregoing brief were ☒ mailed ☐ hand-delivered to:

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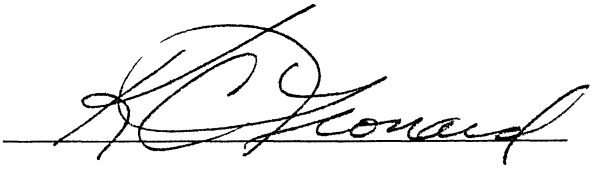

ADDENDUM A

UTAH CODE ANN. § 76-1-502 (West 2004)
UTAH CODE ANN. § 76-2-305 (West 2004)
UTAH CODE ANN. § 76-5-205.5 (West 2004)
UTAH CODE ANN. § 76-6-302 (West 2004)
UTAH CODE ANN. § 77-16a-102 (West 2004)

§ 76–1–502. Negating defense by allegation or proof—When not required

Section 76–1–501 does not require negating a defense:

(1) By allegation in an information, indictment, or other charge; or

(2) By proof, unless:

(a) The defense is in issue in the case as a result of evidence presented at trial, either by the prosecution or the defense; or

(b) The defense is an affirmative defense, and the defendant has presented evidence of such affirmative defense.

Laws 1973, c. 196, § 76–1–502.

§ 76–2–305. Mental illness—Use as a defense—Influence of alcohol or other substance voluntarily consumed—Definition

(1)(a) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged.

(b) Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony under Section 76–3–207 and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide offense under Section 76–5–205.5.

(2) The defense defined in this section includes the defenses known as "insanity" and "diminished mental capacity."

(3) A person who asserts a defense of insanity or diminished mental capacity, and who is under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense is not excused from criminal responsibility on the basis of mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

(4)(a) "Mental illness" means a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of injury, or a residual effect of a physical or mental disease and includes, but is not limited to, mental retardation.

(b) "Mental illness" does not mean an abnormality manifested primarily by repeated criminal conduct.

(5) "Mental retardation" means a significant subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested prior to age 22.

Laws 1983, c. 49, § 1; Laws 1986, c. 120, § 1; Laws 1990, c 306, § 3; Laws 1999, c. 2, § 1, eff. May 3, 1999; Laws 2003, c. 11, § 2, eff. March 15, 2003.

§ 76–5–205.5. Special mitigation reducing the level of criminal homicide offense—Burden of proof—Application to reduce offense

(1) Special mitigation exists when:

(a) the actor causes the death of another under circumstances that are not legally justified, but the actor acts under a delusion attributable to a mental illness as defined in Section 76–2–305; and

(b) the nature of the delusion is such that, if the facts existed as the defendant believed them to be in his delusional state, those facts would provide a legal justification for his conduct.

(2) This section applies only if the defendant's actions, in light of his delusion, were reasonable from the objective viewpoint of a reasonable person.

(3) A defendant who was under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not claim mitigation of the offense under this section on the basis of mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

(4)(a) If the trier of fact finds the elements of an offense as listed in Subsection (4)(b) are proven beyond a reasonable doubt, and also that the existence of special mitigation under this section is established by a preponderance of the evidence, it shall return a verdict on the reduced charge as provided in Subsection (4)(b).

(b) If under Subsection (4)(a) the offense is:

(i) aggravated murder, the defendant shall instead be found guilty of murder;

(ii) attempted aggravated murder, the defendant shall instead be found guilty of attempted murder;

(iii) murder, the defendant shall instead be found guilty of manslaughter; or

(iv) attempted murder, the defendant shall instead be found guilty of attempted manslaughter.

(5)(a) If a jury is the trier of fact, a unanimous vote of the jury is required to establish the existence of the special mitigation.

(b) If the jury does find special mitigation by a unanimous vote, it shall return a verdict on the reduced charge as provided in Subsection (4).

(c) If the jury finds by a unanimous vote that special mitigation has not been established, it shall convict the defendant of the greater offense for which the prosecution has established all the elements beyond a reasonable doubt.

(d) If the jury is unable to unanimously agree whether or not special mitigation has been established, the result is a hung jury.

(6)(a) If the issue of special mitigation is submitted to the trier of fact, it shall return a special verdict indicating whether the existence of special mitigation has been found.

(b) The trier of fact shall return the special verdict at the same time as the general verdict, to indicate the basis for its general verdict.

(7) Special mitigation under this section does not, in any case, reduce the level of an offense by more than one degree from that offense, the elements of which the evidence has established beyond a reasonable doubt.

Laws 1999, c. 2, § 4, eff. May 3, 1999.

§ 76–6–302. Aggravated robbery

(1) A person commits aggravated robbery if in the course of committing robbery, he:

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

(b) causes serious bodily injury upon another; or

(c) takes or attempts to take an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery' if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Laws 1973, c. 196, § 76–6–302; Laws 1975, c. 51, § 1; Laws 1989, c. 170, § 7; Laws 1994, c. 271, § 1; Laws 2003, c. 62, § 1, eff. May 5, 2003.

§ 77–16a–102. Jury instructions

(1) If a defendant asserts a defense of not guilty by reason of insanity, the court shall instruct the jury that it may find the defendant:

(a) guilty;

(b) guilty and mentally ill at the time of the offense;

(c) guilty of a lesser offense;

(d) guilty of a lesser offense and mentally ill at the time of the offense;

(e) not guilty by reason of insanity; or

(f) not guilty.

(2)(a) When a defendant asserts a mental defense pursuant to Section 76–2–305 or asserts special mitigation reducing the level of an offense pursuant to Section 76–5–205.5, or when the evidence raises the issue and either party requests the instruction, the jury shall be instructed that if it finds a defendant guilty by proof beyond a reasonable doubt of any charged offense or lesser included offense, it shall also return a special verdict indicating whether it finds that the defendant was mentally ill at the time of the offense.

(b) If the jury finds the defendant guilty of the charged offense by proof beyond a reasonable doubt, and by special verdict finds the defendant was mentally ill at the time of the offense, it shall return the general verdict of "guilty and mentally ill at the time of the offense."

(c) If the jury finds the defendant guilty of a lesser offense by proof beyond a reasonable doubt, and by special verdict finds the defendant was mentally ill at the time of the offense, it shall return the general verdict of "guilty of a lesser offense and mentally ill at the time of the offense."

(d) If the jury finds the defendant guilty of the charged offense or a lesser included offense and does not find that the defendant was mentally ill at the time of the offense, the jury shall return a verdict of "guilty" of that offense, along with the special verdict form indicating that the jury did not find the defendant mentally ill at the time of the offense.

(e) The special verdict shall be returned by the jury at the same time as the general verdict, to indicate the basis for its general verdict.

(3) In determining whether a defendant should be found guilty and mentally ill at the time of the offense, the jury shall be instructed that the standard of proof applicable to a finding of mental illness is by a preponderance of the evidence. The jury shall also be instructed that the standard of preponderance of the evidence does not apply to the elements establishing a defendant's guilt, and that the proof of the elements establishing a defendant's guilt of any offense must be proven beyond a reasonable doubt.

Laws 1992, c. 171, § 2; Laws 2002, c. 61, § 2, eff. May 6, 2002.

ADDENDUM B

JURY INSTRUCTIONS
(R. 397-422)

FILED
FIFTH DISTRICT COURT
2009 NOV 30 PM 3: 06
IRON COUNTY
BY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. Bryan Featherhat, Defendant.	JURY INSTRUCTIONS Criminal No. 071500011 Judge G. Michael Westfall

INSTRUCTION NO. 1

It is my duty as Judge to instruct you concerning the law applicable in this case, and it is your duty as jurors to follow the law as I shall state it to you. You have been given a written copy of the instructions. You will be given additional instructions later in this case. For now, please follow along as I read the instructions to you.

These jury instructions are given to assist you in your deliberations in this case. The order in which these instructions are given has no significance as to their relative importance, and you should not single out any instruction or ignore any instruction. Consider the instructions as a whole.

These instructions are intended to be applicable to either gender. Any use of a pronoun of one gender should be read to include the appropriate pronoun of the other gender when applicable.

INSTRUCTION NO. 2

The defendant has been charged with the commission of a crime in a formal document called an Information. The clerk has read to you the Information in this case, and has told you that the defendant has plead "Not Guilty" to the charges in the Information. In this trial, as in every trial of criminal charges, there is a disagreement about whether the defendant has committed a crime.

