APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS August 2, 2019

TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

HENRY L. JACKSON,

Petitioner - Appellant,

v.

STATE OF UTAH; SCOTT CROWTHER, Warden at Utah State Prison,

Respondents - Appellees.

No. 18-4154
(D.C. No. 2:15-CV-00237-RJS)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **MATHESON**, and **EID**, Circuit Judges.

Henry L. Jackson, a Utah state prisoner proceeding pro se,[1] seeks a

* This Order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

After examining the appellate record, we have determined unanimously that oral argument would not be of material assistance in the determination of this matter. *See* FED. R. APP. P. 34(a); 10TH CIR. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] Because Mr. Jackson is proceeding pro se, we construe his filings liberally, but we may not construct arguments for him. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Lankford v. Wagner*, 853 F.3d 1119, 1121–22 (10th Cir. 2017).

certificate of appealability ("COA") to challenge the district court's denial of his application for a writ of habeas corpus filed under 28 U.S.C. § 2254. His application for a COA raises four claims: (A) an alleged Due Process Clause violation based on the destruction of evidence, (B) an alleged Equal Protection Clause violation based on the State's use of its peremptory strikes, (C) an alleged Sixth Amendment violation based on ineffective assistance of appellate counsel, and (D) an alleged Sixth Amendment violation based on ineffective assistance of trial counsel. Exercising jurisdiction under 28 U.S.C. § 1291, we **DENY** Mr. Jackson's application for a COA as to each claim and **DISMISS** this matter.

I. BACKGROUND

A. Factual Background

Mr. Jackson hit his estranged girlfriend "with his car, rolled back over her lower leg, and maneuvered the car so it appeared [that he] was going to hit her again." *State v. Jackson* ("*Jackson I*"), 243 P.3d 902, 906 (Utah Ct. App. 2010), *overruled on other grounds by State v. DeJesus*, 395 P.3d 111 (Utah 2017). Her son, who was nearby, tried to stop Mr. Jackson "by opening the front passenger door of [Mr. Jackson]'s car and trying to hit him." *Id.* Mr. Jackson cut the son with "a large knife" and stabbed him in the arm, chased the son as he fled, and then stabbed him in his back and chest. *Id.* At this point, the estranged girlfriend released a pit bull that she was holding on to. *Id.* Mr. Jackson stabbed the pit

bull. *Id.* Mr. Jackson then returned to the estranged girlfriend, picked her up by her shirt, dragged her toward his car, hit her with the back of his knife, and told her, "now talk to me bitch." *Id.* at 906–07. He then let her go and left the scene. *Id.* at 907. The estranged girlfriend's and her son's testimony concerning these events was corroborated by three eyewitnesses. *Id.*

B. State Procedural Background

The State charged Mr. Jackson with two counts of attempted aggravated murder, one count of cruelty to animals, and one count of assault. *Id.* "Prior to trial, [Mr. Jackson] moved to dismiss the case, claiming that the State had destroyed evidence by releasing his car to its lienholder, which promptly cleaned the car and offered it for sale before [Mr. Jackson] was able to examine it." *Id.* Mr. Jackson claimed that testing would have revealed canine blood in the car, demonstrating that the pit bull attacked him in his car and supporting a self-defense theory. *Id.* The state trial court denied the motion, and the case proceeded to trial. *Id.*

During voir dire, the prosecutor exercised a peremptory challenge on a prospective juror who "was the only member of a minority group on the panel." *Id.* Defense counsel challenged the strike under *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id.* The State claimed that "it struck the prospective juror due to his hearing problem and because he seemed too young." *Id.* It "also pointed out the

unlikelihood that the stricken juror would have served in any event, due to his position within the jury pool as number forty-six." *Id.* The trial court denied the *Batson* challenge, "apparently" accepting the prosecutor's proffered nondiscriminatory justifications. *Id.*

At trial, Mr. Jackson sought to present a self-defense theory. *Id.* at 906 n.4. The trial court gave the jury certain instructions regarding this defense, though Mr. Jackson—as we discuss below—argues that they were insufficient. Mr. Jackson did not testify at trial himself "to avoid the introduction of his prior conviction for murder [of his first wife] as impeachment evidence," as the trial court had "rul[ed] that the evidence of his prior conviction would be admissible if he testified." *Jackson v. State* ("*Jackson II*"), 332 P.3d 398, 400 (Utah Ct. App. 2014). The jury, however, rejected the self-defense theory and convicted Mr. Jackson on all counts. *Jackson I*, 243 P.3d at 907. Mr. Jackson's conviction was affirmed on direct appeal by the Utah Court of Appeals, *id.* at 917, and the Utah Court of Appeals subsequently affirmed the denial of his state petition for post-conviction relief, *Jackson II*, 332 P.3d at 400.

C. Federal Procedural Background

Mr. Jackson filed a timely federal habeas petition alleging five claims: (1) the State violated the Due Process Clause by destroying the evidence in his car, (2) the State violated the Equal Protection Clause through its use of

peremptory challenges, (3) the trial court erred by giving inadequate self-defense jury instructions, (4) his Sixth Amendment rights were violated through ineffective assistance of trial counsel, and (5) his Sixth Amendment rights were violated through ineffective assistance of appellate counsel. The district court denied Mr. Jackson's petition and, subsequently, his request for a COA. Mr. Jackson filed a timely application for a COA in this court.[2]

II. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a COA is a jurisdictional prerequisite to our merits review of a § 2254 appeal. *See* 28 U.S.C. § 2253(c)(1)(A); *Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006). A COA may not issue unless an "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327

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[2] Following the entry of judgment, Mr. Jackson also filed a Rule 60(b) motion for relief from the judgment. The district court denied the Rule 60(b) motion after Mr. Jackson noticed his appeal to this court. Because Mr. Jackson never filed a new or amended notice of appeal with respect to the Rule 60(b) ruling, it is not properly before us. *See* FED. R. APP. P. 4(a)(4)(B)(ii). Moreover, the Rule 60(b) motion itself is not in the record on appeal, and Mr. Jackson does not raise the Rule 60(b) ruling as a basis for relief in his COA application. We thus do not address further the district court's resolution of that motion.

(2003); *accord Grant v. Royal*, 886 F.3d 874, 957–58 (10th Cir. 2018), *cert. denied sub nom. Grant v. Carpenter*, 139 S. Ct. 925 (2019).

In determining whether to grant a COA, we review the district court's "*ultimate resolution* of [a] claim—that is, its decision to deny it." *Pruitt v. Parker*, 388 F. App'x 841, 845 n.4 (10th Cir. 2010) (unpublished); *see United States v. Pinson*, 584 F.3d 972, 975–76 (10th Cir. 2009) (noting that the panel "cannot embrace the district court's reasoning," but nevertheless concluding that petitioner failed to meet the standard for issuance of a COA); *see also Sue v. Kline*, 662 F. App'x 604, 611 n.9 (10th Cir. 2016) (unpublished) ("Suffice it to say, we decline to follow the particulars of the district court's analysis here. It is the district court's ultimate resolution of [the prisoner's] habeas petition that is our focus." (collecting cases)). Thus, when reasonable jurists could not disagree with the district court's denial of a claim, we will deny a COA even if they could disagree with particulars of the district court's analysis.

Additionally, in the § 2254 context, our determination of whether reasonable jurists could disagree with the district court's resolution of the claim necessarily implicates the underlying AEDPA framework. *See Miller-El*, 537 U.S. at 336 ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."); *accord Howell v. Trammell*, 728 F.3d 1202, 1225

(10th Cir. 2013). Under AEDPA,

> a petitioner is entitled to federal habeas relief on a claim only if he can establish that the state court's adjudication of the claim on the merits (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Littlejohn v. Trammell, 704 F.3d 817, 824 (10th Cir. 2013) (quoting 28 U.S.C. § 2254(d)(1)–(2)). This standard is "highly deferential [to] state-court rulings [and] demands that state-court decisions be given the benefit of the doubt." *Grant*, 886 F.3d at 888 (alterations in original) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

III. DISCUSSION

In this court, Mr. Jackson seeks a COA on four claims: (A) an alleged Due Process Clause violation based on the destruction of evidence, (B) an alleged Equal Protection Clause violation based on the State's use of its peremptory strikes, (C) an alleged Sixth Amendment violation based on ineffective assistance of appellate counsel, and (D) an alleged Sixth Amendment violation based on ineffective assistance of trial counsel.[3] In our following discussion of each of

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[3] Mr. Jackson concedes that "the district court [was] correct" in ruling that a fifth claim directly concerning the self-defense jury instructions was not properly exhausted, and he states that it was "a litigation mistake" to include this claim as a "standalone issue" in his federal habeas petition. Aplt.'s COA Br. at 9–10. He makes no argument for cause or prejudice and appears to concede that he is not entitled to a COA on this issue.

these claims, we (1) set out the specifics of the claim Mr. Jackson raised in state and district court, (2) describe the reasoning and conclusion provided by the district court, and (3) provide our own reasoning on the proper resolution of each claim. We conclude that reasonable jurists could not disagree with the district court's resolution of each of Mr. Jackson's constitutional claims, and we thus deny his application for a COA as to each claim.

A. Claim One: Destruction of Evidence Claim

Mr. Jackson argues that the State violated his due-process rights when it released his car to a lienholder before he had an opportunity to examine it for potentially exculpatory evidence. We hold that reasonable jurists could not disagree with the district court's resolution of this claim, and we thus deny Mr. Jackson's request for a COA on this issue.

1. Claim Raised

Mr. Jackson raised his destruction of evidence claim on direct appeal. The Utah Court of Appeals rejected the claim on its merits. *Jackson I*, 243 P.3d at 910–11. It concluded that any evidence that could have been found in the car, e.g., the pit bull's blood, would not have significantly negated the other strong evidence of Mr. Jackson's guilt. *Id.* He thus was not prejudiced by the evidence's destruction. *Id.* Furthermore, the disposal of the car "suggest[ed] normal, routine cataloguing and disposition of evidence, not bad faith

destruction." *Id.* at 911. Mr. Jackson then raised this claim again in his habeas petition in the district court.

2. District Court Analysis

The district court determined that the claim in Mr. Jackson's petition had not been raised before the Utah courts and thus was procedurally defaulted. The district court found that this default was unexcused and denied the claim without reaching the merits.

3. Disposition

Although we address the merits of this claim instead of the district court's procedural ruling, we conclude that reasonable jurists could not disagree with the district court's ultimate *resolution* of this issue and thus deny a COA. *See Sue*, 662 F. App'x at 611 n.9 ("It is the district court's ultimate resolution of [the prisoner's] habeas petition that is our focus." (collecting cases)).

Mr. Jackson frames his destruction of evidence claim as arising under *Brady v. Maryland*, 373 U.S. 83 (1963). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). The Utah Court of Appeals concluded that the suppression of any evidence of the dog's blood in

the car would not have prejudiced Mr. Jackson, *Jackson I*, 243 P.3d at 910–11, reasoning: "Although [Mr. Jackson] may have been able to demonstrate that pit bull blood would have been found inside the car had the car not been returned to the lienholder and cleaned, any such blood within the car could have been attributed to having come from [Mr. Jackson]'s person after he stabbed the pit bull in the throat," *id.* at 911. Furthermore, "even if pit bull blood was in the car, the jury still could have concluded beyond a reasonable doubt that [Mr. Jackson] was guilty because the presence of pit bull blood in the car would not have significantly negated the other strong evidence supporting that [Mr. Jackson] became the aggressor when he left the car, that any danger was not immediate after the son retreated, and that [Mr. Jackson]'s use of force was objectively unreasonable." *Id.*

Mr. Jackson nowhere addresses or interacts with these rationales, let alone demonstrates how they constitute an unreasonable determination that he suffered no prejudice under *Brady*. Because Mr. Jackson fails to establish that the Utah Court of Appeals unreasonably applied *Brady*, he cannot succeed in his request for a COA.[4] Thus, we deny Mr. Jackson's request for a COA on this claim

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[4] Furthermore, Mr. Jackson's claim seemingly would have been more appropriately styled as a *Youngblood* claim because he alleges the *destruction* rather than the *suppression* of evidence. *See Arizona v. Youngblood*, 488 U.S. 51 (1988) (establishing the elements for a destruction-of-evidence claim). *Youngblood* requires a showing of bad faith destruction of evidence. *Id.* at 58; *accord Torres v. Mullin*, 317 F.3d 1145, 1161 (10th Cir. 2003). Mr. Jackson

because reasonable jurists could not disagree that the district court's resolution of this issue was correct.

B. Claim Two: *Batson* Claim

Mr. Jackson claims the State violated *Batson* by using a peremptory strike on a minority juror. We hold that reasonable jurists could not disagree with the district court's resolution of this claim, and we thus deny Mr. Jackson's request for a COA on this issue.

1. Claim Raised

Under *Batson*, state courts use a three-step process for determining whether a constitutional violation has occurred:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster v. Chatman, --- U.S. ----, 136 S. Ct. 1737, 1747 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008)); *accord Flowers v. Mississippi*, --- U.S. ----, 139 S. Ct. 2228, 2241 (2019).

After the prosecution used a peremptory strike on a minority juror at Mr. Jackson's trial, his counsel raised a *Batson* challenge. The trial court "determined

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makes no mention of this requirement, nor does he cite *Youngblood*. Therefore, we do not consider this matter further.

that [Mr. Jackson] had made a prima facie case of racial motivation." *Jackson I*, 243 P.3d at 915. The prosecution "then explained that it used a peremptory challenge on the prospective juror due to his young age and deafness in his right ear." *Id.* The prosecution additionally argued the juror would not have made it into the jury pool in any event because he was the forty-sixth juror (and this presumably meant he would not be selected). *Id.* at 907. "[T]he trial court apparently accepted these reasons as facially neutral and not given as a pretext" and rejected the claim. *Id.* at 915.

Mr. Jackson maintained his *Batson* challenge in his state direct appeal brief. The Utah Court of Appeals rejected the claim on the merits. It concluded that the prosecution had provided race-neutral reasons for striking the juror, including his hearing impairment and youth. *Id.* at 913–17. Mr. Jackson then raised this claim—at least in part, as we explain below—in his federal habeas petition in district court.

2. District Court Analysis

The federal district court concluded that this claim was exhausted and proceeded to address the merits of the claim. The court noted that the Utah Court of Appeals had "properly set forth" the *Batson* framework. R. at 601 (Mem. Decision & Order Den. Habeas Corpus Pet., filed Sept. 17, 2018). It then recounted how the Utah Court of Appeals had "thoroughly" applied that

framework, relying on the prosecutor's identification of race-neutral reasons for striking the juror, i.e., his youth and hearing impairment. *Id.* at 603. Finally, it concluded that the Utah Court of Appeals's decision was not contrary to or an unreasonable application of clearly established federal law.

3. Disposition

We discern two arguments in Mr. Jackson's application for a COA. First, Mr. Jackson argues that the prosecution's decision to strike the prospective juror based on his youth and hearing disability was "prohibited by law in the state of Utah." Aplt.'s COA Br. at 8. This argument centers on a footnote that was originally included in the Utah Court of Appeals's decision but was partially removed after the State moved for rehearing. *See Jackson I*, 243 P.3d at 906 n.1. The Utah Court of Appeals removed language stating that striking a juror based on age or disability would no longer be legal under a new state law. Based on the State's motion for rehearing, and the subsequent removal of this language, Mr. Jackson argues that the prosecution "has behaved improperly" and that this footnote provides "evidence to demonstrate that the [S]tate's explanation for its peremptory challenge was a pretext to disguise a racial motive." Aplt.'s COA Br. at 8–9.

We need not parse the iterations of this footnote or determine who is correct about state law because—among other reasons—Mr. Jackson did not make

this argument in district court, instead waiting to raise this aspect of his *Batson* challenge until he applied for a COA in this court. By failing to present this argument in district court, Mr. Jackson failed to preserve this component of his *Batson* challenge for our review. *See Grant*, 886 F.3d at 909 ("We conclude that Mr. Grant has not preserved these three arguments for appellate review because he failed to raise them in his habeas petition." (collecting cases)); *Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013) ("We do not generally consider issues that were not raised before the district court as part of the habeas petition.").