It is your duty in this trial to decide the issues of fact presented by the charges in the Information and the defendant's plea of "Not Guilty" to the charges. You may not consider the filing of the Information, the defendant's "Not Guilty" plea, or the fact that the defendant has been brought before the court for trial, to be evidence of the defendant's guilt or innocence.

You will hear the evidence from the witness stand and through any exhibits admitted during the trial. I am required to instruct you concerning the law which applies to this case, and it is your duty as jurors to follow the law as I state it to you. You are required to base your verdict on the evidence introduced in this trial and the law as I state it to you. You are expected to act conscientiously and calmly in weighing the evidence and applying my legal instructions in order to reach a just verdict, regardless of what the consequences of the verdict may be.

Do not concern yourselves with the subject of a penalty or punishment with respect to any charge. It would be improper for you to allow your verdict to be influenced by such a concern It is your sworn duty to judge only the defendant's innocence or guilt according to these instructions. You should not be influenced by sympathy for the defendant or by prejudice against the defendant.

INSTRUCTION NO. 3

From time to time during the trial we will take recesses. During the recesses you are to be governed by the following admonition:

You are not to discuss this case with anyone or among yourselves, nor to form or express any opinion as to the innocence or guilt of the defendant, until the matter has been submitted to you for decision. You should not allow anyone to discuss the case in your presence. You are not to show your notes to anyone. You are not to attempt to learn anything about this case outside the courtroom or to visit any location mentioned in the trial. You are to avoid and disregard all news media reports and all other information about the trial that is not presented in this courtroom. You are not to have any conversation or communication whatsoever with me or with any attorney, defendant, witness, court employee or other participant in this trial, until the case is submitted to you and you retire to the jury room for your deliberations, and then you may discuss it only among yourselves.

INSTRUCTION NO. 4

You are the exclusive judges of the facts, but you must determine the facts from the evidence produced here in court. Part of my duty is to decide on the admissibility of evidence in this trial, and my decisions are made on the basis of applicable laws and rules. You must not be concerned with the reasons for my rulings, either admitting or excluding evidence, and you should draw no conclusions from my rulings.

When I admit evidence, I do not rule on the weight or convincing force of the evidence, nor on the credibility of the witness or party offering the evidence. Those are matters for you to decide. If I sustain any objection to a question, you must disregard the question and not speculate about what the answer might have been or the reason for the objection. If I order that any evidence shall be stricken, you must disregard it entirely.

No statement made by the attorneys should be regarded as evidence. However, if counsel for both parties stipulate or agree to any fact, you should regard that fact as being conclusively proven.

Where there is conflict in the evidence, you should reconcile the conflict if you reasonably can do so. Where the conflict cannot be reasonably reconciled, however, you still must determine what the ultimate facts are, from the evidence presented to you.

INSTRUCTION NO. 5

You are the sole judges of all questions of fact. You must decide each question of fact for yourselves, from the evidence, without regard to what you may believe I think about it. My opinion about the facts is immaterial. If any statement or ruling of mine seems to indicate that I have an opinion about any fact, this is unintentional and you must disregard it.

INSTRUCTION NO. 6

You are entitled to take notes during this trial and to have those notes with you during deliberations. The bailiff will provide you with writing materials. You are not required to take notes. If any of you do take notes, a word of caution is in order. Some of us may have a tendency to attach undue importance to things which have been written down, just because they were written down. In addition, we may take no notes about some testimony because it appears to be unimportant at the time it is presented, but that testimony may take on greater importance later in the trial, in light of all the evidence presented.

Consequently, you must remember that your notes are only a tool to aid your own individual memory. You should not compare your notes with those of other jurors to determine the content of any testimony or to evaluate the importance of any evidence. The opinion of one juror is not more important than the opinion of another juror simply because one took notes and the other did not. Your notes are not evidence, and are by no means a complete outline of the proceedings or even a list of the highlights of the trial. When it comes time to deliberate and render a decision in this case, your greatest asset is your own memory.

INSTRUCTION NO. 7

When you are judging the credibility or believability of any witness, you should consider the witness's possible bias or possible interest in the result of the trial, and any possible motive the witness may have to testify in a particular way. You may consider the witness's demeanor on the witness stand, the witness's opportunity to know, ability to understand and capacity to remember, and the reasonableness of the witness's statements. You should also consider whether the witness gave self-contradicting testimony or was contradicted by other evidence.

During the course of the trial you will hear testimony from police officers. You are instructed that you are to give no more, or less, weight or credibility to the testimony of a police officer than the testimony of a witness who is not a police officer simply because he or she is a police officer .

From all this you should determine each witness's credibility and what weight you should give the testimony. If you believe that a witness has intentionally testified falsely as to any material fact, you may disregard all of that witness's testimony or give it such weight as you think it deserves. You are not bound to believe a witness unless that witness's testimony is reasonable in view of all the facts. You may believe one witness against many, or many witnesses against a few, in accordance with your honest convictions.

INSTRUCTION NO. 8

A defendant in a criminal case is presumed to be innocent until proven guilty beyond a reasonable doubt. The presumption of innocence benefits the defendant throughout the trial unless the plaintiff meets this burden. The burden never shifts to a defendant to call any witnesses, produce any evidence, or disprove any allegation. All presumptions of law are in favor of innocence. If there is a reasonable doubt as to whether guilt is sufficiently proven, the defendant is entitled to a verdict of "Not Guilty."

The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION NO. 9

The defendant has the absolute right under our Constitution to remain silent, and is not required to testify in his own behalf. The law expressly gives the defendant the privilege of choosing whether to testify or not. The fact that the defendant has not taken the witness stand must not be taken as any indication of guilt, and you should not make any presumption or inference adverse to the defendant by reason of the fact that he exercised his constitutional privilege and did not testify. The burden remains with the prosecution to prove the defendant guilty beyond a reasonable doubt, regardless of whether the defendant chooses to testify or not to testify.

INSTRUCTION NO. 10

Before you may find Defendant BRYAN FEATHERHAT guilty of the offense of Attempted Aggravated Murder as charged in Count 1 of the Amended Information, the State must prove and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements:

1. That the Defendant intentionally or knowingly attempted to cause the death of Jason Thomas; and

2. That the attempted homicide was committed:

A. Incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery; or

B. For the purpose of avoiding or preventing an arrest of the Defendant or another by a peace officer acting under color of legal authority; or

C. Against a peace officer, or law enforcement officer, and the officer was either on duty or the attempted homicide was based on, or was related to, that official position, and the actor knew, or reasonably should have known, that the officer held that official position;

3. The absence of an affirmative defense which the Defendant has put into issue; and

4. That such acts occurred on or about January 5, 2007, in Iron County, State of Utah.

If the State of Utah has failed to prove any one or more of the previously described elements, you must find the Defendant not guilty of the offense of Attempted Aggravated Murder as charged in Count 1 of the Amended Information. If the State has proved, however, each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to find the Defendant guilty of Attempted Aggravated Murder as charged in Count 1 of the Amended Information.

INSTRUCTION NO. 11

If your unanimous verdict is that the Defendant is not guilty of Attempted Aggravated Murder as charged in Count 1 of the Amended Information, you must acquit him of that charge. In that event you must next consider the lesser included offense of Aggravated Assault. The State must prove and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements before you can find Defendant BRYAN FEATHERHAT guilty of Aggravated Assault:

1. That the Defendant acted knowingly or intentionally;

2. That the Defendant did commit an act, with unlawful force or violence, that caused serious bodily injury to another;

3. The absence of an affirmative defense which the Defendant put into issue; and

4. That such acts occurred on or about January 5, 2007, in Iron County, State of Utah.

If the State of Utah has failed to prove any one or more of the previously described elements, you must find the Defendant not guilty of the offense of Aggravated Assault, a lesser included offense. If the State has proved, however, each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to find the Defendant guilty of Aggravated Assault, a lesser included offense.

INSTRUCTION NO. 12

Before you may find Defendant BRYAN FEATHERHAT guilty of the offense of Aggravated Robbery as charged in Count 2 of the Amended Information, the State must prove and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements:

1. That the Defendant unlawfully and intentionally took or attempted to take personal property in the possession of another from his or her person, or immediate presence, against his or her will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property;

2. That, in the course of committing the robbery, the Defendant: (a) used or threatened to use a dangerous weapon; or (b) took or attempted to take an operable motor vehicle;

3. The absence of an affirmative defense which the Defendant has put into issue; and

4. That such acts occurred on or about January 5, 2007, in Iron County, State of Utah.

If the State of Utah has failed to prove any one or more of the previously described elements, you must find the Defendant not guilty of the offense of Aggravated Robbery as charged in Count 2 of the Amended Information. If the State has proved, however, each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to find the Defendant guilty of Aggravated Robbery as charged in Count 2 of the Amended Information.

INSTRUCTION NO. 13

If your unanimous verdict is that the Defendant is not guilty of Aggravated Robbery as charged in Count 2 of the Amended Information, you must acquit him of that charge. In that event you must next consider the lesser included offense of Theft. The State must prove and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements before you can find Defendant BRYAN FEATHERHAT guilty of Theft:

1. That the Defendant obtained or exercised control over the property of another;
2. That the Defendant had a purpose to deprive the owner thereof;
3. That said property was a motor vehicle;
4. The absence of an affirmative defense which the Defendant put into issue; and
5. That such acts occurred on or about January 5, 2007, in Iron County, State of Utah.

If the State of Utah has failed to prove any one or more of the previously described elements, you must find the Defendant not guilty of the offense of Theft, a lesser included offense. If the State has proved, however, each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to find the Defendant guilty of Theft, a lesser included offense.

INSTRUCTION NO. 14

If your unanimous verdict is that the Defendant is not guilty of Theft, you must acquit him of that charge. In that event, you must next consider the lesser included offense of Unauthorized Control of a Motor Vehicle for an Extended Time. ~~That~~ The State must prove and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements before you can find Defendant BRYAN FEATHERHAT guilty of Unauthorized Control of a Motor Vehicle for an Extended Time:

1. That the Defendant obtained or exercised unauthorized control over a motor vehicle of another without the owner's or lawful custodian's consent;

2. That the Defendant acted with the intent to temporarily deprive the owner or lawful custodian of possession of the motor vehicle;

3. That the Defendant did not return the motor vehicle to the owner or lawful custodian within 24 hours after the exercise of unlawful control;

4. The absence of an affirmative defense which the Defendant put into issue; and

5. That such acts occurred on or about January 5, 2007, in Iron County. State of Utah.

If the State of Utah has failed to prove any one or more of the previously described elements, you must find the Defendant not guilty of the offense of Unauthorized Control of a Motor Vehicle for an Extended Time, a lesser included offense. If the State has proved, however, each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to find the Defendant guilty of Unauthorized Control of a Motor Vehicle for an Extended Time, a lesser included offense.

INSTRUCTION NO. 15

In these instructions, certain words and phrases are used which require definitions in order that you may properly understand the nature of the crime charged and in order that you may properly apply the law as contained in these instructions to the facts as you may find them from the evidence. These definitions are as follows:

You are instructed that a person engages in conduct "intentionally," or with "intent," with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

You are instructed that a person engages in conduct "knowingly," or with "knowledge," with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts "knowingly," or with "knowledge," with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

You are instructed that "dangerous weapon" means any item capable of causing death or serious bodily injury; or a facsimile or representation of the item; and the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause serious bodily injury; or the actor represents to the victim verbally or in any other manner that he is in control of such an item.

You are instructed that "serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

You are instructed that "property" is that of another, if anyone other than the actor has a possessory or proprietary interest in any portion thereof.

You are instructed that "homicide" means intentionally, knowingly, or recklessly causing the death of another human being.

You are instructed that "purpose to deprive" means to have the conscious objective:

(a) to withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) to dispose of the property under circumstances that make it unlikely that the owner will recover it.

You are instructed that an "affirmative defense" includes (a) not guilty by reason of insanity/diminished capacity and (b) voluntary intoxication.

You are instructed that "mental illness" means a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a condition as the result of a birth defect, the result of injury, or a residual effect of a physical or mental disease. Mental illness does not mean an abnormality manifested primarily by repeated criminal conduct.

INSTRUCTION NO. 16

You are instructed that a person is guilty of an "attempt" to commit a crime if he: (a) engages in conduct constituting a substantial step toward commission of the crime; and (b) intends to commit the crime; or when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause the result.

INSTRUCTION NO. 17

It is a defense to a prosecution that the Defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense.

The defense of mental illness includes the defenses known as "insanity" and "diminished mental capacity."

If from all the evidence, you have a reasonable doubt whether the Defendant was capable of forming the required state of mind, you must find the Defendant not guilty.

However, a person who asserts a defense of insanity or diminished mental capacity who was under the influence of voluntarily consumed, injected or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense is not excused from criminal responsibility on the basis of mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

INSTRUCTION NO. 18

As you have been previously instructed, you can only convict the Defendant of an offense if you find that the evidence establishes, beyond a reasonable doubt, every element of that offense. If, and only if, you determine that the evidence has proven beyond a reasonable doubt all the elements of any crime, you will be required to fill out and return a special verdict form indicating whether you find, by a preponderance of evidence, that the Defendant was mentally ill at the time of any such crime.

A preponderance of the evidence simply means it is more likely than not that the Defendant was mentally ill at the time of the offense.

Keep in mind that the standard of preponderance of the evidence which applies to a finding that the Defendant was mentally ill at the time of the offense is a different and lower standard than the standard that applies to establishing the Defendant's guilt, which is proof beyond a reasonable doubt. The two standards must never be confused.

As you deliberate, you will be provided a special verdict form for your use should you find the Defendant guilty of any crime charged or guilty of the lesser offense of any crime charged. The special verdict form is designed to help guide your deliberations and to indicate the basis for your verdict.

INSTRUCTION NO. 19

Under the law, a state of voluntary intoxication from alcohol or drugs is not a defense to a criminal charge unless such intoxication is of such a degree or state as to negate the existence of the mental state which is an element of the offense and which in the case of each of the charges now before the court, is that one acted intentionally or knowingly. Evidence of intoxication, whether it be from the influence of drugs or alcohol, may thus be taken into consideration by the jury in connection with determining the intent with which any particular act may have been committed.

But being under the influence of drugs or alcohol is no excuse for the commission of a crime where it merely makes a person more excited or reckless, so that one does things one might not otherwise do.

INSTRUCTION NO. 20

When you retire to consider your verdicts, you will select one of your fellow jurors to act as foreperson who, as foreperson, will preside over your deliberations and who will sign the verdicts to which you agree.

Your verdicts in this case must be as follows:

Count 1: ATTEMPTED AGGRAVATED MURDER

A. We, the jury duly impaneled in the above-entitled case, find the Defendant, BRYAN FEATHERHAT, **guilty** of the offense of Attempted Aggravated Murder as charged in Count 1 of the Amended Information;

OR

B. We, the jury duly impaneled in the above-entitled case, find the Defendant, BRYAN FEATHERHAT, **guilty** of the lesser included offense of Aggravated Assault;

OR

C. We, the jury duly impaneled in the above-entitled case, find the Defendant, BRYAN FEATHERHAT, **not guilty** of Attempted Aggravated Murder as charged in Count 1 of the Amended Information, as the offense is unproven by the burden of evidence required, and **not guilty** of the lesser included offense of Aggravated Assault.

OR

D. We, the jury duly impaneled in the above-entitled case, find the Defendant, BRYAN FEATHERHAT, **not guilty, by reason of insanity**, of Attempted Aggravated Murder as charged in Count 1 of the Amended Information, as the offense is unproven by the burden of evidence

required, and **not guilty, by reason of insanity**, of the lesser included offense of Aggravated Assault.

Count 2: AGGRAVATED ROBBERY

A. We, the jury duly impaneled in the above-entitled case, find the Defendant, BRYAN FEATHERHAT, **guilty** of the offense of Aggravated Robbery as charged in Count 2 of the Amended Information;

OR

B. We, the jury duly impaneled in the above-entitled case, find the Defendant, BRYAN FEATHERHAT, **guilty** of the lesser included offense of Theft;

OR

C. We, the jury duly impaneled in the above-entitled case, find the Defendant, BRYAN FEATHERHAT, **guilty** of the lesser included offense of Unauthorized Control of a Motor Vehicle for an Extended Time;

OR

D. We, the jury duly impaneled in the above-entitled case, find the Defendant, BRYAN FEATHERHAT, **not guilty** of Aggravated Robbery as charged in Count 2 of the Amended Information, as the offense is unproven by the burden of evidence required, and **not guilty** of the lesser included offenses of Theft and Unauthorized Control of a Motor Vehicle for an Extended Time.