Mr. Jackson also argues that "[t]he respondent has omitted a critical fact in petitioner's marshaled evidence (ie. [sic] he 'would not have made it into the jury pool either way because of his listing as no. 46')." Aplt.'s COA Br. at 8 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 n.13 (1994)). This argument does mirror arguments made in state court and in district court, but it fails on the merits. Mr. Jackson's argument here references the prosecutor's statement to the trial court that the potential juror "would not have made it into the jury pool either way because of his listing as No. 46." R. at 196 (Tr. of Jury Trial, filed July 18, 2016). Interpreted charitably, Mr. Jackson argues that the state court contradicted *J.E.B.*'s statement that *Batson* harm arises whether or not a stricken juror actually would have been selected. *See J.E.B.*, 511 U.S. at 142 n.13 ("The

exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system."). The argument is that a state court applies *J.E.B.* unreasonably by rejecting a claim of discrimination because a discriminated-against juror would not have been seated.

But any such argument simply has no application to the facts before us. The Utah Court of Appeals held that *Batson* was not violated because the prosecution based its strike on the juror's hearing deficiency and age. *Jackson I*, 243 P.3d at 915. It thus determined that the strike was not discriminatory *without* relying on the fact that the juror would not have been seated, and so its decision is not contrary to or an unreasonable application of *J.E.B.* And while Mr. Jackson argues that "[*t*]*he respondent* has omitted [this] critical fact," Aplt.'s COA Br. at 8 (emphasis added), *the Utah Court of Appeals* acknowledged that the prosecutor had "pointed out the unlikelihood that the stricken juror would have served in any event, due to his position within the jury pool as number forty-six," *Jackson I*, 243 P.3d at 907. Notably, however, while the Utah Court of Appeals *acknowledged* this fact, it did not *rely* on it in concluding that the strike was not discriminatory. *Id.* at 907, 915. Mr. Jackson provides no further explanation about how *the respondent's* omission of this fact in its briefing could possibly result in a state court disposition that involved either a contradiction or misapplication of clearly established law.

Reasonable jurists could not disagree that the district court correctly determined that the Utah Court of Appeals's decision was not contrary to or an unreasonable application of either *Batson* or its Supreme Court progeny—in particular, *J.E.B.* Thus, we deny Mr. Jackson's request for a COA on this claim.

C. Claim Three: Ineffective Assistance of Appellate Counsel Claim

Mr. Jackson argues that his *appellate* counsel was ineffective for failing to raise several instances of *trial* counsel's purported ineffective assistance. Construed liberally, *Lankford*, 853 F.3d at 1121–22, his arguments are that appellate counsel should have argued that trial counsel was ineffective for: failing to challenge jury instructions concerning self-defense; advising Mr. Jackson not to testify; not introducing certain evidence supporting Mr. Jackson's self-defense theory; and failing to investigate a prior altercation involving the victim and her son (that also purportedly would have supported the self-defense theory). But, to the extent Mr. Jackson's arguments are not procedurally barred, he fails to demonstrate that the Utah Court of Appeals's decision was contrary to or an unreasonable application of clearly established law. Thus, we deny Mr. Jackson's request for a COA on this issue.

1. Claim Raised

Mr. Jackson's ineffective-assistance claims first appear in his post-conviction briefing before the Utah Court of Appeals. There, he contended that

appellate counsel was ineffective for failing to raise trial counsel's alleged ineffectiveness in not challenging the self-defense jury instructions—which ostensibly did not clearly express the proper burden of proof with respect to issues bearing on his guilt, including his defense of self-defense. Citing Utah Supreme Court authority, which in turn relied on *Strickland v. Washington*, 466 U.S. 668 (1984), the Utah Court of Appeals rejected the claim because "the issue would not have resulted in reversal on direct appeal because the jury instructions correctly stated that the burden of proof beyond a reasonable doubt remained with the State." *Jackson II*, 332 P.3d at 400. Mr. Jackson then presented this claim in his habeas briefing in district court.

In the same state-court briefing, Mr. Jackson also claimed that appellate counsel was ineffective for failing to raise trial counsel's failure to object to the trial court's ruling that the State could introduce evidence of Mr. Jackson's prior bad acts if he testified. The Utah Court of Appeals framed this as an argument "that the trial court inappropriately prevented [Mr. Jackson] from testifying and that trial and appellate counsel were ineffective for failing to raise the issue." *Id.* It concluded that Mr. Jackson had a choice to refuse to testify (and avoid the introduction of his prior bad acts as impeachment evidence) or take the witness stand, and so the trial court's evidentiary ruling that such prior bad acts would be admissible if Mr. Jackson chose to testify did not deprive him of due process. *Id.*

And, because it rejected Mr. Jackson's argument on the merits, "neither trial nor appellate counsel were ineffective in failing to raise the issue." *Id.*

In his federal habeas petition, Mr. Jackson argued that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for advising Mr. Jackson not to testify in light of the trial court's prior-bad-acts ruling. The emphasis of this claim shifted somewhat from, on the one hand, trial counsel's failure to object to the court's allegedly erroneous prior-bad-acts ruling to, on the other, trial counsel's advice to Mr. Jackson not to testify based on that ruling. Construing Mr. Jackson's arguments liberally, however, *Lankford*, 853 F.3d at 1121–22, all of Mr. Jackson's appellate-ineffectiveness arguments concerning trial counsel's alleged responses to the prior-bad-acts ruling (i.e., whether failure to object or advising Mr. Jackson not to testify) are of one piece. Thus, the same claim that Mr. Jackson presented to the Utah Court of Appeals was presented in district court.

However, the aforementioned state-court briefing *cannot* be read to fairly raise two related arguments that Mr. Jackson later raised in federal district court. Namely, he did not make appellate-ineffectiveness arguments concerning failure to argue that trial counsel was ineffective for not introducing certain evidence supporting a self-defense theory and for not investigating a prior altercation involving the victim and her son. Trial counsel's failure to introduce this

evidence or investigate this altercation is nowhere alleged to be deficient in Mr. Jackson's briefing before the Utah Court of Appeals. Because these arguments were not made, the Utah Court of Appeals did not address them.

2. District Court Analysis

The district court held that the Utah Court of Appeals reasonably applied *Strickland* in denying Mr. Jackson's appellate-ineffectiveness claim. As to the aspect of the claim related to the self-defense jury instructions, the district court held that Mr. Jackson had failed to "address[] the court of appeals' conclusion that there was no prejudice" resulting from any deficiency. R. at 607. And then, "regarding ineffective assistance of appellate counsel as a whole," the district court noted that Mr. Jackson "does not suggest any United States Supreme Court on-point case law exists that is at odds with the court of appeals' result." *Id.* Thus, it concluded that, "[b]ased on *Strickland*, the Utah Court of Appeals was right to analyze how counsel's performance may or may not have been deficient or prejudicial, and, on the basis that it was not, reject Petitioner's ineffective-assistance-of-counsel claims." *Id.* at 608.

3. Disposition

Reasonable jurists could not disagree with the district court's resolution of the appellate-ineffectiveness claim.

Mr. Jackson identifies *Strickland* as the clearly established law governing

this claim.[5] While *Strickland* can serve as clearly established law, *see Williams v. Taylor*, 529 U.S. 362, 391 (2000), "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial," *Johnson v. Carpenter*, 918 F.3d 895, 900 (10th Cir. 2019) (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)). "A *Strickland* claim will be sustained only when (1) 'counsel made errors so serious that counsel was not functioning as "counsel"' and (2) 'the deficient performance prejudiced the defense.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). This standard is "highly deferential." *Strickland*, 466 U.S. at 689. And, on top of that, AEDPA—more specifically, 28 U.S.C. § 2254(d)(1)—requires us to ask whether the state court's application of *Strickland* was contrary to or an unreasonable application of that clearly established law.

"Thus, '[t]he standards created by *Strickland* and § 2254(d) are *both* highly

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[5] Mr. Jackson cites several other Supreme Court decisions in his appellate-ineffectiveness argument, but none provides relevant guidance beyond that provided by *Strickland*'s general standards. *See Williams v. Taylor*, 529 U.S. 362, 398–99 (2000) (holding petitioner was entitled to habeas relief because of ineffective assistance of trial counsel in gathering mitigation evidence for sentencing); *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (holding petitioner was not prejudiced by trial counsel's failure to object to sentencing enhancement); *Murray v. Carrier*, 477 U.S. 478, 488–89 (1986) (acknowledging that ineffective assistance of appellate counsel can serve as cause for a procedural default but holding that petitioner had not demonstrated ineffectiveness); *United States v. Cronic*, 466 U.S. 648, 658–59, 666–67 (1984) (holding that a finding of ineffective assistance of trial counsel must be based on actual specified errors and not merely the circumstances surrounding the representation); *cf. House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008) ("[C]learly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*.").

deferential, and when the two apply in tandem, review is doubly so.'" *Johnson*, 918 F.3d at 900 (alteration in original) (emphasis added) (quoting *Richter*, 562 U.S. at 105); *accord Ellis v. Raemisch*, 872 F.3d 1064, 1084 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 978 (2018). More specifically, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is *any reasonable argument* that counsel satisfied *Strickland*'s deferential standard." *Ellis*, 872 F.3d at 1084 (quoting *Richter*, 562 U.S. at 104). Under this doubly deferential standard of review, Mr. Jackson has failed to demonstrate that reasonable jurists could disagree about whether the Utah Court of Appeals reasonably determined that his appellate counsel's performance was not constitutionally deficient. We explain why.

We start with Mr. Jackson's appellate-ineffectiveness argument concerning failure to raise trial counsel's failure to challenge the self-defense jury instructions. The Utah Court of Appeals rejected this argument because "the jury instructions correctly stated the . . . burden of proof," and so appellate counsel was not ineffective for not arguing that trial counsel was deficient for not challenging the instructions. *Jackson II*, 332 P.3d at 400. Moreover, as the district court observed, Mr. Jackson's arguments do not call into question the reasonableness of the Utah Court of Appeals's related prejudice determination—that is, its conclusion that appellate counsel was not ineffective

for failing to raise the instructional claim because appealing "the issue would not have resulted in reversal." *Id.*

Mr. Jackson's response boils down to only the general argument that "[t]he instructions were insufficient to convey to the jury . . . the burden of disproving the asserted self-defense defense." Aplt.'s COA Br. at 18. Putting aside the fact that the Utah cases that Mr. Jackson cites have approved of similar instructions, *see, e.g.*, *State v. Knoll*, 712 P.2d 211, 215 (Utah 1985), it is not our role under § 2254 to second-guess a state appellate court's determination of the sufficiency *under state law* of jury instructions, *see, e.g.*, *Bland v. Sirmons*, 459 F.3d 999, 1016–17 (10th Cir. 2006); *Boyd v. Ward*, 179 F.3d 904, 917 (10th Cir. 1999). Therefore, Mr. Jackson's response is not sufficient to generate a disagreement among reasonable jurists concerning the correctness of the district court's resolution of this aspect of Mr. Jackson's appellate-ineffectiveness claim.

Next, we turn to Mr. Jackson's appellate-ineffectiveness argument concerning failure to raise trial counsel's failure to object to the trial court's prior-bad-acts ruling and subsequent advice to Mr. Jackson not to testify in his own defense. Mr. Jackson's argument that *appellate* counsel was ineffective on this score only amounts to a paragraph-long recitation of the facts in the "Statement of Facts" section of his brief. Aplt.'s COA Br. at 5–6.

In that discussion, he does not address the Utah Court of Appeals's opinion

or provide any argument about how or why that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Likewise, while Mr. Jackson's "Statement of Facts" concerning his *trial*-ineffectiveness claim contains a similar factual recitation, Aplt.'s COA Br. at 4, his substantive arguments pertaining to both his appellate- and trial-ineffectiveness claims do not mention theories of ineffectiveness related to trial counsel's actions in connection with the prior-bad-acts ruling or provide any authority supporting such theories. Aplt.'s COA Br. at 10–17, 18–21. Thus, we could hold that Mr. Jackson waived further review of these aspects of his appellate-ineffectiveness claim. *See Tiger v. Workman*, 445 F.3d 1265, 1267 n.1 (10th Cir. 2006) ("In his application for a COA, Tiger lists all ten of the issues presented to the federal district court as '[i]ssues to be raised on appeal.' However, he presents argument only on the two jury instruction issues. Thus, the other issues are waived."); *United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (holding that the appellant waived his claim on appeal "because he failed to address that claim in either his application for a COA or his brief on appeal"); *Hill v. Allbaugh*, 735 F. App'x 520, 522 n.2 (10th Cir. 2018) (unpublished) (noting petitioner "has waived appellate review of the other issues presented in his habeas petition to the district court by failing to address them in his briefing to this court").

But even if this briefing was sufficient to preserve Mr. Jackson's arguments, it is unavailing on the merits. As the district court noted, Mr. Jackson "does not effectively address the matter of possible strategy, nor does he address how his retrospective, subjective perspective of his counsel's performance . . . square[s] with the court of appeals' more objective perspective, as supported by the record." R. at 607. Mr. Jackson acknowledged in briefing before the Utah Court of Appeals that, had he testified that he was acting in self-defense, the trial court had ruled that the State would be allowed to submit evidence that Mr. Jackson had murdered his first wife and previously committed domestic violence. *See also Jackson I*, 243 P.3d at 912 (noting, in analyzing sentencing issues, that Mr. Jackson had previously "serv[ed] time for killing his wife and for a parole violation related to another domestic violence incident"). As Mr. Jackson concedes, this information would have been very prejudicial in this case involving violence against an estranged girlfriend.

Applying our doubly-deferential standard of review, we cannot say that there was no reasonable argument that appellate counsel satisfied *Strickland* by *not* arguing trial counsel was ineffective for failing to object to the trial court's prior-bad-acts ruling and for advising Mr. Jackson not to testify in his own defense. *See Ellis*, 872 F.3d at 1084; *Johnson*, 918 F.3d at 900.

Finally, we turn to Mr. Jackson's appellate-ineffectiveness arguments

concerning failure to argue that trial counsel was ineffective for not introducing certain evidence supporting Mr. Jackson's self-defense theory and for not investigating a prior altercation involving the victim and her son. These contentions—which are distinct aspects or sub-claims of Mr. Jackson's overarching appellate-ineffectiveness claim—are mentioned only in the "Statement of Facts" section of Mr. Jackson's brief, and he presents no argument or authority in support of them. Thus, we could deem these contentions waived. *See Tiger*, 445 F.3d at 1267 n.1; *Springfield*, 337 F.3d at 1178; *Hill*, 735 F. App'x at 522 n.2.

Moreover, because Mr. Jackson did not present these ineffective-assistance sub-claims in post-conviction briefing to the Utah Court of Appeals, we may apply an anticipatory procedural bar to them because—like Mr. Jackson's other ineffective-assistance claims—they could have been raised in that briefing. *See* UTAH CODE § 78B-9-106(1)(d) (stating that "[a] person is not eligible for relief under this chapter [i.e., for post-conviction relief] upon any ground that . . . (d) was raised or addressed in any previous request for post-conviction relief or *could have been, but was not, raised* in a previous request for post-conviction relief" (emphasis added)); *Thacker v. Workman*, 678 F.3d 820, 841 (10th Cir. 2012) (explaining that the defendant needed to "overcome an 'anticipatory procedural bar' to proceed on his ineffective assistance claim" because if he were

"to now return to state court to attempt to exhaust a claim that trial counsel was ineffective . . . , it would be procedurally barred" under state law); *Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) ("'Anticipatory procedural bar' occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." (quoting *Moore v. Schoeman*, 288 F.3d 1231, 1233 n.3 (10th Cir. 2002))).