OR

E. We, the jury duly impaneled in the above-entitled case, find the Defendant, BRYAN FEATHERHAT, **not guilty, by reason of insanity**, of Aggravated Robbery as charged in Count 2 of the Amended Information, as the offense is unproven by the burden of evidence required, and **not**

guilty, by reason of insanity, of the lesser included offenses of Theft and Unauthorized Control of a Motor Vehicle for an Extended Time.

INSTRUCTION NO. 21

Your verdict must constitute the individual opinion of each juror, and each of you should be judicious in reaching your verdict. It is not appropriate for any juror, upon first entering the jury room, to express an emphatic opinion about the case or to announce a determination to stand for a certain verdict. If any of you were to do that at the outset, your sense of pride may be aroused and you may then hesitate to recede from your announced position even if you were later shown that your position was incorrect.

On the other hand, when you have reached a conclusion as to the guilt or innocence of the defendant, you should not lightly change your mind merely because other jurors may disagree with you. Discuss your opinions with open minds and, if you are satisfied that your first conclusion was wrong, then you may change it.

Remember that you are not partisans or advocates. You are impartial judges of the facts.

INSTRUCTION NO. 22

You have previously been instructed that, in order to return a verdict, each juror must agree to the same verdict. You each have a duty to consult with each other and to deliberate with a view to reaching an agreement, if it can be done without abandoning your individual judgment. Each juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with the other jurors. You should deliberate together in an atmosphere of mutual deference and respect, giving due consideration to the views of the others. In the course of deliberations, you should not hesitate to reexamine your own views and change your opinion if you are convinced that it is erroneous. On the other hand, you should not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the sole purpose of returning a verdict.

INSTRUCTION NO. 23

In this criminal case your verdict must be unanimous. You may not reach a verdict by drawing straws, by flipping a coin or by a majority vote. Instead, your verdict must represent the careful and conscientious judgment of each of you and all of you.

Your verdict must be in writing, and it must be returned to the court. A verdict form has been prepared for your use Your presiding juror will complete the verdict form so that it correctly sets forth your decision. It is not necessary for anyone other than the presiding juror to sign your verdict. When you have arrived at a verdict, the presiding juror should sign and date the verdict form, and then notify the bailiff that you are ready to report to the court. The foreperson should mark only one "yes" under each count on the jury verdict form.

The foregoing 17 Instructions are given and dated this 3rd day of November, 2008.

G. Michael Westfall, Judge
Fifth District Court

ADDENDUM C

PARTIAL TRANSCRIPT
(R. 505:3-6)

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. BRYAN FEATHERHAT Defendant.	CASE NO. 071500011

BEFORE THE HONORABLE G. MICHAEL WESTFALL

FIFTH DISTRICT COURT

CEDAR CITY HALL OF JUSTICE

40 NORTH 100 EAST

CEDAR CITY, UTAH 84720

REPORTER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL

VOLUME 4

ORIGINAL

NOVEMBER 20, 2008

FILED
UTAH APPELLATE COURTS
JUL 15 2009

REPORTED BY: Russel D. Morgan

20090381-CA

November 20, 2008. Cedar City, Utah.

PROCEEDINGS

(Whereupon, the following proceedings were held in open court outside the presence of the jury.)

THE COURT: Good morning, ladies and gentlemen. We are back on the record in State vs. Featherhat. Case number 071500011. The defendant is present with his attorney, Mr. Burns. And the state is represented by Mr. Garrett. The jury is not in the jury box.

This is the -- this hearing is for the purpose right now in determining the final jury instructions. Counsel and I met earlier this morning. And I believe that we have completed the jury instructions with regard -- and I realize, Mr. Burns, you have an additional instruction you would like to have given -- but with regard to the jury instructions that have been typed and prepared as instructions 9 through 23, is there any objection? Mr. Garrett?

MR. GARRETT: No, Your Honor.

THE COURT: Mr. Burns?

MR. BURNS: No, Your Honor.

THE COURT: All right. Thank you. Now, with regard to your new jury instruction, the jury instruction that you proposed, Mr. Burns, with regard to special mitigation, the state objects to that, to that jury instruction. Do you want to be heard further with regard to that?

MR. BURNS: Yes, Your Honor. I would like its inclusion as special mitigation for mentally ill or mental defect, insanity, in this case. I understand that the state's objection is based upon that there has not been offered legal justification in this case.

That's the basis for the objection, am I correct?

MR. GARRETT: Yes, Your Honor. That and the fact no evidence of a delusional state or no justification was offered in support of his actions.

THE COURT: Thank you.

MR. BURNS: And I object to that. I believe there was evidence of delusional state coming in through Dr. Wootton and through Dr. Kockler in his testimony regarding hallucinations. Just make that part of the record, Your Honor.

THE COURT: All right. Thank you. Now, with regard to the state has stipulated that the jury instructions should be given with regard to the voluntary intoxication and not guilty by reason of insanity, the mental illness defense. With regard to this instruction, there has been an objection presented by the state. As I view the facts, I do not believe that there is sufficient facts presented to justify instructing the jury with regard to that issue, Mr. Burns. So, that request is denied.

I have attached to that -- although, you filed it

today, I attached that to your other instructions that were filed just so I wouldn't lose track of it. So, it's stapled to the defendant's jury instructions which were filed on the 19th to make sure that it's part of the record.

MR. BURNS: Thank you, Your Honor.

THE COURT: All right. Thank you. All right. Is there anything else we need to take care of outside the presence of the jury or should we bring them in, give them the final instructions and then permit closing argument?

MR. GARRETT: Bring them in, Your Honor.

THE COURT: Mr. Burns?

MR. BURNS: We are prepared to go forward, Your Honor.

THE COURT: All right. Thank you. And we discussed time for closing argument yesterday. And counsel indicated they would like to have the option of going as long as 45 minutes but didn't anticipate that they would take that much time. Is that correct, Mr. Garrett?

MR. GARRETT: That's correct, Your Honor.

THE COURT: Mr. Burns?

MR. BURNS: Yes.

THE COURT: Mr. Garrett, how much of that 45 minutes do you want to reserve for rebuttal?

MR. GARRETT: I'm going to try to break it up with 30 minutes and then 15.

THE COURT: All right. Thank you. Then, I'll remind you about 30 minutes, and then it's up to you how much of that rebuttal time you want to take up in concluding your closing argument.

MR. GARRETT: All right.

THE COURT: All right. Thank you. Let's have the jury brought back in the courtroom.

(Whereupon, the following proceedings were held in open court in the presence of the jury.)

THE COURT: Good morning. The jury is back in the jury box.

Ladies and gentlemen of the jury, did any of you violate the admonition that I gave you before our afternoon recess yesterday? If so, raise your hand. No one has raised their hand.

All right. All of the evidence is before you. I'm now going to give you your final instructions about the law which will govern your deliberations. And I have a copy for each of you. These are instructions numbers 9 through 23.

(Court reading final jury instructions 9 through 23.)

THE COURT: Is that the way it should read, Mr. Garrett?

MR. GARRETT: I think so, Your Honor.

THE COURT: "That the defendant obtained or exercised control over the property of another." Is that the way you

ADDENDUM D

DEFENDANT'S PROPOSED
ELEMENTS INSTRUCTION
(R. 358)

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FILED
FIFTH DISTRICT COURT
2008 NOV 19 PM 2:49
IRON COUNTY
BY LS

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. BRYAN FEATHERHAT Defendant.	**DEFENDANT'S REQUESTED JURY INSTRUCTIONS** Case No. 071500011 Judge: G. Michael Westfall

The Defendant, by and through Jack B. Burns, request that this Court give the following instructions to the jury impaneled in this matter. The Defendant may request the insertion of additional instructions and verdict forms depending on the evidence introduced during trial.

DATED this 19th day of November, 2008.

Jack B. Burns
Attorney for the Defendant

INSTRUCTION NO. _____

The state must prove and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements before you can find the defendant, BRYAN FEATHERHAT, guilty of Attempted Aggravated Murder as charged in Count 1 of the Amended Information:

1. That the Defendant intentionally or knowingly attempted to cause the death of Jason Thomas; and

2. The attempted homicide was committed:

A. Incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery; or

B. For the purpose of avoiding or preventing an arrest of the Defendant or another by a peace officer acting under the color of legal authority; or

C. Against a peace officer or law enforcement officer, and the officer was either on duty or the attempted homicide was based on, or was related to, that official position, and the actor know, or reasonably should have known, that the officer held that official position.

3. That the Defendant did not lack the required mental state of intent or knowledge due to mental illness;

4. That such acts occurred on or about January 5, 2007, in Iron County, State of Utah.

If the State of Utah has failed to prove any one or more of the previously described elements, you must find the Defendant not guilty of the offense of Attempted Aggravated

Murder as charged in County 1 of the Amended Information. If the State has proved, however, each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to find the Defendant guilty of Attempted Aggravated Murder as charged in Count 1 of the Amended Information.

ADDENDUM E

PROPOSED SPECIAL MITIGATION INSTRUCTION
(R. 367)

INSTRUCTION NO. _____

A person who would otherwise be guilty of attempted aggravated murder may only be guilty of attempted murder if the evidence establishes special mitigation.

Special mitigation applies when a person causes the death of another under circumstances that are not legally justified, but the person acts under a delusion attributable to a mental illness, and the nature of the delusion is such that, if the facts existed as the defendant believed them to be in his delusional state, those facts would provide a legal justification for his conduct.

Special mitigation only applies if the defendant's actions, in light of his delusion, were reasonable from the objective viewpoint of a reasonable person.

A person who was under the influence of voluntarily consumed, injected or ingested alcohol., controlled substances, or volatile substances at the time of the alleged offense may not avail himself of special mitigation based on mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

ADDENDUM F

DECISION AND ORDER
GRANTING IN PART AND
DENYING IN PART
DEFENDANT'S MOTION TO SUPPRESS
(R. 265-87)

FILED

JUL 30 2008

5th DISTRICT COURT
IRON COUNTY
DEPUTY CLERK

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR

IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. BRYAN FEATHERHAT, Defendant.	**DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO SUPPRESS** Case No. 071500011 Judge G. Michael Westfall

On November 5, 2007, Defendant Bryan Featherhat moved to suppress the evidence obtained during a search of his residence and the statements he made to police and/or other state agents. On January 14, 2008, an evidentiary hearing was held on the Motion to Suppress. On March 24, 2008, Defendant filed a memorandum in support of the Motion. On April 2, 2008, the State filed a memorandum responding to the Motion. On April 10, 2008, Defendant filed a reply memorandum in support of the Motion. On May 27, 2008, at a review hearing, counsel verbally requested that the Motion be submitted for decision. As explained below, the Motion is granted in part and denied in part.

BACKGROUND

Based on the evidence presented at the evidentiary hearing on the Motion, the Court finds

the following facts:[1]

A. Defendant's Initial Statements to Law Enforcement

On January 5, 2007, the Cedar City Police Department received a report that one of their officers had been shot with a 12-gauge shotgun. Based on the report, local law enforcement began searching for Defendant as a suspect.

On January 6, 2007, at about 4:00 a.m., Cedar City police officers Matthew Topham and Tim Bonzo located Defendant on Old Highway 91 in Iron County.

Officer Topham encountered Defendant first, and shined his spotlight at him. Defendant immediately raised his hands in the air.

Asked what his name was, Defendant responded, "Bryan," at which time the officer pointed his .40 caliber service pistol at him. Defendant confirmed that his name was Bryan Featherhat, turned around, and complied with the officer's instruction to lie down.

About this time, Detective Bonzo arrived, and instantly trained his shotgun on Defendant.

Without administering Miranda warnings, and while the officers still had their weapons aimed at Defendant, Officer Topham asked Defendant where his (Defendant's) shotgun was. This question was motivated, at least in part, by Officer Topham's concern for his own and Detective Bonzo's safety.

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[1] For convenience, some of the facts included below are taken verbatim, or with only slight modifications, from the fact statements respectively presented by the parties.

Defendant responded that it was up in the mountains.

B. Defendant's Interrogation

Within about an hour of his arrest, Defendant was transported to an interrogation room at the Cedar City Police Department.[2] The interrogating officer, Detective Mike Bleak, began by taking an active interest in making Defendant comfortable. He inquired whether Defendant, whose clothes had been frozen and covered with snow at the time of his arrest, was warming up. (4:48:25-4:48:30).[3] At Defendant's request, Detective Bleak brought him some water and adjusted Defendant's handcuffs. Additionally, Detective Bleak gave Defendant some hot chocolate and put a blanket over his shoulders. (4:48:50-4:54:55).

Next, Detective Bleak requested that Defendant give him certain identifying and contact information, including his name, address, phone number, date of birth, and social security number. Defendant gave all of the requested information, and Detective Bleak wrote it down, within less than two minutes. (4:55:19-4:56:36).

Then the following conversation occurred:

Detective Bleak: Alright, well Bryan, I'm sure you know why you're here

---

[2] Officer Topham testified, and the Court finds, that Defendant was arrested at about 4:00 a.m. The time shown at the beginning of the video of the interrogation is about 4:48. Detective Bleak testified, and the Court finds, that the time shown on the video is accurate.

[3] All of the time references included here are taken from the time shown on the video of the interrogation

000267

tonight. And let me just start out by telling you this, alright? I know that—that there's two sides to every story, and I know that every—

Defendant: Is he alright?[4]

Detective Bleak: What's that?

Defendant: Is he alright?

Detective Bleak: Yeah, yeah, he is—he's going to be alright. But I know—I mean, there's two sides to every story. And, it's just important for us to, uh, just get to the bottom of it—figure out why, you know, try and understand what led you to this, and I guess the thing that we're probably most concerned of, Bryan, is that when you get—somebody gets to this point, obviously you need some kind of help with something, and you know that—it's unfortunate that it has to go to these extremes to try and get you some help, but you know that's kind of the point we're at now—that's something we might be able to offer you. Um, and as we talk, I—I don't expect, I don't want you to make anything up, but, all I—all I want's the truth. The truth is something that's—that's really going to help you out

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[4] Detective Bleak testified, and the Court finds, that he understood the "he" in Defendant's question to refer to Officer Jason Thomas, the Cedar City police officer allegedly shot by Defendant the night before the interrogation. That Defendant's question was intended to refer to Officer Thomas is also evident later in the interrogation, when Detective Bleak discusses this question with Defendant, and expressly states that Defendant was referring to Officer Thomas, which Defendant does not deny. (5:28:45-5:32:27).

in the long run. And I'm—I'm not blowing smoke up you're a**, I'm here to be straight with you, and as long as—you're straight with me, I'm straight with you, 'kay? Uh, as we're talking (clears throat), and bef—and before I ask you any questions, I just wanna make sure that you understand what your rights are, okay? Uh, first of all, you have the right to remain silent. And anything you say can and will be used in court against you. You have the right to an attorney and have him present during any questioning. And if you can't afford an attorney, one can be provided to you by the court. Do you understand those rights okay, Bryan?

Defendant: Yeah.

Detective Bleak: Okay, with those rights in mind, do you want to tell me your side of the story?

Defendant: Well, it's just like, I don't know, I've just been hearing a lot of stuff, you know?[5]

Detective Bleak: What kind of stuff?

Defendant: Like, to the breaking point where I either commit suicide or—it's like, everything, like everything is talking to me, like God's talking to me and, it's like (inaudible) over the radio and stuff and I don't know if it's me putting the

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[5] Defendant incorrectly states that he said, "Well, I don't know, we did a lot of stuff you know." Mem. in Supp. at 3.

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heads in my own thought or whatever and stuff, and just like, I don't know, it just told me to murder. I don't know if it was the music telling me to do it or what. (4:56:40-4:59:05).

A little over a half-hour later in the interview, after Defendant had said, among other things, that he could not remember a lot of what had happened the night before, the conversation continued as follows:

Detective Bleak: Was [the gun] laying on the seat?

Defendant: Will this help me in court?[6]

Detective Bleak: It'll—it–

Defendant: Or will it help you guys?