"The only way for [Mr. Jackson] to circumvent this anticipatory procedural bar is by making either of two alternate showings: he may demonstrate 'cause and prejudice' for his failure to raise the claim in his initial application for post-conviction relief, or he may show that failure to review his claim will result in a 'fundamental miscarriage of justice.'" *Thacker*, 678 F.3d at 841–42 (quoting *Anderson*, 476 F.3d at 1140). But Mr. Jackson makes neither argument as to the additional sub-claims of ineffective assistance at issue, and so these sub-claims are procedurally barred.

In sum, reasonable jurists could not disagree with the district court's determination that, under *Strickland*, Mr. Jackson has failed to establish that the Utah Court of Appeals's decision concerning his appellate-ineffectiveness claim was contrary to or an unreasonable application of clearly established Supreme Court law. He is not entitled to a COA on this claim.

D. Claim Four: Ineffective Assistance of Trial Counsel Claim

Mr. Jackson also seeks relief on a distinct claim of ineffective assistance of *trial* counsel. Namely, Mr. Jackson's brief in this court—construed liberally, *Lankford*, 853 F.3d at 1121–22—argues that trial counsel failed to object to the self-defense instructions discussed above, improperly discouraged him from testifying that he acted in self-defense, failed to introduce certain evidence that would have supported the self-defense theory, and failed to investigate a prior altercation involving the victim and her son. But this trial-ineffectiveness claim is partially waived and entirely procedurally barred, and Mr. Jackson cannot overcome the procedural bar. Therefore, reasonable jurists could not disagree with the district court's resolution of this claim. We deny Mr. Jackson's request for a COA on this issue.

1. Claim Raised

In post-conviction briefing before the Utah Court of Appeals, Mr. Jackson raised a claim that trial counsel was ineffective for failing to object to the self-defense jury instructions. The Utah Court of Appeals rejected this claim because it could have been raised on direct appeal, and Mr. Jackson failed to demonstrate, as grounds for overlooking this failure, that his direct-appeal counsel was ineffective for failing to argue trial counsel's ineffectiveness. *See Jackson II*, 332 P.3d at 399–400; *see* UTAH CODE § 78B-9-106(1)(c), 3(a) (stating that "[a] person

is not eligible for relief under this chapter [i.e., for post-conviction relief] upon any ground that . . . (c) could have been but was not raised at trial or on appeal"; but "[n]otwithstanding Subsection (1)(c), a person may be eligible for relief . . . if the failure to raise that ground was due to ineffective assistance of counsel").

In federal district court, Mr. Jackson's petition did not present a stand-alone *trial*-ineffectiveness claim on this jury-instructions issue, although it did reference the alleged "failures of both defense counsel at the jury trial and appellate counsel" in advancing a related *appellate*-ineffectiveness argument. R. at 11–12 (Pet. Under § 2254, filed Apr. 8, 2015). Mr. Jackson's reply brief in district court more clearly raised this jury-instructions theory as a distinct trial-ineffectiveness argument.

As to Mr. Jackson's other trial-ineffectiveness arguments, we observed *supra* that, in the aforementioned post-conviction briefing, Mr. Jackson raised an *appellate*-ineffectiveness claim concerning failure to argue that trial counsel improperly discouraged Mr. Jackson from testifying that he acted in self-defense. The Utah Court of Appeals concluded that Mr. Jackson's briefing included a freestanding contention that *trial* counsel was ineffective for advising Mr. Jackson not to take the stand, but it rejected this aspect of Mr. Jackson's claim. *See Jackson II*, 332 P.3d at 400 ("Jackson also argues that the trial court inappropriately prevented him from testifying and that *trial* and appellate counsel

were ineffective for failing to raise the issue. . . . Because Jackson's argument has been rejected, neither *trial* nor appellate counsel were ineffective in failing to raise the issue." (emphases added)). Mr. Jackson's federal habeas petition included this trial-ineffectiveness theory.

Finally, Mr. Jackson's briefing before the Utah Court of Appeals did not raise sub-claims that trial counsel was ineffective for failing to introduce certain evidence allegedly supporting the self-defense theory or for failing to investigate a prior altercation involving the victim and her son. These theories of ineffectiveness first appeared in Mr. Jackson's federal habeas petition.

2. District Court Analysis

The district court concluded that "some of the ineffective assistance of counsel grounds are procedurally defaulted," but it did not specifically address the different aspects of Mr. Jackson's arguments concerning trial counsel's ineffectiveness. R. at 595. It generally concluded that Mr. Jackson's "procedurally defaulted claims are . . . denied." *Id.* at 597.

3. Disposition

Reasonable jurists could not disagree with the district court's denial of the trial-ineffectiveness claim because it was partially waived and entirely procedurally barred.

First, the jury-instructions aspect of the trial-ineffectiveness claim was

waived in district court. As we have mentioned, Mr. Jackson's habeas petition did not discuss trial counsel's failure to object to the jury instructions as part of a *trial*-ineffectiveness claim; that discussion was only included in a claim concerning *appellate* counsel. And because trial- and appellate-ineffectiveness claims are distinct, that is not good enough to preserve the former for review. *See Milton v. Miller*, 812 F.3d 1252, 1264 (10th Cir. 2016) ("We fail to see how a claim based on trial counsel's ineffectiveness merely amplifies a claim based on appellate counsel's ineffectiveness."); *Manning v. Patton*, 639 F. App'x 544, 547 n.1 (10th Cir. 2016) (unpublished) (noting that petitioner "does not point to any case holding that an ineffective appellate counsel claim carries with it an ineffective trial counsel claim"). Failure to include this claim in his petition resulted in waiver of this claim. *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015) ("Because the argument was not raised in his habeas petition, it is waived on appeal."); *accord Grant*, 886 F.3d at 909 (collecting cases).

Second, even if we liberally construe Mr. Jackson's petition to have included the jury-instructions aspect of the trial-ineffectiveness claim, the entire claim must fail because it is procedurally barred. The Utah Court of Appeals concluded that both the jury-instructions and the advice-not-to-testify aspects of the trial-ineffectiveness claim were procedurally barred in state court because they were not brought on direct appeal and because Mr. Jackson failed to

demonstrate, as grounds for overlooking this failure, that his direct-appeal counsel was ineffective for failing to present a trial-ineffectiveness claim. Mr. Jackson has not made any argument that the procedural bar that the Utah Court of Appeals invoked is not adequate or independent. *See, e.g.*, *Maples v. Thomas*, 565 U.S. 266, 280 (2012) ("As a rule, a state prisoner's habeas claims may not be entertained by a federal court 'when (1) "a state court [has] declined to address [those] claims because the prisoner had failed to meet a state procedural requirement," and (2) "the state judgment rests on independent and adequate state procedural grounds."'" (alterations in original) (quoting *Walker v. Martin*, 562 U.S. 307, 316 (2011))).

Consequently, Mr. Jackson must demonstrate cause and prejudice or a fundamental miscarriage of justice to overcome this bar. *See, e.g.*, *Hammon v. Ward*, 466 F.3d 919, 925–26 (10th Cir. 2006); *Smallwood v. Gibson*, 191 F.3d 1257, 1268 (10th Cir. 1999). He has not done so. As most relevant here, as our analysis *supra* makes clear, Mr. Jackson has not demonstrated cause and prejudice through a meritorious showing of ineffective assistance of appellate counsel. *See, e.g.*, *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 747 (10th Cir. 2016) ("A claim of ineffective assistance of appellate counsel can serve as cause and prejudice to overcome a procedural bar, if it has merit.").

And while the Utah Court of Appeals did not address the aspects of Mr.

Jackson's trial-ineffectiveness claim concerning failure to introduce evidence supporting the self-defense theory and failure to investigate a prior altercation involving the victim and her son, that was only because Mr. Jackson did not present these aspects of his trial-ineffectiveness claim to that court. Thus, we apply an anticipatory procedural bar to these aspects of this claim because—like Mr. Jackson's other trial-ineffectiveness arguments—they could have been made on direct appeal but were not. *See Thacker*, 678 F.3d at 841. And, as above, Mr. Jackson has not demonstrated cause and prejudice or a fundamental miscarriage of justice to overcome this bar.

Accordingly, even if Mr. Jackson's trial-ineffectiveness claim or some distinct components thereof were adequately presented in district court, the claim is entirely procedurally barred. Thus, reasonable jurists could not disagree with the district court's resolution of this issue, and Mr. Jackson is not entitled to a COA.

IV. CONCLUSION

For the foregoing reasons, we **DENY** Mr. Jackson's application for a COA as to each claim and **DISMISS** this matter.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH – CENTRAL DIVISION

HENRY L. JACKSON, Petitioner, v. STATE OF UTAH et al., Respondents.	**MEMORANDUM DECISION & ORDER DENYING HABEAS CORPUS PETITION** Case No. 2:15-CV-00237-RJS District Judge Robert J. Shelby

Petitioner Henry L. Jackson was charged with two counts of attempted aggravated murder, one count of assault, and one count of cruelty to an animal. To support the aggravated murder charges, the State alleged that Petitioner had previously been convicted of murder. He was convicted as charged and sentenced on April 21, 2008.

Petitioner's convictions were affirmed on appeal. *State v. Jackson*, 243 P.3d 902 (Utah App. 2010), *cert. denied,* 247 P.3d 774 (2011).

Petitioner then filed a state post-conviction petition which was denied. Denial of the petition was affirmed on appeal. *Jackson v. State*, 332 P.3d 393 (Utah App. 2014), *cert. denied,* 343 P.3d 708 (2015).

Petitioner filed his current federal habeas petition on April 8, 2015.

I. Petitioner's Federal Habeas Claims

Petitioner raises the following claims here:

A. Destruction of evidence – Petitioner alleges that the state violated his right to due process and a fair trial under the Federal Constitution when it released his vehicle to the lienholder before the defense had the opportunity to investigate its evidentiary value. (Claim 1 is

unexhausted because federal constitutional issues were not raised on direct appeal, where the destruction of evidence was addressed; only violations of the Utah State Constitution and Utah Rules of Criminal Procedure were raised. *See State v. Jackson*, 2010 UT App 328, ¶¶ 19-22 (citing *State v. Tiedemann*, 2007 UT 49, ¶¶ 41, 44-45 (analyzing evidentiary matter under Utah Rule of Criminal Procedure 16 and Utah Constitution)); Appellant's Brief, *State v. Jackson*, No. 20080418-CA, at 46-48, Mar. 11, 2009.)

B. *Batson* violation – Petitioner alleges that the State violated the Fourteenth Amendment when it used a peremptory challenge to remove from the jury panel what appeared to be its only minority person. (Claim 2 is exhausted because it was addressed by the Utah Court of Appeals in Petitioner's direct appeal and certiorari review was denied. *State v. Jackson*, 243 P.3d 902 (Utah App 2010), *cert. denied,* 247 P.3d 774 (2011).)

C. Jury instructions – Petitioner alleges that the trial court plainly erred when it gave a jury instruction on the affirmative defense of self-defense. (Claim 3 is unexhausted because it was not raised as a standalone issue on direct appeal or on state-post-conviction review; it was properly raised only as an instance of ineffective assistance of appellate counsel. *Jackson v. State*, 2014 UT App 168, ¶¶ 1-7, *cert denied*, 343 P.3d 708 (2015); *Jackson v. State*, No. 110918677, at 9-10 (dismissing "Count VIII: Trial Court Committed Plain Error in Failing to Adequately Instruct the Jury on the State's Burden to Disprove Self-Defense" because it "could have been raised at trial or on appeal but [was] not.")

D. Ineffective assistance of trial counsel – Petitioner alleges that he was denied effective assistance of trial counsel because:

1. counsel discouraged him from testifying (raised in state post-conviction petition, but procedurally barred because could have been raised on direct

appeal but was not);

2. counsel did not subpoena the victim's prior boyfriend to testify about a similar incident (raised in state post-conviction petition, but procedurally barred because could have been raised on direct appeal but was not);

3. counsel did not suggest to the jury that the victim's injuries were inconsistent with having been run over by a vehicle (unexhausted and procedurally barred);

4. counsel did not call the attending physician or an expert witness to testify as to the victim's injuries (unexhausted and procedurally barred).

E. Ineffective assistance of appellate counsel – Petitioner alleges that he was denied effective assistance of appellate counsel because:

1. appellate counsel did not argue that trial counsel was ineffective for advising Petitioner not to testify (exhausted because raised in state post-conviction petition);

2. appellate counsel did not argue that trial counsel was ineffective for failing to investigate the prior incident with the victim's prior boyfriend (exhausted because raised in state post-conviction petition); and

3. appellate counsel did not argue that the trial court plainly erred by inadequately instructing the jury on the State's burden of proof to disprove the affirmative defense of self-defense (exhausted because addressed by Utah Court of Appeals).

II. Analysis

A. Procedural Default

Respondent argues that some of the ineffective assistance of counsel grounds are procedurally defaulted. The Court agrees and also concludes that the grounds of destruction-of-evidence and plain error in the self-defense jury instruction are procedurally defaulted. *White v. Medina*, 464 F. App'x 715, 720 (10th Cir. 2012) (unpublished) ("[D]istrict courts are permitted to raise issues of procedural bar sua sponte.") (citing *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir. 1992)). Petitioner's claims are procedurally defaulted because they were not raised to the highest State court and they either were explicitly barred by the Utah Court of Appeals or would be procedurally barred if Petitioner attempted to now raise them in State court.

A petitioner is deemed to have exhausted state remedies if either: (1) a state remedy is no longer available; or (2) claims asserted in a federal petition have been presented to the highest state court either on direct appeal from his conviction or in a state post-conviction proceeding. *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Smith v. Atkins*, 678 F.2d 883, 884-85 (10th Cir. 1982); *accord Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994).

"Section 2254(b) requires habeas applicants to exhaust those remedies 'available in the courts of the State.' This requirement, however, refers only to remedies *still available* at the time of the federal petition." *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982) (citing *Humphrey v. Cady*, 405 U.S. 504, 516 (1972)) (emphasis added). It follows, therefore, that a "habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion [because] there are no state remedies any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

Petitioner's claims of destruction of evidence; trial court plain error in its jury instruction on self defense; and ineffective assistance of trial counsel were never fairly presented to the highest state court. *See Jackson v. State*, 2014 UT App 168, ¶¶ 1-7, *cert denied*, 343 P.3d 708 (2015) (jury instruction and trial counsel ineffective assistance); *State v. Jackson*, 2010 UT App 328, ¶¶ 19-22 (citing *State v. Tiedemann*, 2007 UT 49, ¶¶ 41, 44-45 (analyzing evidentiary matter under Utah Rule of Criminal Procedure 16 and Utah Constitution).

The claim of federal constitutional violations regarding destruction of evidence is technically exhausted because it would be procedurally barred if Petitioner now tried to return to raise it in the highest State court. There are no longer any state remedies available to Petitioner. Petitioner's claims of trial court plain error in its self-defense jury instruction and trial counsel ineffective assistance of counsel are barred because they could have been brought on direct appeal but were not. Because the claims would be or were procedurally barred in State court, they are procedurally defaulted in federal court.

"Where the reason a petitioner has exhausted his state remedies is because he has failed to comply with a state procedural requirement for bringing the claim, there is a further and separate bar to federal review, namely procedural default." *Parkhurst v. Shillinger*, 128 F.3d 1366, 1370 (10th Cir. 1997); *see also Coleman*, 501 U.S. at 750 (holding, when federal claim is defaulted in state court based on independent and adequate state procedural rule, federal review of claim is barred unless petitioner shows cause for default and actual prejudice).

"This court may not consider issues raised in a habeas petition 'that have been defaulted in state court on an independent and adequate procedural ground[] unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice.'" *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000) (alteration omitted) (citation omitted). Petitioner has not

shown that he is entitled to any exception to procedural default. He has asserted cause for his default by asserting that his default is excused by the ineffective assistance of appellate counsel. Even if he could establish this as cause, he cannot establish prejudice, because his ineffective-assistance-of-appellate-counsel claims are not meritorious, as set forth below. Petitioner also may not meet the miscarriage-of-justice exception because he has not asserted and cannot establish actual innocence.

Petitioner's procedurally defaulted claims are thus denied.

B. Merits

The remaining claims are denied on the merits. These are the *Batson* claim and claims of ineffective assistance of appellate counsel.

1. Standard of Review

The standard of review to be applied in federal habeas cases is found in § 2254, of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), under which this habeas petition is filed. It states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.S. § 2254(d) (2018). Subsection (d)(1) governs claims of legal error while subsection (d)(2) governs claims of factual error." *House v Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008).

The Court's inquiry centers on whether the Utah Court of Appeals' rejection of Petitioner's claims "was contrary to, or involved an unreasonable application of, clearly established Federal law. 28 U.S.C.S. § 2254(d)(1) (2018). This "'highly deferential standard,'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (citations omitted); *see also Littlejohn v. Trammell*, 704 F.3d 817, 824 (10th Cir. 2013), is "'difficult to meet,' because the purpose of AEDPA is to ensure that federal habeas relief functions as a "'guard against extreme malfunctions in the state criminal justice systems,'" and not as a means of error correction." *Greene v. Fisher*, 132 S. Ct. 38, 43-44 (2011) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment))). The Court is not to determine whether the court of appeals' decision was correct or whether this Court may have reached a different outcome. *See Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). And, "[t]he petitioner carries the burden of proof." *Cullen*, 131 S. Ct. at 1398.

Under *Carey v. Musladin*, 549 U.S. 70 (2006), the first step is determining whether clearly established federal law exists relevant to Petitioner's claims. *House*, 527 F.3d at 1017-18; *see also Littlejohn*, 704 F.3d at 825. Only after answering yes to that "threshold question" may the Court go on to "ask whether the state court decision is either contrary to or an unreasonable application of such law." *Id.* at 1018.

> [C]learly established [federal] law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

Id. at 1016.

Further, "in ascertaining the contours of clearly established law, we must look to the '*holdings* as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Littlejohn*, 704 F.3d at 825 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (emphasis added) (citations omitted)). And, in deciding whether relevant clearly established federal law exists, this Court is not restricted by the state court's analysis. *See Bell v. Cone*, 543 U.S. 447, 455 (2005) ("[F]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation."); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) ("[A] state court need not even be aware of our precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'") (citation omitted).

If this threshold is overcome, this Court may grant habeas relief only when the state court has "unreasonably applied the governing legal principle to the facts of the petitioner's case." *Walker v. Gibson*, 228 F.3d 1217, 1225 (10th Cir. 2000) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000)). This deferential standard does not let a federal habeas court issue a writ merely because it determines on its own that the state-court decision erroneously applied clearly established federal law. *See id.* "'Rather that application must also be unreasonable.'" *Id.* (quoting *Williams*, 529 U.S. at 411). Indeed, "'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Harrington*, 131 S. Ct. at 785 (emphasis in original) (quoting *Williams*, 529 U.S. at 410).

This highly demanding standard was meant to pose a sizable obstacle to the habeas petitioner. *Id.* at 786. Section 2254(d) "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Id.* It maintains power to issue the writ when no possibility exists that "fairminded jurists could disagree that the state court's

decision conflicts with th[e Supreme] Court's precedents. It goes no farther." *Id.* To prevail in federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87. It is against this backdrop that this Court now applies the standard of review to the circumstances of this case.

2. *Batson* Violation

Petitioner argues that his federal constitutional rights were violated when the State "used a peremptory challenge to remove what appeared to be the only minority from the Jury panel." He asserts these "Supporting Facts":

> During voir dire, the State used its fourth peremptory challenge to strike Sam Curry, who appeared to be the only racial minority on the jury panel.
>
> Before the trial court swore in the jury, defense counsel requested a sidebar conference, the trial court read the juror's names and asked whether this was the jury that the parties selected. Defense counsel said it was with the exception "noted in the sidebar." That conference is not transcribed. After the trial court swore in the jury and dismissed the panel, defense counsel "made a record" of his objection. The State struck Mr. Curry, who "appears to be the only racial minority on the jury panel." So "we are making a challenge under *Batson* arguing the State has behaved improperly and needs to give the court a legitimate reason why they struck Mr. Curry other than based on his race." Responding, the State "assumed that the court is finding there's a prima facie case" and that it "needed to address the issue." The trial court agreed and the State explained that it struck Mr. Curry because he "would not have made it into the jury pool either way because of his listing as number 46. Furthermore, Mr. Curry also indicated that he was deaf in his right ear, and he struck me as too young." The trial court overruled the *Batson* objection.

(Pet. at 4-5, Doc. No. 1.)

Again, under *Carey v. Musladin*, 549 U.S. 70 (2006), the first step is to determine whether clearly established federal law exists that is relevant to Petitioner's claims. *House*, 527 F.3d at 1017-18; *see also Littlejohn*, 704 F.3d at 825. Only after answering yes to that "threshold question" may the Court go on to "ask whether the state court decision is either contrary to or an unreasonable application of such law." *Id.* at 1018. And the Court does answer, "Yes," to that threshold question. The court of appeals applied the correct United States Supreme Court precedent to analyze this issue: *Batson v. Kentucky*, 476 U.S. 79 (1986) (determining Equal Protection Clause is implicated if counsel uses peremptory challenges solely on basis of race). *Jackson*, 2010 UT App 328, at ¶¶ 27-34.

The Court goes on to the question of whether the Utah Court of Appeals' decision is contrary to or an unreasonable application of *Batson* and its United States Supreme Court progeny. To evaluate this question, the Court carefully reviewed the court of appeals' analysis, *Jackson*, 2020 UT App 328, at ¶¶ 27-34, and every United States Supreme Court case construing *Batson*. *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Davis v. Ayala*, 135 S. Ct. 2187 (2015); *Felkner v. Jackson*, 562 U.S. 594 (2011) (per curiam); *Thaler v. Haynes*, 559 U.S. 43 (2010) (per curiam); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Rice v. Collins*, 546 U.S. 333 (2006); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Hernandez v. New York*, 500 U.S. 352 (1991); *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam); *Batson*, 475 U.S. at 79-100.

The court of appeals properly set forth the "three-step analytical process to evaluate the merits of a *Batson* challenge:

> The opponent of the strike, Defendant here, "must first make out the prima facie case by presenting facts adequate to raise an inference of improper discrimination." [*State v.*]*Colwell*, 2000 UT 8, ¶ 18, 994 P.2d 177 [citing *State v. Cantu*, 750 P.2d 591,

> 595 (Utah 1988) (citing *Batson*, 476 U.S. 79)]. Then, if the trial court determines that the opponent met his or her burden of proving a prima facie case, the burden shifts to the proponent of the strike, the State here, to provide a facially neutral reason for its use of the peremptory challenge. *See id.* ¶ 19 [citing *Purkett*, 514 U.S. at 768]; [*State v.*]*Cannon*, 2002 UT App 18, ¶¶ 9-10, 41 P.3d 1153 [citing *Purkett*, 514 U.S. at 768-69]. "This [second] step 'does not demand an explanation that is persuasive, or even plausible,'" Cannon. 2002 UT App 18, ¶ 9, 41 P.3d 1153 (quoting *Purkett*[, 514 U.S. at 768], and "'need not rise to the level justifying exercise of a challenge for cause,'" *Colwell*, 2000 UT 8, ¶ 22, 994 P.2d 177 (quoting *Batson*, 476 U.S. at 97, 106 S Ct. 1712). A reason will be considered "facially valid," *Cannon*, 2002 UT App 18, ¶ 10, 41 P.3d 1153, if it is "(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate." *Colwell*, 2000 UT 8, ¶ 22, 994 P.2d 177 (citation and internal quotation marks omitted). The requirement that the explanation be legitimate does not mean "a reason that makes sense, but a reason that does not deny equal protection." *Purkett*, 514 U.S. at 769, 115 S. Ct. 1769. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 768, 115 S. Ct. 1769 (citation and internal quotation marks omitted; *accord Colwell*, 2000 UT 8, ¶ 19, 994 P.2d 177.
>
> Finally, under the third step, if the State has succeeded in providing a facially neutral explanation, the trial court then must evaluate all the evidence before it and determine whether or not the State's explanation for its peremptory challenge, although facially neutral, was actually just "a pretext to disguise a racial motive." *Cannon*, 2002 UT App 18, ¶ 11, 41 P.3d 1153 [quoting *State v. Bowman*, 945 P.2d 153, 156 (Utah Ct. App. 1997) (citing *Batson*, 476 U.S. at 79)]. In doing so, "trial courts [need to] 'undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" *State v. Pharris*, 846 P.2d 454, 461 (Utah Ct. App.1993) (quoting *Batson*, 476 U.S. at 93, 106 S. Ct. 1712 (additional citation and internal quotation marks omitted), cert. denied, 857 P.2d 948 (Utah 1993).

Jackson, 2010 UT App 328, ¶¶ 28-29. The court of appeals recognized that the third step "rests largely on credibility," which is a trial court "factual determination." *Id.* at ¶ 29.

The court of appeals went on set forth how the three steps played out in this case: The trial court ruled that a prima facie case of racial motivation was made (step one). *Id.* at ¶ 30. The

prosecutor then asserted that his peremptory challenge was based on the prospective juror's youth and right-ear deafness (step two). *Id.* The trial court accepted these assertions as neutral on their face and not pretextual, in denying the *Batson* motion (step three). *Id.*

The trial court's ruling of a prima facie case of discrimination mooted the need for the court of appeals to address step one. *Id.* ¶ 31. The court of appeals therefore considered steps two and three and did so thoroughly, with due attention to the facts of this case, *id.* (stating prosecutor's reasons of potential juror's youth and hearing impairment for striking with peremptory challenge); *id.* at ¶ 32 (comparing stricken juror's characteristics to those of other youthful jurors to rule out pretext); giving deference to the trial court's credibility determinations, *id.* at ¶ 33 ("[A]lthough the stricken juror indicated that he had thus far been able to hear the proceedings, from the cold record we have no way of knowing if his bearing or mannerisms indicated otherwise or at least suggested cause for concern."); *id.* at ¶ 34 ("Given all the evidences and circumstances before the trial court, and with due deference to the trial court's ability to judge the credibility of the attorneys and to personally observe the prospective juror peremptorily stricken by the State, we affirm the court's determination that the evidence as a whole did not suggest racial motivation in striking him from the jury."); citations to relevant case law, *Purkett*, 514 U.S. at 766, 769 (upholding peremptory challenge when reasons given were based on physical characteristics "not peculiar to any race"); *United States v. Hughes*, 970 F.2d 227, 231-32 (7th Cir. 1992) (supporting statement that "no other juror had all key characteristics in common with the stricken juror" and citing to *United States v. Williams*, 934 F.2d 847, 850 (7th Cir. 1991), which cites to *Batson*, 476 U.S. at 91); *State v. Bowman*, 945 P.2d 153, 155-56 (Utah Ct. App. 1997) (stating "prosecutor's failure to voir dire [the prospective juror] does not make his facially valid explanation for dismissing [him] pretextual as a matter of law" and citing

to *Purkett*, 115 S. Ct. at 1772, *Hernandez*, 500 U.S. 352, and *Batson*, 476 U.S. at 79); *Colwell*, 2000 UT 8, ¶¶ 15, 19, 22 (upholding peremptory challenge when reasons given were age- and hearing-based and citing *Purkett*, 514 U.S. at 768-69, and *Batson*, 476 U.S. at 97); *State v. Cosey*, 873 P.2d 1177, 1179 (Utah Ct. App. 1994) (stating "selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities" (quoting *Romero v. Lynaugh*, 884 F.2d 871, 878 (5th Cir. 1989), *cert. denied*, *Romero v. Collins*, 494 U.S. 1012 (1990))); *State v. Harrison*, 805 P.2d 769, 777 (Utah Ct. App. 1991) (indicating that lone minority juror had been excused for cause due to hearing issues and citing *Batson*, 476 U.S. at 97); and Petitioner's arguments, *Jackson*, 2010 UT App 328 at ¶ 29 ("Under *Batson*'s third step, Defendant initially claims that the State's reasoning that the stricken juror was 'to[o] young' was just a pretext and points to several potential jurors that the State did not strike who were about the same age."); *id.* at ¶ 30 ("Defendant suggests that the State's stated reason for striking the prospective juror, namely that he is deaf in one ear, was also pretextual because the State 'could have questioned him further' after he responded affirmatively when the court asked if he was able to hear the judge.").

Under this review of the Utah Court of Appeals' decision on direct appeal, this Court concludes that the decision was not contrary to, nor did it involve "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.S. § 2254(d)(1) (2018). Nor was the decision "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). In concluding this, the Court presumes the state trial court's factual findings (e.g., prosecutor's credibility and stricken juror's demeanor) are correct because Petitioner has not rebutted "that

presumption by 'clear and convincing evidence.'" *Id.* § 2254(e)(1). The Court thus denies federal habeas relief on the basis of Petitioner's *Batson* challenge.

3. Ineffective Assistance of Appellate Counsel

Again, these are the grounds upon which Petitioner asserts ineffective assistance of appellate counsel: Appellate counsel did not argue that trial counsel was ineffective for advising Petitioner not to testify and failing to investigate an incident with the victim's prior boyfriend; and that the trial court plainly erred by inadequately instructing the jury on the State's burden of proof to disprove the affirmative defense of self-defense.

Remembering that review is tightly restricted by the federal habeas standard of review, this Court observes that the Utah Court of Appeals selected the correct governing legal principle with which to analyze the ineffective-assistance-of-counsel issue. *Jackson*, 2014 UT App 168, ¶ 2 (quoting *Lafferty v. State*, 2007 UT 73, ¶ 39 (citing *Bruner v. Carver*, 920 P.2d 1153, 1157 (Utah 1996) (citing *Tillman v. Cook*, 855 P.2d 211, 221 (Utah 1993) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984))))). It is the familiar two-pronged standard of *Strickland v. Washington,* 466 U.S. 668 (1984): (1) deficient performance by counsel, measured by a standard of "reasonableness under prevailing professional norms"; and, (2) prejudice to the defense caused by counsel's deficient performance. *Id.* at 687-88. The prejudice element requires a showing that errors were so grave as to rob the petitioner of a fair proceeding, with a reliable, just result. *Id.*

As required by the standard of review, the Court now analyzes whether the Utah Court of Appeals' application of *Strickland* was reasonable. In evaluating this issue under *Strickland*, the court stated:

> Jackson asserts that trial counsel was ineffective because counsel failed to object to a self-defense jury instruction that did

not clearly express the burden of proof. To prevail, this alleged "failure" must be obvious from the trial record. *See* [*Lafferty*, 2007 UT 73, ¶ 39]. However, it appears that Jackson's trial counsel was the proponent of the identified instruction and successfully included it in the jury instructions over the State's objection. Accordingly, Jackson's characterization of the issue is not obvious from the trial record.

Furthermore, the issue would not have resulted in reversal on direct appeal because the jury instructions correctly stated that the burden of proof beyond a reasonable doubt remained with the State. "Jury instructions must be evaluated as a whole to determine their adequacy." *State v. Garcia*, 2001 UT App 19, ¶ 13. "[A]s long as the 'trial court's instructions constituted a correct statement of the law' the instructions are upheld." *Id.* (quoting *State v. Knoll*, 712 P.2d 211, 215 (Utah 1985)). Although the jury instruction challenged here did not use the language Jackson suggests in his petition, the instruction correctly stated the law and burden of proof, especially when considered with other instructions setting forth the elements of the crimes charged and the State's burden to prove the elements beyond a reasonable doubt. The trial court made clear that Jackson did not bear the burden to establish self-defense and that "if there was a reasonable doubt as to whether [the] defendant did or did not act in self-defense, then the jury should acquit." Knoll, 712 P,2d at 215.

Jackson also argues that the trial court inappropriately prevented him from testifying and that trial and appellate counsel were ineffective for failing to raise the issue. Jackson decided not to testify at trial to avoid the introduction of his prior conviction for murder as impeachment evidence. He asserts that the trial court erred in ruling that the evidence of his prior conviction would be admissible if he testified and that this ruling interfered with his right to present a defense.