Detective Bleak: Dude, I'll be honest with you. Honesty goes a long way for everyone involved. I'll tell you that straight up. Honesty goes a long way–with the prosecutor, with the judge–nobody wants to go into court and listen to some b.s., dude, ah, ah, and that's the truth. Honesty goes a long way–with me, with–with the judge, with the prosecutor. I mean, I–I'll be honest with you. I mean it's–we've got all the evidence in the world of what happened. The–the thing that we're missing, the thing that–that we're just trying to understand is–is

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[6] Defendant incorrectly states that his question was, "Will they send me to court?" Mem. in Supp. at 3.

what was going on. What–I mean everybody's got–there's two sides to every story, there's–there's two versions to every story, and we've got all sorts of pieces here. (Clears throat.) The only things we're missing is your version. This is your opportunity to tell us what's going on–tell us what you were thinking. I mean this–this is your one opportunity Bryan. This is–this is–this is the only time you and I are going to talk, 'kay? And this is the opportunity, you know, for me to go to the prosecutor and say, "Hey, Bryan jerked me around" or (inaudible) "Bryan was straight up honest, and let's get this guy some help," and that's no bullsh**, that's straight up. At this point, you're gonna do nothing but help yourself in the long run, man. And that's–that's honest. I–I–I just want to know what happened. I want to understand, Bryan–you wanna–what happened there tonight. And I know that you know. I know you can remember–'cuz that's–I mean that's a pretty traumatic thing–I–I know that you can remember. Bryan, start–start with me from when you reached in the truck and got the gun and just tell me what happened.

Defendant: (Coughs.) Is this like a confession or . . . ?

Detective Bleak: This is just me trying to understand.

Defendant: You might think I'm crazy and stuff, but–you know, I wouldn't–I, you know, I just told you it was the music and stuff, and it was like–you know, it told me–it told me to shoot him and stuff.

(5:36:20-5:40:20).

In the course of the interview, Defendant failed to answer a number of Detective Bleak's questions, choosing instead to remain silent.

Toward the end of the interview, Defendant was reminded again that his statement would be forwarded to the prosecutor. Detective Bleak stated:

> Well, at this point, we put a case together last night a little bit and the Judge has already seen the initial report and the Judge issued a warrant for your arrest. So that's . . . you're gonna be arrested on a warrant and booked into jail. Like I said. I told you earlier, honesty goes a long way with us. That's something that's definitely gonna get passed on to the prosecutor. He'll deal with it from here on out. Alright?

(6:23:27-6:23:58)

Defendant did not respond to that statement or the invitation to comment.

C. Search of Defendant's Bedroom

On the evening of January 5, 2007, shortly after the shooting, Detective Dustin Orton and other Cedar City police officers visited the home of Defendant's parents, where Defendant was then residing. Defendant's father, Harlan Featherhat, met Detective Orton at the front door and, in response to the detective's inquiry, stated that Defendant was not there. Detective Orton informed Harlan that the officers were looking for Defendant in connection with a shooting incident, and asked whether the police could come in and search for him and other items. Harlan

consented, telling Detective Orton that the police could look for anything they needed.[7] Defendant's mother was present during this exchange, and at no time manifested any opposition to Detective Orton's request to search.

Accordingly, the officers went through the home and confirmed that Defendant was not there. In the process of looking for Defendant, Detective Orton recovered some items that were in plain view in Defendant's bedroom. Detective Orton's search did not extend beyond anything in plain view.

Soon after the police had searched the home for Defendant, Detective Bonzo arrived. Informed by Detective Orton that Defendant's parents had verbally consented to a search of the home, Detective Bonzo proceeded to conduct a thorough search of Defendant's bedroom, and recovered a number of items from desk drawers and the closet area. Detective Bonzo spoke with Harlan at least once during the search, and again before leaving, showing Harlan the items recovered from Defendant's bedroom. At no time did Harlan manifest any opposition to the officers' presence or to the search, and he affirmatively approved of them taking the items they had found.[8]

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[7] The testimony on this point was conflicting. Detective Orton testified that he asked for, and was given, consent to search the home for Defendant and other items. Harlan testified that the detective only requested, and that he only gave, consent to search for Defendant. The Court finds the detective's testimony here more credible than that of Harlan.

[8] Again, the testimony here was conflicting. The testimony from Detective Orton and Detective Bonzo supports the above statement of the facts. Harlan testified that, after the officers

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ANALYSIS[9]

A. Defendant's Initial Statements to Law Enforcement

The State acknowledges that Defendant was in custody at the time Officer Topham questioned him regarding the location of his shotgun, and concedes that Defendant's response to this question should be suppressed because no Miranda[10] warnings preceded it. See State's Response to Defendant's Motion to Suppress ("Response") at 5. Consequently, although the Court does not necessarily agree that Miranda warnings were required prior to Officer Topham's inquiry, see, e.g., United States v. Lackey, 334 F.3d 1224 (10th Cir. 2003) (public safety exception justified officers in asking defendant, after arrest but prior to giving Miranda warnings,

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had confirmed that Defendant was not at the home, he asked Detective Orton if they were done searching, and that Detective Orton responded that they were not done because Defendant's bedroom was "a crime scene." Additionally, Harlan testified that, after Detective Bonzo had been searching Defendant's bedroom for 15-20 minutes, Harlan expressly told Detective Orton that he wanted the officers to obtain a search warrant. According to Harlan, Detective Orton relayed this information to Detective Bonzo, who said that he only needed to search for a few more minutes. Harlan testified that he then told Detective Bonzo to get a search warrant anyway, but that Detective Bonzo went back into the room and came out about five minutes later, saying that the officers would bring a search warrant by the home the next day, which the officers never did. Defendant's half-sister, Amber Picyavit, gave testimony that was somewhat similar to that of Harlan, but also somewhat conflicting. Suffice it to say that the Court finds the detectives' testimony to be more credible than that of Harlan and Ms. Picyavit.

[9] Additional facts are included in the discussion below as necessary.

[10] See Miranda v. Arizona, 384 U.S. 436 (1966).

question regarding presence of weapons); State v. Kooyman, 112 P.3d 1252, 1263 (Utah Ct. App. 2005) (during execution of search warrant, "officer's brief questions about the presence of weapons in the home did not implicate Miranda" where the inquiry was motivated by safety concerns, and where there was "nothing precluding a conclusion that the question was 'normally attendant to . . . custody'") (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)) (other citations omitted), Defendant's Motion to Suppress is granted as to his initial statement regarding the shotgun's location.

B. Defendant's Interrogation

1. Defendant's Pre-Miranda Question About Officer Thomas

Defendant argues that his inquiry regarding whether Officer Thomas was alright should be suppressed because "Defendant had not been given his *Miranda* rights, was in custody and was in the process of being interrogated." Memorandum in Support of Motion to Suppress ("Mem. in Supp.") at 6.

In response, the State argues that such inquiry is admissible as a spontaneous, voluntary statement. See Response at 9 (citing State v. Meinhart, 617 P.2d 355 (Utah 1980); State v. Easthope, 510 P.2d 933 (Utah 1973)).

Defendant challenges this description, asserting that "in light of the amount of time [he] was in custody, the length of time [he] was questioned before *Miranda* rights were given and the

['false friend' and 'half truth'] tactics[11] used by the interrogating officer, the Defendant's statements pre-*Miranda* cannot accurately be described as voluntary or spontaneous." Reply at 3.

The question here is whether Defendant is correct in asserting that he "was in the process of being interrogated" at the time he asked about Officer Thomas. The Court answers this question in the negative, concluding that, at the time of Defendant's inquiry about Officer Thomas, Defendant was not "subjected to either express questioning or its functional equivalent." Kooyman, 112 P.3d at 1262 (citations and quotation marks omitted).

> As stated by the Supreme Court in Rhode Island v. Innis, 446 U.S. 291, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980), an encounter is considered to be an interrogation if an officer uses "any words or actions . . . (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301. Therefore, if a police officer's questions or comments are "normally attendant to . . . custody" or are not "reasonably likely to elicit an incriminating response," the Miranda warnings are not required. Id. at 301. Consequently, any statement made by a defendant under these circumstances is considered voluntary and untainted. See id. at 301-02.

Kooyman, 112 P.3d at 1262-63.