Utah appellate courts have rejected arguments like Jackson's that a trial court's evidentiary ruling forced a choice not to testify and thus deprived him of due process. *See State v. Gentry*, 747 P.2d 1032, 1036 (Utah 1987); *State v. Kirkwood*, 2002 UT App 128, ¶ 15. Here, similar to those cases, Jackson

> "misconstrues the nature of the constitutional right in question. The Constitution affords an accused a choice: he may refuse to become a witness, or he may elect to take the witness stand and testify in his own behalf. . . . [Jackson] having exercised his constitutional right to

> remain silent and not testify, cannot now be heard to complain that the court forced the choice upon him and thereby denied him due process."
>
> *Kirkwood*, 2002 UT App 128, ¶ 15 (quoting *Gentry*, 747 P.2d at 1036). Because Jackson's argument has been rejected, neither trial nor appellate counsel were ineffective in failing to raise the issue. *Parsons v. Barnes*, 871 P.2d 516, 525 (Utah 1994) (holding that the failure to raise a futile issue does not constitute ineffective assistance of counsel).

Jackson, 2014 UT App 168, at ¶¶ 2-6.

Under the standard of review--as to the issues of advising Petitioner not to testify and failing to investigate the prior-boyfriend incident--Petitioner does not even argue that the court of appeals got this wrong. He merely restates his belief that his attorney's alleged failures equaled--per se--a deficient performance. He does not effectively address the matter of possible strategy, nor does he address how his retrospective, subjective perspective of his counsel's performance does not square with the court of appeals' more objective perspective, as supported by the record.

And, as to the issue of the inadequate jury instruction, Petitioner has not addressed the court of appeals' conclusion that there was no prejudice:

> Although the jury instruction challenged here did not use the language that Jackson suggests in his petition, the instruction correctly stated the law and burden of proof, especially when considered with other instructions setting for the elements of the crimes charged and the State's burden to prove the elements beyond a reasonable doubt.

Id. at ¶ 5.

Most importantly, regarding ineffective assistance of appellate counsel as a whole, Petitioner does not suggest any United States Supreme Court on-point case law exists that is at odds with the court of appeals' result. And, this Court's review of Supreme-Court case law

reveals none. *See, e.g., Bell v. Cone*, 535 U.S. 685, 698, 702 (2002) (stating "defendant must overcome the 'presumption that, under the circumstances, the challenged action "might be considered sound trial strategy"'" and "court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight") (citations omitted).

Based on *Strickland*, the Utah Court of Appeals was right to analyze how counsel's performance may or may not have been deficient or prejudicial, and, on the basis that it was not, reject Petitioner's ineffective-assistance-of-counsel claims. This Court is therefore not at all persuaded that the court of appeals' application of relevant Supreme-Court precedent was unreasonable and denies habeas relief on the basis of ineffective assistance of counsel.

CONCLUSION

Petitioner's claims are either procedurally defaulted or do not pass muster under the federal habeas standard of review.

IT IS THEREFORE ORDERED that the petition for writ of habeas corpus is DENIED and DISMISSED WITH PREJUDICE.

IT IS ALSO ORDERED that a certificate of appealability is DENIED.

This action is CLOSED.

DATED this 17th day of September, 2018.

BY THE COURT:

JUDGE ROBERT J. SHELBY
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

HENRY L. JACKSON, Petitioner, v. STATE OF UTAH et al., Respondents.	**JUDGMENT IN A CIVIL CASE** Case No. 2:15-CV-237-RJS District Judge Robert J. Shelby

IT IS ORDERED AND ADJUDGED

that Petitioner's action is dismissed with prejudice because it fails to state a claim upon which relief may be granted.

DATED this 17th day of September, 2018.

BY THE COURT:

JUDGE ROBERT J. SHELBY
United States District Court

APPENDIX C

FILED
United States Court of Appeals
Tenth Circuit

October 8, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HENRY L. JACKSON,

Petitioner - Appellant,

v.

STATE OF UTAH, et al.,

Respondents - Appellees.

No. 18-4154

ORDER

Before **HOLMES**, **MATHESON**, and **EID**, Circuit Judges.

Appellant's petition for review, construed as a petition for rehearing, is denied.

The petition for en banc review was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

APPENDIX D

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Henry Louis Jackson, Defendant and Appellant.	OPINION (For Official Publication) Case No. 20080418-CA F I L E D (May 27, 2010) 2010 UT App 136

Third District, Salt Lake Department, 061907630
The Honorable Randall N. Skanchy

Attorneys: Lori J. Seppi, Salt Lake City, for Appellant
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City, for Appellee

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Before Judges McHugh, Orme, and Greenwood.[1]

ORME, Judge:

¶1 Defendant Henry Louis Jackson was convicted of several offenses, including attempted murder. On appeal, he raises many issues, including whether the trial court improperly admitted hearsay and photographs; whether the trial court erred in not dismissing the case after the State "destroyed" evidence in a vehicle used in the attempted murder; whether the State was racially motivated in striking a potential juror; and whether the trial court erred in reopening the case and in sentencing Defendant. We affirm.

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1. Judge Pamela T. Greenwood participated in this case as a regular member of the Utah Court of Appeals. She retired from the court on January 1, 2010, before this decision issued. Hence, she is designated herein as a Senior Judge. See Utah Code Ann. § 78A-3-103(2) (2008); Sup. Ct. R. of Prof'l Practice 11-201(6).

BACKGROUND[2]

¶2 On November 9, 2006, a mother and her eighteen-year-old son returned home after picking up some lunch. As the mother began walking toward her apartment, she saw Defendant, her estranged boyfriend, parked nearby. She sat down on a curb and told her son, who was still by their car retrieving his pit bull, that Defendant was back. Defendant then drove toward the mother, hit her with his car, rolled back over her lower leg, and maneuvered the car so it appeared Defendant was going to hit her again. After giving his mother the pit bull, the son tried to stop Defendant by opening the front passenger door of Defendant's car and trying to hit him. According to the son, he did not make contact with Defendant.

¶3 Defendant had a large knife and cut the son's hand when the son tried to grab the knife. Defendant then stabbed the son's arm, whereupon the son retreated from the car and started running away.[3] Defendant chased the son and stabbed him again, inflicting additional wounds to his back and chest. After seeing Defendant stab her son in the back, the mother released the pit bull, and the dog chased Defendant. Defendant stopped pursuing the son and stabbed the pit bull in the throat. Defendant then approached the mother, "picked [her] up by [her] shirt," and started dragging her toward his car.[4] The mother testified that

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2. Our recitation of the facts is drawn from the testimony of the victims and eyewitnesses, presented in the light most consistent with the jury verdict. See generally State v. Hales, 2007 UT 14, ¶ 36, 152 P.3d 321 ("[W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury.") (citation and internal quotation marks omitted). Defendant did not testify at trial. In stating the facts, we have not drawn on testimony presented by the investigating officers to which Defendant objects.

3. In raising his self-defense theory, Defendant pointed to the son's size. The son weighed approximately 320 pounds and stood over six feet tall.

4. In support of his theory that the son and pit bull actually started the altercation when the son approached the car, and that Defendant was only defending himself, Defendant challenged the credibility of the victims' version of events as thus far outlined. In argument at trial, Defendant's counsel pointed to Defendant's history with the victims, including that he and the mother had been "on again, off again lover[s]," that he and the son had recently had a confrontation, and that the mother

(continued...)

"he was hitting me in the head with the back of the knife telling me now talk to me bitch."[5] After letting the mother go, Defendant left the scene and was later arrested.

¶4 Three eyewitnesses testified at trial, two of whom were standing in a nearby doorway and yelling for the son to come toward them to safety and one who observed the events through her sliding-glass door. Collectively, the eyewitness testimony established that (1) there was a loud bang that sounded like a car crash; (2) the mother was on the ground, appeared injured, and was saying Defendant had hit her with the car; (3) Defendant, armed with a knife, left his car and chased the son while threatening to kill him; (4) Defendant stabbed the son in the back with the knife; (5) the pit bull approached Defendant, and Defendant stabbed the pit bull; and (6) Defendant then went back to the mother, who could barely stand, held the knife to her neck, and threatened to kill her.[6]

¶5 The State charged Defendant with two counts of attempted aggravated murder, first degree felonies, see Utah Code Ann. § 76-5-202(1)(i)(iii) (Supp. 2009) (aggravated murder), id. §§ 76-4-101, -102(1)(a) (2008) (defining attempt and classifying attempt offenses); one count of cruelty to animals, a class B misdemeanor, see id. § 76-9-301(2)(c), (3)(a) (2008); and one count of assault, a class B misdemeanor, see id. § 76-5-102(1)-

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4. (...continued)
sustained relatively minor injuries for having been hit by a car. Defense counsel also suggested that it was unlikely the son would have given the mother the pit bull before approaching Defendant's car. Defense counsel posited that the victims concocted their version of events to avoid criminal liability for the son's having first attacked Defendant. As indicated in our discussion of the evidentiary issues, however, the evidence presented by the State sufficiently negated Defendant's self-defense theory beyond a reasonable doubt.

5. Defendant apparently had been helping the victims move and, according to the mother, was angry because she originally had refused to tell him where she was moving.

6. To avoid unnecessary repetition in detailing what each eyewitness observed or heard, we describe the eyewitnesses' testimony as a whole, while acknowledging that not every eyewitness saw or heard the entire incident as we have summarized it.

(2).[7] Prior to trial, Defendant moved to dismiss the case, claiming that the State had destroyed evidence by releasing his car to its lienholder, which promptly cleaned the car and offered it for sale before Defendant was able to examine it. Defendant also claimed that the evidence in the car was crucial to his self-defense theory. He hoped to have obtained blood samples from the car that, upon testing, would have revealed canine blood in the car, which Defendant claims would have corroborated his claim that the pit bull attacked him, making self-defense necessary. At the hearing on the issue, it was clear that the State had taken blood samples from the car and, although the State had not submitted the samples for testing, the State indicated that it would "address the issue" if Defendant wanted to. The trial court denied Defendant's motion to dismiss, and the case proceeded to trial.

¶6 During jury voir dire, the State exercised one of its peremptory challenges on a prospective juror who had a high school education, worked as a mechanic, subscribed to "Car and Driver" magazine, and was deaf in one ear. Defense counsel objected to the strike pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), arguing that the prospective juror was the only member of a minority group on the panel, though defense counsel could not "hazard to guess as to [the prospective juror]'s racial background." The State opposed the challenge by stating it struck the prospective juror due to his hearing problem and because he seemed too young. The State also pointed out the unlikelihood that the stricken juror would have served in any event, due to his position within the jury pool as number forty-six. In denying Defendant's Batson motion, the trial court apparently determined that the State was not racially motivated for the reasons the State offered.

¶7 The trial, held in December of 2007, was bifurcated so that only evidence on the underlying charges was presented to the jury, which found Defendant guilty on all counts. After the jury was released, the State presented the trial court with its evidence on the aggravating circumstance, i.e., Defendant's prior murder conviction. Defendant argued that the prior crime was not murder, but manslaughter. Defendant also requested additional time for briefing his position on the aggravating circumstance. When Defendant filed his brief, he challenged whether the State had sufficiently established his identity with regard to the

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7. We cite to the current versions of the statutes as recent amendments have no bearing on our analysis. See Utah Code Ann. § 76-5-202 amendment notes (2008 & Supp. 2009); id. §§ 76-4-101 amendment notes, -102 amendment notes (2008); id. § 76-9-301 amendment notes (2008); id. § 76-5-102 history (2008).

previous conviction. At a hearing in January of 2008, the trial court allowed the State additional time to prove Defendant's identity based on the court's determinations that Defendant, having apparently conceded the identity issue during trial by making reference to Defendant's prior conviction, raised the identity issue for the first time after trial and that the witness who could authenticate the prior conviction was on military leave. The court also noted, in response to Defendant's objection, that it did not think the proceedings had been officially closed because it had allowed Defendant additional time for argument and submission of evidence.

¶8 At the next hearing, in April 2008, the trial court determined that the State had established Defendant's identity as it related to the previous murder conviction and, thus, had proven the aggravating circumstance. The court thereafter sentenced Defendant to two consecutive sentences of five years to life for the attempted aggravated murder convictions and 180 days of jail time for the two class B misdemeanors, with credit for time served.

ISSUES AND STANDARDS OF REVIEW

¶9 Defendant first argues that the trial court erred in admitting hearsay from two police officers, claiming that the testimony did not fall within the excited utterance or prior consistent statement exceptions. See Utah R. Evid. 803 (2), 801(d)(1)(B). When reviewing rulings on hearsay, we review "[l]egal questions regarding admissibility . . . for correctness, . . . questions of fact . . . for clear error," and the final "ruling on admissibility for abuse of discretion." State v. Rhinehart, 2006 UT App 517, ¶ 10, 153 P.3d 830 (citations and internal quotation marks omitted). Defendant also challenges the trial court's decision to admit photographic evidence, asserting that the relevance of the photographs was outweighed by their prejudicial impact under rule 403 of the Utah Rules of Evidence, see Utah R. Evid. 403. "A trial court's ruling under rule 403 is reviewed for abuse of discretion." State v. Bluff, 2002 UT 66, ¶ 47, 52 P.3d 1210, cert. denied, 537 U.S. 1172 (2003). Evidentiary errors on the part of the trial court will only be reversed if prejudicial. See State v. Calliham, 2002 UT 86, ¶ 45, 55 P.3d 573; State v. Dunn, 850 P.2d 1201, 1221 (Utah 1993).

¶10 Defendant additionally claims that the trial court erred in denying his motion to dismiss based on the State's destruction of evidence. "Whether the State's destruction of potentially exculpatory evidence violates due process is a question of law that we review for correctness. 'However, because this question

requires application of facts in the record to the due process standard, we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations.'" State v. Tiedemann, 2007 UT 49, ¶ 12, 162 P.3d 1106 (citation omitted).

¶11 Next, Defendant challenges the trial court's decision to reopen the case to allow the State to present additional evidence on the aggravating circumstance. "A motion to reopen to take additional testimony when a case has been submitted to the court, but prior to the entry of judgment, is addressed to the sound discretion of the [trial] court." Lewis v. Porter, 556 P.2d 496, 497 (Utah 1976). "A court should consider a motion to reopen to take additional testimony in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice." Id.

¶12 Defendant also asserts that the trial court improperly entered consecutive sentences without considering all the relevant factors. "We review sentences for abuse of discretion. 'An abuse of discretion may be manifest if the actions of the judge in sentencing were inherently unfair or if the judge imposed a clearly excessive sentence.'" State v. Valdez, 2008 UT App 329, ¶ 4, 194 P.3d 195 (citations omitted), cert. denied, 200 P.3d 193 (Utah 2008).

¶13 Finally, Defendant seeks reversal of the trial court's ruling on his Batson challenge, i.e., the court's determination that the State was not racially motivated in striking the prospective juror. The issue presented only involves analysis of the trial court's decisions at the second and third steps of its Batson review. The second step, a determination of whether the State presented a facially neutral reason for the strike, is reviewed for an abuse of discretion. See State v. Valdez, 2004 UT App 214, ¶ 17, 95 P.3d 291, rev'd on other grounds, 2006 UT 39, 140 P.3d 1219.[8] The third step, whether the State's actual motivation was discriminatory, is reviewed for clear error because it involves a weighing of the evidence. See id. ¶ 16.

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8. In State v. Valdez, 2006 UT 39, 140 P.3d 1219, the Utah Supreme Court explicitly declined to address the issue of whether this court applied the correct standard of review in State v. Valdez, 2004 UT App 214, 95 P.3d 291. See 2006 UT 39, ¶ 12.

ANALYSIS

I. Evidentiary Claims Failing Due to No Prejudice

¶14 Defendant has failed to demonstrate prejudice with regard to his arguments that the trial court improperly admitted hearsay under the criteria governing excited utterances, see Utah R. Evid. 803(2), and prior consistent statements, see id. R. 801(d)(1)(B), and that it improperly admitted photographs under rule 403, see id. R. 403. See generally State v. Calliham, 2002 UT 86, ¶ 45, 55 P.3d 573 ("Notwithstanding error by the trial court [in admitting evidence], we will not reverse a conviction if we find that the error was harmless."). Defendant claims the officers' testimony unfairly bolstered the victims' testimony, particularly with regard to how the altercation began, to which no other eyewitnesses testified. He reasons that without the officers' testimony reiterating and reinforcing the victims' version of how the altercation began, the outcome of the case would have rested on whether the jury found Defendant's self-defense theory, particularly that he was not the first aggressor, more credible than the victims' testimony that Defendant was the first aggressor when he ran over the mother with his car.

¶15 Defendant's theory, however, fails to take into account the eyewitnesses who heard what sounded like a car crash and who then observed the injured mother on the ground saying the Defendant had just hit her with his car. The eyewitnesses also saw Defendant get out of his car, chase the mother's son with a butcher knife while threatening to kill him, stab the son in the back, stab the pit bull in the throat, and then put the knife to the mother's throat while cursing and threatening her.

¶16 Even if Defendant was the first aggressor, when faced with such evidence reasonable minds clearly would conclude, beyond a reasonable doubt, that the risk of death or serious injury after the son retreated from Defendant's car was not imminent and that Defendant used unreasonable and unnecessary force to protect himself.[9] This defeats his self-defense theory. See Utah Code Ann. § 76-2-402(1) (2008) ("A person is justified in threatening

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9. Under Utah's self-defense jurisprudence, it is true that "a person does not have a duty to retreat" when the incident occurs "in a place where" he has a lawful right to remain. Utah Code Ann. § 76-2-402(3) (2008). However, the fact that Defendant was in his car and could have simply driven away to safety after the son retreated from Defendant's car does bear on the issue of whether the perceived danger was imminent and whether Defendant reasonably feared death or serious injury so as to justify the force he used. See id. § 76-2-402(1); State v. Duran, 772 P.2d 982, 985 (Utah Ct. App. 1989).

or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force[.]"); id. § 76-2-402(5) ("In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors: (a) the nature of the danger; (b) the immediacy of the danger; (c) the probability that the unlawful force would result in death or serious bodily injury; (d) the other's prior violent acts or violent propensities; and (e) any patterns of abuse or violence in the parties' relationship."); State v. Duran, 772 P.2d 982, 985 (Utah Ct. App. 1989) (discussing that the use of force to protect oneself must be "objectively reasonable") (citation and internal quotation marks omitted). See also State v. Wetzel, 868 P.2d 64, 69 (Utah 1993) (determining that even where the trial court erred in admitting hearsay, "reversal [wa]s not warranted" because any error was harmless when "the record indicate[d] that there was ample evidence to convict defendant even without" the hearsay and the defendant therefore did not "show a 'reasonable likelihood that the error affected the outcome of the proceedings'") (citations omitted).

¶17 In any event, the alleged hearsay evidence was cumulative because it reiterated the essence of testimony presented by the victims or other eyewitnesses, even if the exact wording was different. Contrary to Defendant's assertion, the alleged additional evidence provided by one of the police officers, insofar as it went beyond the victims' own account of events--namely, that the mother said Defendant threatened to kill her after stabbing the son--was also provided in an eyewitness's testimony. See State v. Thomas, 777 P.2d 445, 449-50 (Utah 1989) (holding that hearsay improperly admitted under the prior consistent statement exception was cumulative and not harmful in that it was unlikely to have changed the outcome of the trial).

¶18 The same is true of the photographic evidence. Irrespective of whether the photographs were properly admitted under rule 403 of the Utah Rules of Evidence, see Utah R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"), Defendant has not demonstrated that the photographic depiction of the severe injuries he admittedly inflicted prejudiced the trial's outcome, especially in light of the highly descriptive eyewitness testimony negating his self-defense theory. See generally State v. Dunn, 850 P.2d 1201, 1221 (Utah 1993) (stating that "[e]ven if we find that the trial court's decision to admit

[evidence under rule 403] was 'beyond the limits of reasonability,' we will reverse only if the error was harmful, i.e., if absent the error there is a reasonable likelihood of an outcome more favorable to the defendant") (citations omitted).

II. Destruction of Evidence

¶19 Defendant's argument that the trial court erred in denying his motion to dismiss based on the State's destruction of evidence is also unavailing. He claims that the State violated his Due Process rights when it released his car to the lienholder, which cleaned the car's interior, potentially destroying evidence, before Defendant had an opportunity to inspect it.

¶20 When evaluating a motion to dismiss based on destruction of evidence, courts should consider the "nonexclusive factors" outlined in rule 16 of the Utah Rules of Criminal Procedure:

> (1) the extent to which the prosecution's representation [of the existing evidence] is actually inaccurate, (2) the tendency of the omission or misstatement to lead defense counsel into tactics or strategy that could prejudice the outcome, (3) the culpability of the prosecutor in omitting pertinent information or misstating the facts, and (4) the extent to which appropriate defense investigation would have discovered the omitted or misstated evidence.

State v. Tiedemann, 2007 UT 49, ¶ 41, 162 P.3d 1106 (alteration in original) (citation and internal quotation marks omitted). Additionally, if a defendant establishes "a reasonable probability that lost or destroyed evidence would be exculpatory," courts also need to consider

> (1) the reason for the destruction or loss of the evidence, including the degree of negligence or culpability on the part of the State; and (2) the degree of prejudice to the defendant in light of the materiality and importance of the missing evidence in the context of the case as a whole, including the strength of the remaining evidence.

Id. ¶ 44.

¶21 Here, the relevant factors favor the State and, thus, countenance against dismissal. Defendant claims that the car may have contained some of the pit bull's blood, which blood

allegedly would have supported his self-defense theory by potentially establishing that the son and pit bull attacked first. Although Defendant may have been able to demonstrate that pit bull blood would have been found inside the car had the car not been returned to the lienholder and cleaned, any such blood within the car could have been attributed to having come from Defendant's person after he stabbed the pit bull in the throat.[10] Additionally, even if pit bull blood was in the car, the jury still could have concluded beyond a reasonable doubt that Defendant was guilty because the presence of pit bull blood in the car would not have significantly negated the other strong evidence supporting that Defendant became the aggressor when he left the car, that any danger was not immediate after the son retreated, and that Defendant's use of force was objectively unreasonable. Thus, Defendant has failed to establish that he was prejudiced by any destruction of evidence.

¶22 Additionally, the facts here simply do not speak of bad faith on the part of the State. After the State photographed and took blood samples from the car, it was taken by the lienholder and cleaned. This procedure suggests normal, routine cataloguing and disposition of evidence, not bad faith destruction.[11] Moreover, although the State chose not to test the retained blood samples, Defendant could have had those samples tested to see if any included canine blood, which Defendant apparently opted not to do. When considering that the presence of canine blood likely would not have changed the outcome of the trial and that the loss of the evidence does not suggest bad faith on the State's part, we affirm the trial court's denial of Defendant's motion to dismiss. See generally Tiedemann, 2007 UT 49, ¶ 45 ("The touchstone for the balancing process is fundamental fairness. If the behavior of the State in a given case is so reprehensible as to warrant sanction, a sanction might be available even where

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10. Witness testimony reflected that the pit bull "was bleeding profusely" and "continually," and that "the blood was just squirting out of his neck."

11. At oral argument, the State indicated for the first time that the blood evidence in the vehicle had been "destroyed" earlier than it had previously thought. Counsel for Defendant made a motion in open court for further briefing on the issue of bad faith in light of this new information. We deny counsel's motion because, as indicated, the facts here simply do not suggest bad faith when the evidence was only destroyed after numerous photographs and blood samples were obtained, especially when it appears that such photographs and samples could have been made available to Defendant upon request. Nor was the evidence destroyed for its own sake but, rather, as a result of delivering the car to the lienholder entitled to its possession.

prejudice to the defendant is slight or only speculative. If prejudice to the defendant, on the other hand, is extreme, fairness may require sanction even where there is no wrongdoing on the part of the State. In between those extremes, we have confidence that trial judges can strike a balance that preserves defendants' constitutional rights without undue hardship to the prosecution.").

III. Reopening the Case

¶23 Defendant has not succeeded in showing that the trial court abused its discretion in reopening the case to allow the State to present evidence of his identity with regard to his prior conviction. See Lewis v. Porter, 556 P.2d 496, 497 (Utah 1976) (stating that a trial court's decision to reopen a case is within "the sound discretion of the [trial] court"). Even if defense counsel's statements at trial regarding Defendant's prior conviction did not technically amount to an admission of identity, and even if the documents the State submitted during the trial did not conclusively prove his identity, the trial court did not abuse its discretion in reopening the case. The trial court's actions were justified when defense counsel's statements during the relevant proceedings suggested that identity was not an issue; when during trial the State produced documents to establish Defendant's prior conviction and stated its belief that Defendant's name on the documents was sufficient to establish Defendant's prior conviction and Defendant neither objected nor argued that the evidence produced did not establish Defendant's identity; and when Defendant first disputed his identity through additional briefing the court allowed following the trial. Under these circumstances, where Defendant essentially misled the State and the court, or at least fostered the State's and the court's misperception that identity was not an issue, it was entirely fair, and in the interest of justice, for the trial court to exercise its discretion and reopen the case so the State could admit additional evidence conclusively establishing Defendant's identity.[12] See id. ("A court should

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12. Defendant also has not persuaded us that the trial court abused its discretion in allowing the State time to gather evidence in light of the reason for reopening the case and the fact that the witness who could authenticate photographs from the 1982 case was on military leave. Contrary to what Defendant suggests through limited argument on the issue, we do not see that the Double Jeopardy Clause was implicated here, see generally U.S. Const. amend. V; Utah Const. art. I, § 12; Tibbs v. Florida, 457 U.S. 31, 41 (1982), because there was never an acquittal or dismissal for insufficient evidence, see State v. Jackson, 857 P.2d 267, 269 n.1 (Utah Ct. App. 1993). In this (continued...)

consider a motion to reopen to take additional testimony in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice."); Davis v. Riley, 20 Utah 2d 325, 437 P.2d 453, 455 (1968) ("[W]hen a case has . . . been submitted to the court[,] whether [it] will allow the presentation of further evidence is ordinarily a matter of discretion. . . . The word 'discretion' itself imports that the action should be taken with reason and in good conscience, and with an understanding of and consideration for the rights of the parties, for the purpose of serving the always desired objective of doing justice between them.").

IV. Consecutive Sentences

¶24 Defendant's argument that the trial court abused its discretion in sentencing him to "two terms of five years to life consecutively," without "adequately consider[ing]" his rehabilitative needs and that his convictions came from "one criminal episode," also fails.[13] "In determining whether state offenses are to run concurrently or consecutively, the court shall consider the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant." Utah Code Ann. § 76-3-401(2) (2008) (emphasis added). The statute specifically authorizes the court

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12. (...continued)
case, the trial court delayed ruling on the aggravating circumstance to allow additional argument and briefing by the parties as Defendant requested. As the trial court indicated at the subsequent hearing, which hearing was contemplated at the conclusion of the trial, it questioned whether the proceedings had even been completely closed based on the additional briefing and argument it allowed. And although State v. Gregorious, 81 Utah 33, 16 P.2d 893 (1932), and State v. Seel, 827 P.2d 954 (Utah Ct. App.), cert. denied, 836 P.2d 1383 (Utah 1992), both mentioned, in affirming the trial courts' decisions to reopen in those cases, that no delay was entailed by reopening, it does not necessarily follow that if some delay will occur, the trial court abuses its discretion in reopening. See Gregorious, 16 P.2d at 895; Seel, 827 P.2d at 962.

13. In a single sentence, without legal argument beyond mere citation to authority, Defendant also claims that the trial court "improperly limited the [Parole] Board's discretion 'to release' [Defendant] when he is rehabilitated." We decline to address the issue further, especially given Defendant's failure to demonstrate preservation of this issue. See Utah R. App. P. 24(a)(9) (requiring briefs to contain legally supported arguments and record citations).

to "impose consecutive sentences for offenses arising out of a single criminal episode." Id. § 76-3-401(5).

¶25 In this case, the court clearly heard information regarding the likelihood of Defendant's rehabilitation, i.e., the State's evidence that Defendant's assault on the mother was preceded by Defendant serving time for killing his wife and for a parole violation related to another domestic violence incident. And at the sentencing hearing, Defendant's counsel pointed out that the convictions resulted from a single criminal episode. Defendant has not provided any detailed argument that the trial court's consideration of these facts was inadequate. Cf. State v. Galli, 967 P.2d 930, 938 (Utah 1998) (determining that the trial court abused its discretion in ordering consecutive sentences when the record showed that the defendant "did not inflict any physical injuries" and "was incapable of inflicting serious injury" given the fact he was using a pellet gun; "the amount of money taken . . . was relatively small"; the defendant's "prior criminal history consisted of minor traffic offenses and one misdemeanor theft conviction"; "[the defendant] voluntarily confessed and admitted responsibility" and he "expressed a commitment and hope to improve himself"; and the defendant's actions during his flight from justice demonstrated "he ha[d] the ability to improve himself and become a productive, law-abiding citizen"); State v. Strunk, 846 P.2d 1297, 1302 (Utah 1993) ("[T]he trial court abused its discretion in failing to sufficiently consider defendant's rehabilitative needs in light of his extreme youth and the absence of prior violent crimes."). Therefore we cannot say that the trial court abused its discretion in ordering consecutive sentences based on inadequate consideration of Defendant's rehabilitative needs and the fact that a single criminal episode defines the nature of the criminal activity for which he was convicted. See generally State v. Valdez, 2008 UT App 329, ¶ 8, 194 P.3d 195 ("[A] trial court need not state to what extent it considered each of the statutory factors at the sentencing hearing.") (citation and internal quotation marks omitted), cert. denied, 200 P.3d 193 (Utah 2008).

¶26 Defendant's argument that the court "failed to consider that [the mother]'s injuries were relatively minor" is also without merit. The same judge presided over all relevant proceedings, i.e., the underlying jury trial, the proceedings regarding the aggravating circumstances, and the sentencing hearing. Therefore, the court was fully cognizant of the details of the crime and the extent of the injuries inflicted. Cf. State v. Helms, 2002 UT 12, ¶¶ 12-13, 40 P.3d 626 (upholding sentence when the record showed the trial court reviewed a presentence report that had information regarding all the factors); id. ¶ 14 ("[T]he fact [the defendant] views his situation differently than did the trial court does not prove that the trial court neglected to consider the factors . . . . Indeed, . . . sentencing reflects

the personal judgment of the court, and consequently, a sentence imposed by the trial court should be overturned only when it is inherently unfair or clearly excessive."). In sum, the record shows that evidence bearing on all the statutory factors was before the trial court and considered by it, and the evidence readily supports the conclusion that the trial court did not abuse its discretion in ordering consecutive sentences.

V. Batson Challenge

¶27 Finally, irrespective of whether Defendant waived his Batson challenge,[14] see Batson v. Kentucky, 476 U.S. 79, 88-99 (1986) (determining Equal Protection Clause is implicated if counsel uses peremptory challenges solely on the basis of race), Defendant has not convinced us that the State violated the Equal Protection Clause in the course of jury selection. In general, during the jury selection process parties are "permitted to exercise their peremptory challenges for virtually any reason, or for no reason at all." State v. Cannon, 2002 UT App 18, ¶ 6, 41

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14. The State has raised the issue of whether Defendant's Batson challenge was timely or, more accurately, whether Defendant waived the Batson challenge in not pressing the trial court to rule on the issue prior to swearing in the jury and dismissing the venire. In light of our decision to address the merits of the challenge, we do not reach the interesting issue of whether prior case law clearly required defense counsel to insist upon a ruling prior to dismissal of the venire. See State v. Valdez, 2006 UT 39, 140 P.3d 1219 (decided before Defendant's trial); State v. Rosa-Re, 2008 UT 53, 190 P.3d 1259 (decided after Defendant's trial). See generally Valdez, 2006 UT 39, ¶ 19 (discussing that the United States Supreme Court has declined to "set forth . . . specific guidelines regarding [the] timeliness" of Batson challenges but that it has "held that 'only a firmly established and regularly followed state practice may be interposed by a State to prevent subsequent review . . . of a federal constitutional claim'") (second omission in original) (quoting Ford v. Georgia, 498 U.S. 411, 423-24 (1991)). See also Rosa-Re, 2008 UT 53, ¶¶ 13-14 ("clarify[ing] that in the future . . . trial courts have an obligation to resolve Batson objections before the jury is sworn and the venire dismissed," that "defense counsel also has an absolute obligation to notify the court that resolution is needed before the jury is sworn and the venire dismissed," and that defense counsel's "[f]ailure to do so . . ..will in the future constitute a waiver of the original objection"); Valdez, 2006 UT 39, ¶ 33 n.19 ("We note that this procedure, whereby an objection was made prior to the swearing of the jury but not addressed by the court until after the jury was sworn in and dismissed, will generally not meet the standard we set forth today.").