Nothing that Detective Bleak said or did prior to Defendant asking about Officer Thomas was "reasonably likely to elicit an incriminating response." Id. Defendant points to "the amount of time [he] was in custody," Reply at 3, and "the length of time [he] was questioned before

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[11] Defendant argues that Detective Bleak "went out of his way to appear as a friend to the defendant . . . by making statements such as 'I know there are two sides to every story,'" and by stating that he was primarily interested in getting Defendant help. Reply at 2-3. The latter statement was made after Defendant had asked whether Officer Thomas was alright.

Miranda rights were given," Reply at 3, but he had only been in custody for about an hour and he had only been asked questions (all of which were permissible)[12] for a couple of minutes. Defendant has presented no authorities holding that Miranda warnings must be given within any particular time-frame, and the Court cannot conclude that the brief custodial period leading up to Defendant's inquiry here added significantly to the coercion "inherent in custody itself." State v. James, 858 P.2d 1012, 1016 (Utah Ct. App. 1993) ("Interrogation must reflect a greater measure of compulsion than that inherent in custody itself.") (citing Miranda, 384 U.S. at 479).

Similarly, the Court rejects Defendant's argument that his statement was not voluntary or spontaneous merely because Detective Bleak said that he knew there were "two sides to every story."[13] Detective Bleak's comment did not call for a response, and he was not expecting one,

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[12] As the State has noted, all of the pre-Miranda questions asked by Detective Bleak were typical of questions "normally attendant to arrest and custody." See State v. Dutchie, 969 P.2d 422, 426-27 (Utah 1998).

[13] Defendant also condemns as a "false friend" or "half truth" tactic Detective Bleak's statement suggesting that his primary interest was in getting Defendant help. See Reply at 3 (citing State v. Tiedemann, 162 P.3d 1106 (Utah 2007)). It is unclear whether Defendant intends this argument to apply to his argument that Detective Bleak's "tactics" show that Defendant's question about Officer Thomas was involuntary, see Reply at 3, but if so, the argument is rejected. As noted above, Detective Bleak had not yet made this statement at the time Defendant asked about Officer Thomas, so even assuming that the statement was improper, it could not have affected the voluntariness of Defendant's question. It is likewise unclear whether Defendant is arguing that his question was involuntary because Detective Bleak had given him water, hot chocolate, and a blanket, but if so, this argument is also rejected. See People v. Logan, 797 N.Y.S.2d 634, 636 (N.Y. App. Div. 2005) (defendant who was given a blanket, water, and a cigarette was not coerced or intimidated into making a statement).

as shown by the fact that Defendant interrupted the detective to ask about Officer Thomas. Having reviewed the video of the entire conversation, the Court has no difficulty finding, under the totality of the circumstances, that Defendant's question about Officer Thomas was indeed spontaneous and voluntary, and that it is therefore admissible under Miranda itself. See Dutchie, 969 P.2d at 426 (defendant's statements were admissible where they "were voluntary, spontaneous, and not the product of interrogation") (citing Miranda, 384 U.S. at 478). Hence, as to this statement, the Motion to Suppress is denied.

2. Defendant's Post-Miranda Statements

The next issue raised by Defendant with regard to the interrogation is whether the State has carried its "heavy burden" of "demonstrat[ing] that [he] knowingly and intelligently waived his Miranda rights." State v. Leyva, 951 P.2d 738, 743 (Utah 1997) (quoting Miranda, 384 U.S. at 475) (quotation marks omitted). The Court must "look at the totality of the circumstances to determine if a suspect has made a valid waiver." Leyva, 951 P.2d at 744 (citation and quotation marks omitted).

Defendant's argument begins with the following rule:

> After an officer has informed a suspect of his Miranda rights and has determined that the suspect understands those rights, the officer must then determine if the suspect is willing to waive those rights and answer questions. If the suspect responds ambiguously or equivocally, the officer must then focus on clarifying the suspect's intent.

Leyva, 951 P.2d at 744.

Asserting that he said, "Well, I don't know . . ." when Detective Bleak inquired as to whether he wished to give "[his] side of the story," Defendant characterizes his response as ambiguous and equivocal, and argues that Detective Bleak failed to clarify his intent to waive his Miranda rights. Mem. in Supp. at 6-7.

Defendant's argument is unpersuasive. First, Defendant's representation of the facts is incorrect. He did not say, "Well, I don't know . . . ." Rather, he said, "Well, it's just like, I don't know, I've just been hearing a lot of stuff, you know?" Taken in context, the "I don't know" was not an expression of doubt as to whether he wished to give his side of the story, but an expression of doubt as to how to explain his side of the story.[14]

Defendant did not explicitly state "yes" or "no" in response to Detective Bleak's question, but by beginning to tell his side of the story immediately after acknowledging his understanding of his rights, and by proceeding without objection to answer Detective Bleak's questions, he clearly indicated his intent to waive his Miranda rights. See Levva, 951 P.2d at 744 (concluding that defendant knowingly and intelligently waived his Miranda rights where, among other things, defendant responded without hesitation to officer's questions after acknowledging his right not to do so); State v. Barrett, 147 P.3d 491, 495 (Utah Ct. App. 2006) (stating that "[defendant's]

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[14] In response to Detective Bleak's very next question ("What kind of stuff?"), Defendant continued his explanation, and again used the same expression: ". . . [I]t's like, everything, like everything is talking to me, like God's talking to me and, it's like (inaudible) over the radio and stuff and I don't know if it's me putting the heads in my own thought or whatever and stuff, and *just like I don't know*, it just told me to murder. . . ." (Emphasis added.)

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admission of guilt immediately after acknowledging that he understood his rights also supports waiver"); State v. Hilfiker, 868 P.2d 826, 831 (Utah Ct. App. 1994) (defendant's waiver was knowing and intelligent where, among other things, "[h]e acknowledged his rights and still proceeded to make the incriminating statements"). See also United States v. Frankson, 83 F.3d 79, 82 (4th Cir. 1996) ("[A] defendant's 'subsequent willingness to answer questions after acknowledging [his] Miranda rights is sufficient to constitute an implied waiver.'") (quoting United States v. Velasquez, 626 F.2d 314, 320 (3rd Cir. 1980), and citing Cape v. Francis, 741 F.2d 1287, 1298 (11th Cir. 1984), cert. denied, 474 U.S. 911 (1985); United States v. Stark, 609 F.2d 271 (6th Cir. 1979)).

Defendant argues, however, that the invalidity of his waiver is shown by his subsequent questions about whether answering the detective's questions would help Defendant or the State in court, and whether he was giving a confession. See Mem. in Supp. at 7.

In response, the State urges application of the rule that once a party has waived his Miranda rights, he may not invoke such rights without a clear statement. See Response at 9 (citing Davis v. United States, 512 U.S. 452 (1994); Leyva, 951 P.2d at 742). According to the State, Defendant's questions are ambiguous statements that "do not rise to the level of re-invocation . . . ." Response at 9.

The State's argument does not address the issue raised by Defendant, which is whether his waiver was valid, not whether he invoked his rights after waiving them. See Leyva, 951 P.2d

at 743 ("The questions of waiver of Miranda rights and of postwaiver invocation of those rights are entirely separate.") (citation omitted). In essence, Defendant appears to be arguing that his waiver was not knowing and intelligent because he did not sufficiently understand its consequences. See State v. Strain, 779 P.2d 221, 224 (Utah 1989) ("[T]he waiver [of Miranda rights] must have been . . . executed with 'full awareness both of the nature of the right being abandoned and [of] *the consequences of the decision to abandon it.*'") (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)) (emphasis added).[15]

On their face, Defendant's questions as to whether he was giving a confession, and as to whom he would be helping–himself or law enforcement officers–by answering the detective's questions cast doubt on whether or not he fully understood "the nature of the right being abandoned and . . . the consequences of the decision to abandon it." Strain, 779 P.2d at 224.

Of course, the Court may not consider such questions in a vacuum, but must evaluate them together with the other "facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." State v. Moore, 697 P.2d 233, 236 (Utah 1985) (citation and quotation marks omitted). The difficulty here is that no evidence regarding Defendant's background and experience was presented at the hearing on the Motion to Suppress.

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[15] Of course, the waiver of Miranda rights must also be voluntary; that is, it "must have been the product of a 'free and deliberate choice rather than intimidation, coercion or deception.'" Strain, 779 P.2d at 224 (quoting Moran, 475 U.S. at 421). There is no issue here as to the voluntariness of Defendant's post-Miranda statements

Cf. Moore, 697 P.2d at 236 (defendant's waiver was knowing and intelligent where he was "an intelligent and well-educated person" who had "graduated from high school, completed two years of college, and r[isen] to a position of high responsibility at his place of employment"); State v. Dutchie, 969 P.2d 422, 429 (Utah 1998) (defendant's waiver was valid where, among other things, he had significant "prior experience with police and the criminal justice process").[16]

Defendant's conduct here appears inconsistent. On the one hand, Defendant expressly affirmed that he understood the Miranda warnings, including that "anything [he] sa[id] c[ould] and w[ould] be used in court against [him]." On the other, he subsequently asked whether responding to questions would "help [him] in court." (Emphasis added.) If Defendant understood that his statements would be used "against" him in court, it is unclear why he would

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[16] At the preliminary hearing in this matter, the Court heard evidence that Defendant has had previous run-ins with the law, including multiple arrests by the very officer he is alleged to have shot. See April 3, 2007 Preliminary Hearing Transcript (filed April 19, 2007) at 14:2-6 (testimony by Officer Jason Thomas stating that he knew Defendant prior to January 5, 2007 because he had "arrested him a couple of times"). Had such evidence been presented at the suppression hearing, it may well have weighed in favor of finding that Defendant understood his rights. See, e.g., Dutchie, 969 P.2d at 429. However, it would be improper to incorporate, sua sponte, evidence from the preliminary hearing into the suppression hearing. Although "[c]ourts may take judicial notice of the records and prior proceedings in the same case," Riche v. Riche, 784 P.2d 465, 468 (Utah Ct. App. 1989) (citations omitted), the facts so noticed must be "not subject to reasonable dispute . . . ." U.R.E. Rule 201(b). The Court cannot conclude that this standard is satisfied here, particularly since the Court has received no evidence as to the underlying reasons for the prior arrests mentioned, or whether Defendant was given Miranda warnings in connection with such arrests. Cf. United States v. Hall, 724 F.2d 1055, 1059 (2d Cir. 1983) ("[T]here is force in the [trial] judge's observation that [the defendant] knew his rights all along since he was not a newcomer to the law, and, more important, no newcomer to the jurisprudence of Miranda.") (citations and quotation marks omitted).

have asked if such statements would "help" him in court The obvious explanation is the one advanced by Defendant he did not understand that his statements would be used against him

However, this explanation is undermined by the other facts of this case First, Defendant had previously indicated that he understood his statements would be used against him in court Second, in response to Defendant's question as to whether answering questions would help him or the police in court, Detective Bleak said, in part,

> Dude, I ll be honest with you Honesty goes a long way for everyone involved I ll tell you that straight up Honesty goes a long way–with the prosecutor, with the judge–nobody wants to go into court and listen to some b s , dude, ah, ah, and that's the truth Honesty goes a long way–with me, with–with the judge, with the prosecutor

Hence, Defendant was reminded that whatever he said would be shared with both the judge and the prosecutor [17] Third, throughout the interview, in response to a number of Detective

[17] The Court acknowledges that it is troubled by the way this reminder was given, couched as it was in terms of the benefits of being honest See, e g , Hart v AG, 323 F 3d 884, 894 (11th Cir 2003) ("Telling [the defendant] that 'honesty wouldn't hurt him' contradicted the Miranda warning that anything he said could be used against him in court ") Cf State v Strain 779 P 2d 221, 225 (Utah 1989) ([A]ppeals to the defendant that full cooperation would be his best course of action have been recognized as not coercive ") (citation omitted) Had Detective Bleak simply given straightforward answers to Defendant's questions, it would certainly have made it easier for the Court to find that Defendant's waiver was knowing and intelligent See e g Rice v Cooper, 148 F 3d 747, 752 (7th Cir 1998) (where during administration of Miranda warnings, defendant asked what various warnings meant, and where officer then explained the warnings in simpler terms, and where defendant then indicated that he understood, "[t]his pattern is consistent with [the defendant s] having, to the best of the police officers' knowledge, understood the warnings sufficiently to be able to waive them knowingly") Nevertheless, even assuming that Detective Bleak s responses to Defendant's questions obscured more than they illuminated the Court is still persuaded based on the remaining circumstances here, that

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Bleak's questions, Defendant simply remained silent, signifying his awareness of his right to speak only when he chose to do so, and of the fact that speaking might not be in his best interest. See United States v. Banks, 78 F.3d 1190, 1198 (7th Cir. 1996) (fact that defendant "selectively chose not to answer some of the questions that were put to him" weighed in favor of finding that he understood his right to remain silent), overruled on other grounds as stated in United States v. Sherrod, 445 F.3d 980, 982 (7th Cir. 2006). Fourth, at the conclusion of the interview, Detective Bleak told Defendant that he would be arrested, and that information was going to be given to the prosecutor, and Defendant manifested no surprise, as would be expected if he had mistakenly understood that his statements were not to be used against him.

Based on the totality of the circumstances here, the Court concludes that Defendant's waiver was knowing and intelligent. Although Defendant may not have understood, in the abstract, whether or not he was giving "a confession," Defendant "understood that he had the right to remain silent and that anything he said could be used as evidence against him." Colorado v. Spring, 479 U.S. 564, 574 (1987). Consequently, the Motion to Suppress is denied as to Defendant's post-Miranda statements.

C. Search of Defendant's Bedroom

The dispute with regard to the search of Defendant's bedroom is a factual one. See State v. Hansen, 63 P.3d 650, 663 (Utah 2002) ("Consent is a factual finding that should be made

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Defendant's waiver was knowing and intelligent.

based on the totality of the circumstances."). Defendant claims that his father's consent to a search of the bedroom was limited to a search for Defendant's person, and did not extend to any other items. In contrast, the State claims that Defendant's father gave the officers consent to conduct a thorough search of the room for any criminal evidence. Each side bases its argument entirely on its own version of the facts, as respectively supported or contested by the different testimony offered at the suppression hearing.

Having carefully considered the competing testimony, the Court has resolved this dispute in favor of the State, and therefore finds that the search conducted by the officers was not constitutionally offensive. "It is well established that consent provides an exception to the general rule prohibiting warrantless searches." State v. Johnson, 748 P.2d 1069, 1073 (Utah 1987) (citations omitted).[18] Accordingly, the Motion to Suppress is denied as to the evidence recovered from Defendant's bedroom.

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[18] Defendant has not challenged the actual or apparent authority of his father to grant Detective Orton's request for consent to search Defendant's bedroom. See, e.g., State v. Duran, 131 P.3d 246, 249 (Utah Ct. App. 2005) ("A warrantless search is reasonable if it is conducted with the consent of the defendant or some other person who 'possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected.'") (quoting United States v. Matlock, 415 U.S. 164, 171 (1974)); State v. Earl, 92 P.3d 167, 174 (Utah Ct. App. 2004) ("[E]ven in the absence of actual 'common authority,' if it would be reasonable for an officer to believe that the [third party] had 'common authority,' pursuant to Matlock, when a [third party] consents to the warrantless entry, the entry and search will be deemed valid.") (citing Illinois v. Rodriguez, 497 U.S. 177, 188-89 (1990)). Neither has Defendant asserted that any consent his father gave was given involuntarily. See, e.g., State v. Humphrey, 138 P.3d 590, 594 (Utah Ct. App. 2006) ("[A] consent which is not voluntarily given is invalid.") (citation omitted). Because these issues have not been raised, the Court does not address them.

ORDER

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that.

1. the Motion to Suppress is granted as to

    a. Defendant's pre-Miranda statement regarding the shotgun's location; and

2. the Motion to Suppress is denied as to

    a. Defendant's pre-Miranda inquiry regarding Officer Thomas;

    b. Defendant's post-Miranda statements; and

    b. the evidence recovered from the search of Defendant's bedroom.

Dated this 31st day of July, 2008.

BY THE COURT:

G. Michael Westfall
District Court Judge

MAILING CERTIFICATE

I hereby certify that on the 31 day of July, 2008. a copy of the attached document was sent to the following people for case 071500011 by mail.

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