P.3d 1153. Accord Utah R. Crim. P. 18(d) ("A peremptory challenge is an objection to a juror for which no reason need be given."). However, "parties in a criminal action may not discriminate against potential jurors by exercising peremptory challenges solely on the basis of race." State v. Colwell, 2000 UT 8, ¶ 14, 994 P.2d 177.

¶28 Courts employ a three-step analytical process to evaluate the merits of a Batson challenge. See id. ¶¶ 17-20; Cannon, 2002 UT App 18, ¶¶ 7-11. The opponent of the strike, Defendant here, "must first make out the prima facie case by presenting facts adequate to raise an inference of improper discrimination." Colwell, 2000 UT 8, ¶ 18. Then, if the trial court determines that the opponent met his or her burden of proving a prima facie case, the burden shifts to the proponent of the strike, the State here, to provide a facially neutral reason for its use of the peremptory challenge. See id. ¶ 19; Cannon, 2002 UT App 18, ¶¶ 9-10. "This [second] step 'does not demand an explanation that is persuasive, or even plausible,'" Cannon, 2002 UT App 18, ¶ 9 (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam)), and "'need not rise to the level justifying exercise of a challenge for cause,'" Colwell, 2000 UT 8, ¶ 22 (quoting Batson, 476 U.S. at 97). A reason will be considered "facially valid," Cannon, 2002 UT App 18, ¶ 10, if it is "(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate," Colwell, 2000 UT 8, ¶ 22 (citation and internal quotation marks omitted). The requirement that the explanation be legitimate does not mean "a reason that makes sense, but a reason that does not deny equal protection." Purkett, 514 U.S. at 769. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Id. at 768 (citation and internal quotation marks omitted). Accord Colwell, 2000 UT 8, ¶ 19.

¶29 Finally, under the third step, if the State has succeeded in providing a facially neutral explanation, the trial court then must evaluate all the evidence before it and determine whether the State's explanation for its peremptory challenge, although facially neutral, was actually just "a pretext to disguise a racial motive." Cannon, 2002 UT App 18, ¶ 11. In doing so, "trial courts [need to] 'undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" State v. Pharris, 846 P.2d 454, 461 (Utah Ct. App.) (quoting Batson, 476 U.S. at 93) (additional citation and internal quotation marks omitted), cert. denied, 857 P.2d 948 (Utah 1993).

> [T]he presence of one or more of [the following] factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged. [15]

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15. We recognize that Utah case law is not entirely clear on whether a trial court is supposed to consider these additional factors under step two of the analysis (as bearing on whether the proffered reason for the strike is facially neutral), or under step three (as bearing on whether the purportedly facially neutral reason is actually a pretext for discrimination). Compare State v. Cantu, 778 P.2d 517, 518-19 (Utah 1989) (listing and considering these factors as part of its analysis under step two and not identifying step three), and State v. Pharris, 846 P.2d 454, 463-64 (Utah Ct. App.) (listing and considering these factors as part of its analysis under step two), cert. denied, 857 P.2d 948 (Utah 1993), with State v. Cannon, 2002 UT App 18, ¶¶ 11-16, 41 P.3d 1153 (discussing these factors under step three of the analysis), and State v. Bowman, 945 P.2d 153, 155-56 (Utah Ct. App. 1997) (same). Based on Purkett v. Elem, 514 U.S. 765 (1995) (per curiam), we conclude the best place to consider these factors is at step three of the analysis when the persuasiveness of the prosecution's reason is appropriately considered by the trial court.

In Purkett, the United States Supreme Court determined that the federal court of appeals had "erred by combining Batson's second and third steps into one" and emphasized that the persuasiveness of the reason is only relevant at step three. Id. at 768. It also recognized that the court of appeals was probably led astray by language in Batson indicating that to be race-neutral "the proponent of a strike must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." Id. (citation and internal quotation marks omitted). The Purkett court clarified that "legitimate" did not refer to whether the reason made sense, but whether it denied equal protection. See id. at 768-69. Notably, the cases we cite that discuss the factors at the second step were decided before Purkett, see Cantu, 778 P.2d at 517; Pharris, 846 P.2d at 454, and the cases discussing the factors at the third step were decided after Purkett, see Cannon, 2002 UT App 18; Bowman, 945 P.2d at 153. The decision in the later cases to adjust the analysis was likely in response to the clarification of the

(continued...)

State v. Cantu, 778 P.2d 517, 518-19 (Utah 1989) (citation and internal quotation marks omitted). As this determination rests largely on credibility, an appellate court will only set aside a trial court's factual determinations under step three if they are clearly erroneous. See id. at 518.

¶30 In this case, the trial court determined that Defendant had made a prima facie case of racial motivation. The State then explained that it used a peremptory challenge on the prospective juror due to his young age and deafness in his right ear.[16] In denying Defendant's Batson motion, the trial court apparently accepted these reasons as facially neutral and not given as a pretext.

¶31 Our analysis of this case's specific facts, then, begins with Batson's second step because, as the parties agree, once the State has "offered [an] explanation for the peremptory challenge[] and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing [as required under Batson's first step] becomes moot." State v. Chatwin, 2002 UT App 363, ¶ 9, 58 P.3d 867 (first alteration in original) (citation and internal quotation marks omitted), cert. denied, 67 P.3d 495 (Utah 2003). The State satisfied Batson's second step by providing reasons for its peremptory challenge, i.e., youth

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15. (...continued)
required analytic steps in Purkett. In any event, based on Purkett, we conclude that the factors bear on the persuasiveness of the reason and are appropriately considered at the third step.

We also clarify, however, to the extent the later cases indicate otherwise, see Cannon, 2002 UT App 18, ¶¶ 9, 12-13; Bowman, 945 P.2d at 155-56, that whether the reason is "(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate," State v. Colwell, 2000 UT 8, ¶ 22, 994 P.2d 177 (citation and internal quotation marks omitted), is appropriately considered at step two under Batson and Purkett. See Purkett, 514 U.S. at 768-69; Batson v. Kentucky, 476 U.S. 79, 98 & n.20 (1986).

16. As discussed in paragraphs 31-33, infra, case law supports that these reasons were racially neutral and that the trial court properly determined the reasons were not a pretext under step three. However, based on a recent statutory amendment that became effective after Defendant's trial, see Utah Code Ann. § 78B-1-103(2) amendment notes (2008), striking a juror based on age or disability will no longer be legal, see id. § 78B-1-103(2) ("A qualified citizen may not be excluded from jury service on account of race, color, religion, sex, national origin, age, occupation, disability, or economic status.") (emphasis added).

and a hearing impairment, that were facially neutral--not "peculiar to any race"--and related to the case at hand.[17] See Colwell, 2000 UT 8, ¶¶ 15, 19, 22 (stating the neutrality requirements and determining that the State's proffered reason for its peremptory strike of a potential juror who "was 'quite elderly [and] has difficulty hearing'" was "facially valid because 'discriminatory intent [wa]s [not] inherent' in the prosecutor's explanation") (first and third alterations in original) (citation omitted). See generally Purkett, 514 U.S. at 766, 769 (discussing that the prosecution struck a potential juror because he had "long, . . . curly, unkempt hair" and "a mustache and a goatee type beard," which characteristics made him seem like he would "not be a good juror," and he was "suspicious to" the attorney, and determining that these reasons passed step two because such physical characteristics were not "peculiar to any race") (citations and internal quotation marks omitted); Cannon, 2002 UT App 18, ¶ 10 (determining that although the prosecution's explanation that it struck a juror because "he had difficulty explaining himself, [and was] one of the more undereducated people" on the panel was somewhat "suspect," it passed the facial neutrality requirement of step two);[18] State v. Harrison, 805 P.2d 769, 777 (Utah Ct. App.) (indicating that one minority juror had been excused for cause due to hearing issues), cert. denied, 817 P.2d 327 (Utah 1991). The State's proffered reasons also satisfied Batson's second step requirements that the reasons be specific and legitimate, i.e, no "discriminatory intent [wa]s inherent in the prosecutor's explanation." Purkett, 514 U.S. at 768. See Colwell, 2000 UT 8, ¶ 22. Therefore, we conclude that the State presented a racially neutral explanation that justified its peremptory challenge.

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17. Whether a juror can hear the proceedings is a relevant concern because a lack of hearing always could affect the outcome of the case if such a juror caught only a portion of the evidence and arguments. See State v. Colwell, 2000 UT 8, ¶ 22, 994 P.2d 177 (stating that a "juror's hearing capacity . . . would have affected the case to be tried"). Although the State did not elaborate on why hearing was particularly relevant to its case when presenting its reasons to the trial court, whether jurors can hear does seem necessarily relevant. At certain times during the trial, the State asked witnesses to step away from the witness stand, and thus the microphone, to review and mark certain exhibits and continued to question those witnesses during those times.

18. This court, however, ultimately remanded in Cannon based on the trial court's failure to adequately explain its ruling regarding the prosecution's explanation and credibility. See State v. Cannon, 2002 UT App 18, ¶¶ 14-16, 41 P.3d 1153.

¶32 Under Batson's third step, Defendant initially claims that the State's reasoning that the stricken juror was "to[o] young" was just a pretext and points to several potential jurors that the State did not strike who were about the same age. See Cantu, 778 P.2d at 518-19 (stating that one factor that "will tend to show that the state's reasons are . . . an impermissible pretext [is] a challenge based on reasons equally applicable to juror[s] who were not challenged"). However, only one of those other potential jurors was also not married, had no children, and was not attending college. That other potential juror, however, rather than subscribing to "Car and Driver," subscribed to "Time" magazine and did not indicate that he had a hearing impairment. Accordingly, as the State points out, no other juror had all key characteristics in common with the stricken juror. See United States v. Hughes, 970 F.2d 227, 231-32 (7th Cir. 1992). And based on a comparison of the stricken juror with the other potential jurors, the State legitimately could have concluded that his youth, limited life experience, and reading interests made him one of the less sophisticated potential jurors and, therefore, not a person it wanted on the jury, irrespective of his race. See generally State v. Cosey, 873 P.2d 1177, 1179 (Utah Ct. App.) ("[T]he selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities.") (citation and internal quotation marks omitted), cert. denied, 883 P.2d 1359 (Utah 1994).

¶33 Second, Defendant suggests that the State's stated reason for striking the prospective juror, namely that he is deaf in one ear, was also pretextual because the State "could have questioned him further" after he responded affirmatively when the court asked if he was able to hear the judge. Although "failure to examine the juror or perfunctory examination" by the State is one factor the court considers when determining if the strike was a pretext for racial discrimination, "the prosecutor's failure to voir dire [the prospective juror] does not make his facially valid explanation for dismissing [him] pretextual as a matter of law." State v. Bowman, 945 P.2d 153, 155-56 (Utah Ct. App. 1997). And, although the stricken juror indicated that he had thus far been able to hear the proceedings, from the cold record we have no way of knowing if his bearing or mannerisms indicated otherwise or at least suggested cause for concern. Cf. Cosey, 873 P.2d at 1179-80 ("This court has . . . recognized the difficulty of trying to assess what counsel was thinking during jury selection, because of our inability, on appeal, to view the jurors and assess their potential bias. Only those present, the court and counsel, have that advantaged view. . . . [T]he transcript reveals nothing about [the juror's] demeanor or other intangible characteristics that constitute the collage of attributes attorneys assess in choosing jurors. For all we know [he] was . . . the only one who glanced disparagingly at the

prosecution or sympathetically toward the defendant. Our review of counsel's performance is inherently hampered by our necessary reliance on only the lifeless transcript to assess the dynamic and highly judgmental process of jury selection.") (second and third alterations in original) (citations and internal quotation marks omitted). In any event, the fact the stricken juror was deaf in one ear provided a specific and legitimate basis, irrespective of his race, that would warrant the prosecution in being concerned about whether he would, in actuality, be able to fully hear and understand the proceedings. See State v. Colwell, 2000 UT 8, ¶¶ 15-19, 994 P.2d 177

¶34 Given all the evidence and circumstances before the trial court, and with due deference to the trial court's ability to judge the credibility of the attorneys and to personally observe the prospective juror peremptorily stricken by the State, see Cosey, 873 P.2d at 1179-80, we affirm the court's determination that the evidence as a whole did not suggest racial motivation in striking him from the jury.[19]

CONCLUSION

¶35 Even if the trial court erred in admitting hearsay and photographs, Defendant has not demonstrated any prejudice caused by such evidence. Defendant has also failed to establish that, in light of balancing the relevant factors, fundamental fairness required dismissal of his case after evidence in the vehicle was destroyed. The trial court did not err in reopening the case to give the State an opportunity to conclusively prove Defendant's identity with regard to the aggravating circumstance. Defendant requested additional briefing on the aggravating circumstance and gave no indication that identity was an issue until the additional briefing. Defendant's counsel also made statements at trial fostering the court's and the State's misconception that identity was not at issue. The decision imposing consecutive sentences is sustainable because the record shows that the trial court had evidence on all the relevant sentencing factors before it and adequately considered those factors. Finally, the trial court's determination that Defendant's Batson challenge failed

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19. Although the trial court's ruling could have been more detailed, see State v. Cannon, 2002 UT App 18, ¶¶ 11-12, 14-16, 41 P.3d 1153 (discussing the necessity of a complete record and assessment of the relevant facts and law with regard to a Batson challenge), Defendant has not challenged the adequacy of the trial court's ruling, but only the sufficiency of the evidence to support it.

because the State was not racially motivated in peremptorily striking a prospective juror is supported by the evidence.

¶36 Affirmed.

Gregory K. Orme, Judge

¶37 WE CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

Pamela T. Greenwood,
Senior Judge

243 P.3d 902
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Henry Louis JACKSON, Defendant and Appellant.

No. 20080418–CA.
Nov. 18, 2010.

Synopsis

Background: Defendant was convicted in a jury trial in the Third District Court, Salt Lake Department, Randall N. Skanchy, J., of attempted aggravated murder, cruelty to animals, and assault. Defendant appealed.

Holdings: The Court of Appeals, Orme, J., held that:

[1] any error in admitting officers' alleged hearsay testimony and allegedly prejudicial photographic depiction of victims' injuries was not reversible error;

[2] State's alleged destruction of evidence did not warrant dismissal of charges;

[3] trial court did not abuse its discretion in reopening case to allow State to present evidence of defendant's identity with regard to prior conviction;

[4] two consecutive sentences of five years to life for attempted murder convictions was not an abuse of discretion; and

[5] peremptory strike of prospective juror who was young and had hearing impairment did not violate *Batson*.

Affirmed.

Attorneys and Law Firms

*906 Lori J. Seppi, Salt Lake City, for Appellant.

Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City, for Appellee.

Before Judges MCHUGH, ORME, and GREENWOOD.*

AMENDED OPINION [1]

ORME, Judge:

¶ 1 Defendant Henry Louis Jackson was convicted of several offenses, including attempted murder. On appeal, he raises many issues, including whether the trial court improperly admitted hearsay and photographs; whether the trial court erred in not dismissing the case after the State "destroyed" evidence in a vehicle used in the attempted murder; whether the State was racially motivated in striking a potential juror; and whether the trial court erred in reopening the case and in sentencing Defendant. We affirm.

BACKGROUND [2]

¶ 2 On November 9, 2006, a mother and her eighteen-year-old son returned home after picking up some lunch. As the mother began walking toward her apartment, she saw Defendant, her estranged boyfriend, parked nearby. She sat down on a curb and told her son, who was still by their car retrieving his pit bull, that Defendant was back. Defendant then drove toward the mother, hit her with his car, rolled back over her lower leg, and maneuvered the car so it appeared Defendant was going to hit her again. After giving his mother the pit bull, the son tried to stop Defendant by opening the front passenger door of Defendant's car and trying to hit him. According to the son, he did not make contact with Defendant.

¶ 3 Defendant had a large knife and cut the son's hand when the son tried to grab the knife. Defendant then stabbed the son's arm, whereupon the son retreated from the car and started running away. [3] Defendant chased the son and stabbed him again, inflicting additional wounds to his back and chest. After seeing Defendant stab her son in the back, the mother released the pit bull, and the dog chased Defendant. Defendant stopped pursuing the son and stabbed the pit bull in the throat. Defendant then

approached the mother, "picked [her] up by [her] shirt," and started dragging her toward his car.[4] The mother testified that "he was hitting me in the head with the back of the *907 knife telling me now talk to me bitch."[5] After letting the mother go, Defendant left the scene and was later arrested.

¶ 4 Three eyewitnesses testified at trial, two of whom were standing in a nearby doorway and yelling for the son to come toward them to safety and one who observed the events through her sliding-glass door. Collectively, the eyewitness testimony established that (1) there was a loud bang that sounded like a car crash; (2) the mother was on the ground, appeared injured, and was saying Defendant had hit her with the car; (3) Defendant, armed with a knife, left his car and chased the son while threatening to kill him; (4) Defendant stabbed the son in the back with the knife; (5) the pit bull approached Defendant, and Defendant stabbed the pit bull; and (6) Defendant then went back to the mother, who could barely stand, held the knife to her neck, and threatened to kill her.[6]

¶ 5 The State charged Defendant with two counts of attempted aggravated murder, first degree felonies, *see* Utah Code Ann. § 76–5–202(1)(i)(iii) (Supp.2009) (aggravated murder), *id.* §§ 76–4–101, –102(1)(a) (2008) (defining attempt and classifying attempt offenses); one count of cruelty to animals, a class B misdemeanor, *see id.* § 76–9–301(2)(c), (3)(a) (2008); and one count of assault, a class B misdemeanor, *see id.* § 76–5–102(1)–(2).[7] Prior to trial, Defendant moved to dismiss the case, claiming that the State had destroyed evidence by releasing his car to its lienholder, which promptly cleaned the car and offered it for sale before Defendant was able to examine it. Defendant also claimed that the evidence in the car was crucial to his self-defense theory. He hoped to have obtained blood samples from the car that, upon testing, would have revealed canine blood in the car, which Defendant claims would have corroborated his claim that the pit bull attacked him, making self-defense necessary. At the hearing on the issue, it was clear that the State had taken blood samples from the car and, although the State had not submitted the samples for testing, the State indicated that it would "address the issue" if Defendant wanted to. The trial court denied Defendant's motion to dismiss, and the case proceeded to trial.

¶ 6 During jury voir dire, the State exercised one of its peremptory challenges on a prospective juror who had a high school education, worked as a mechanic, subscribed to "Car and Driver" magazine, and was deaf in one ear. Defense counsel objected to the strike pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), arguing that the prospective juror was the only member of a minority group on the panel, though defense counsel could not "hazard to guess as to [the prospective juror]'s racial background." The State opposed the challenge by stating it struck the prospective juror due to his hearing problem and because he seemed too young. The State also pointed out the unlikelihood that the stricken juror would have served in any event, due to his position within the jury pool as number forty-six. In denying Defendant's *Batson* motion, the trial court apparently determined that the State was not racially motivated for the reasons the State offered.

¶ 7 The trial, held in December of 2007, was bifurcated so that only evidence on the underlying charges was presented to the jury, which found Defendant guilty on all counts. After the jury was released, the State presented the trial court with its evidence on the aggravating circumstance, i.e., Defendant's prior murder conviction. Defendant argued that the prior crime was not murder, but manslaughter. Defendant also *908 requested additional time for briefing his position on the aggravating circumstance. When Defendant filed his brief, he challenged whether the State had sufficiently established his identity with regard to the previous conviction. At a hearing in January of 2008, the trial court allowed the State additional time to prove Defendant's identity based on the court's determinations that Defendant, having apparently conceded the identity issue during trial by making reference to Defendant's prior conviction, raised the identity issue for the first time after trial and that the witness who could authenticate the prior conviction was on military leave. The court also noted, in response to Defendant's objection, that it did not think the proceedings had been officially closed because it had allowed Defendant additional time for argument and submission of evidence.

¶ 8 At the next hearing, in April 2008, the trial court determined that the State had established Defendant's identity as it related to the previous murder conviction and, thus, had proven the aggravating circumstance. The court thereafter sentenced Defendant to two consecutive

sentences of five years to life for the attempted aggravated murder convictions and 180 days of jail time for the two class B misdemeanors, with credit for time served.

ISSUES AND STANDARDS OF REVIEW

[1] [2] [3] ¶ 9 Defendant first argues that the trial court erred in admitting hearsay from two police officers, claiming that the testimony did not fall within the excited utterance or prior consistent statement exceptions. *See* Utah R. Evid. 803(2), 801(d)(1)(B). When reviewing rulings on hearsay, we review "[l]egal questions regarding admissibility ... for correctness, ... questions of fact ... for clear error," and the final "ruling on admissibility for abuse of discretion." *State v. Rhinehart,* 2006 UT App 517, ¶ 10, 153 P.3d 830 (citations and internal quotation marks omitted). Defendant also challenges the trial court's decision to admit photographic evidence, asserting that the relevance of the photographs was outweighed by their prejudicial impact under rule 403 of the Utah Rules of Evidence, *see* Utah R. Evid. 403. "A trial court's ruling under rule 403 is reviewed for abuse of discretion." *State v. Bluff,* 2002 UT 66, ¶ 47, 52 P.3d 1210, *cert. denied,* 537 U.S. 1172, 123 S.Ct. 999, 154 L.Ed.2d 914 (2003). Evidentiary errors on the part of the trial court will only be reversed if prejudicial. *See State v. Calliham,* 2002 UT 86, ¶ 45, 55 P.3d 573; *State v. Dunn,* 850 P.2d 1201, 1221 (Utah 1993).

[4] ¶ 10 Defendant additionally claims that the trial court erred in denying his motion to dismiss based on the State's destruction of evidence. "Whether the State's destruction of potentially exculpatory evidence violates due process is a question of law that we review for correctness. 'However, because this question requires application of facts in the record to the due process standard, we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations.' " *State v. Tiedemann,* 2007 UT 49, ¶ 12, 162 P.3d 1106 (citation omitted).

[5] [6] ¶ 11 Next, Defendant challenges the trial court's decision to reopen the case to allow the State to present additional evidence on the aggravating circumstance. "A motion to reopen to take additional testimony when a case has been submitted to the court, but prior to the entry of judgment, is addressed to the sound discretion of the [trial] court." *Lewis v. Porter,* 556 P.2d 496, 497 (Utah 1976). "A court should consider a motion to reopen to take additional testimony in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice." *Id.*

[7] ¶ 12 Defendant also asserts that the trial court improperly entered consecutive sentences without considering all the relevant factors. "We review sentences for abuse of discretion. 'An abuse of discretion may be manifest if the actions of the judge in sentencing were inherently unfair or if the judge imposed a clearly excessive sentence.' " *State v. Valdez,* 2008 UT App 329, ¶ 4, 194 P.3d 195 (citations omitted), *cert. denied,* 200 P.3d 193 (Utah 2008).

[8] ¶ 13 Finally, Defendant seeks reversal of the trial court's ruling on his *Batson* ***909** challenge, i.e., the court's determination that the State was not racially motivated in striking the prospective juror. The issue presented only involves analysis of the trial court's decisions at the second and third steps of its *Batson* review. The second step, a determination of whether the State presented a facially neutral reason for the strike, is reviewed for an abuse of discretion. *See State v. Valdez,* 2004 UT App 214, ¶ 17, 95 P.3d 291, *rev'd on other grounds,* 2006 UT 39, 140 P.3d 1219.[8] The third step, whether the State's actual motivation was discriminatory, is reviewed for clear error because it involves a weighing of the evidence. *See id.* ¶ 16.

ANALYSIS

I. Evidentiary Claims Failing Due to No Prejudice

[9] ¶ 14 Defendant has failed to demonstrate prejudice with regard to his arguments that the trial court improperly admitted hearsay under the criteria governing excited utterances, *see* Utah R. Evid. 803(2), and prior consistent statements, *see id.* R. 801(d)(1)(B), and that it improperly admitted photographs under rule 403, *see id.* R. 403. *See generally State v. Calliham,* 2002 UT 86, ¶ 45, 55 P.3d 573 ("Notwithstanding error by the trial court [in admitting evidence], we will not reverse a conviction if we find that the error was harmless."). Defendant claims the officers' testimony unfairly bolstered the victims' testimony, particularly with regard to how the altercation began, to which no other eyewitnesses testified. He reasons that without the officers' testimony reiterating and reinforcing the victims' version of how the altercation

began, the outcome of the case would have rested on whether the jury found Defendant's self-defense theory, particularly that he was not the first aggressor, more credible than the victims' testimony that Defendant was the first aggressor when he ran over the mother with his car.

¶ 15 Defendant's theory, however, fails to take into account the eyewitnesses who heard what sounded like a car crash and who then observed the injured mother on the ground saying the Defendant had just hit her with his car. The eyewitnesses also saw Defendant get out of his car, chase the mother's son with a butcher knife while threatening to kill him, stab the son in the back, stab the pit bull in the throat, and then put the knife to the mother's throat while cursing and threatening her.

[10] ¶ 16 Even if Defendant was the first aggressor, when faced with such evidence reasonable minds clearly would conclude, beyond a reasonable doubt, that the risk of death or serious injury after the son retreated from Defendant's car was not imminent and that Defendant used unreasonable and unnecessary force to protect himself.[9] This defeats his self-defense theory. *See* Utah Code Ann. § 76–2–402(1) (2008) ("A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force[.]"); *id.* § 76–2–402(5) ("In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors: (a) the nature of the danger; (b) the immediacy ***910** of the danger; (c) the probability that the unlawful force would result in death or serious bodily injury; (d) the other's prior violent acts or violent propensities; and (e) any patterns of abuse or violence in the parties' relationship."); *State v. Duran,* 772 P.2d 982, 985 (Utah Ct.App.1989) (discussing that the use of force to protect oneself must be "objectively reasonable") (citation and internal quotation marks omitted). *See also State v. Wetzel,* 868 P.2d 64, 69 (Utah 1993) (determining that even where the trial court erred in admitting hearsay, "reversal [wa]s not warranted" because any error was harmless when "the record indicate[d] that there was ample evidence to convict defendant even without" the hearsay and the defendant therefore did not "show a 'reasonable likelihood that the error affected the outcome of the proceedings' ") (citations omitted).

¶ 17 In any event, the alleged hearsay evidence was cumulative because it reiterated the essence of testimony presented by the victims or other eyewitnesses, even if the exact wording was different. Contrary to Defendant's assertion, the alleged additional evidence provided by one of the police officers, insofar as it went beyond the victims' own account of events—namely, that the mother said Defendant threatened to kill her after stabbing the son—was also provided in an eyewitness's testimony. *See State v. Thomas,* 777 P.2d 445, 449–50 (Utah 1989) (holding that hearsay improperly admitted under the prior consistent statement exception was cumulative and not harmful in that it was unlikely to have changed the outcome of the trial).

[11] ¶ 18 The same is true of the photographic evidence. Irrespective of whether the photographs were properly admitted under rule 403 of the Utah Rules of Evidence, *see* Utah R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"), Defendant has not demonstrated that the photographic depiction of the severe injuries he admittedly inflicted prejudiced the trial's outcome, especially in light of the highly descriptive eyewitness testimony negating his self-defense theory. *See generally State v. Dunn,* 850 P.2d 1201, 1221 (Utah 1993) (stating that "[e]ven if we find that the trial court's decision to admit [evidence under rule 403] was 'beyond the limits of reasonability,' we will reverse only if the error was harmful, i.e., if absent the error there is a reasonable likelihood of an outcome more favorable to the defendant") (citations omitted).

II. Destruction of Evidence

[12] ¶ 19 Defendant's argument that the trial court erred in denying his motion to dismiss based on the State's destruction of evidence is also unavailing. He claims that the State violated his Due Process rights when it released his car to the lienholder, which cleaned the car's interior, potentially destroying evidence, before Defendant had an opportunity to inspect it.

[13] **[14]** ¶ 20 When evaluating a motion to dismiss based on destruction of evidence, courts should consider the "nonexclusive factors" outlined in rule 16 of the Utah Rules of Criminal Procedure:

> (1) the extent to which the prosecution's representation [of the existing evidence] is actually inaccurate, (2) the tendency of the omission or misstatement to lead defense counsel into tactics or strategy that could prejudice the outcome, (3) the culpability of the prosecutor in omitting pertinent information or misstating the facts, and (4) the extent to which appropriate defense investigation would have discovered the omitted or misstated evidence.

State v. Tiedemann, 2007 UT 49, ¶ 41, 162 P.3d 1106 (alteration in original) (citation and internal quotation marks omitted). Additionally, if a defendant establishes "a reasonable probability that lost or destroyed evidence would be exculpatory," courts also need to consider

> (1) the reason for the destruction or loss of the evidence, including the degree of negligence or culpability on the part of the State; and (2) the degree of prejudice to the defendant in light of the materiality and importance of the missing evidence in *911 the context of the case as a whole, including the strength of the remaining evidence.

Id. ¶ 44.

¶ 21 Here, the relevant factors favor the State and, thus, countenance against dismissal. Defendant claims that the car may have contained some of the pit bull's blood, which blood allegedly would have supported his self-defense theory by potentially establishing that the son and pit bull attacked first. Although Defendant may have been able to demonstrate that pit bull blood would have been found inside the car had the car not been returned to the lienholder and cleaned, any such blood within the car could have been attributed to having come from Defendant's person after he stabbed the pit bull in the throat.[10] Additionally, even if pit bull blood was in the car, the jury still could have concluded beyond a reasonable doubt that Defendant was guilty because the presence of pit bull blood in the car would not have significantly negated the other strong evidence supporting that Defendant became the aggressor when he left the car, that any danger was not immediate after the son retreated, and that Defendant's use of force was objectively unreasonable. Thus, Defendant has failed to establish that he was prejudiced by any destruction of evidence.

¶ 22 Additionally, the facts here simply do not speak of bad faith on the part of the State. After the State photographed and took blood samples from the car, it was taken by the lienholder and cleaned. This procedure suggests normal, routine cataloguing and disposition of evidence, not bad faith destruction.[11] Moreover, although the State chose not to test the retained blood samples, Defendant could have had those samples tested to see if any included canine blood, which Defendant apparently opted not to do. When considering that the presence of canine blood likely would not have changed the outcome of the trial and that the loss of the evidence does not suggest bad faith on the State's part, we affirm the trial court's denial of Defendant's motion to dismiss. *See generally Tiedemann*, 2007 UT 49, ¶ 45, 162 P.3d 1106 ("The touchstone for the balancing process is fundamental fairness. If the behavior of the State in a given case is so reprehensible as to warrant sanction, a sanction might be available even where prejudice to the defendant is slight or only speculative. If prejudice to the defendant, on the other hand, is extreme, fairness may require sanction even where there is no wrongdoing on the part of the State. In between those extremes, we have confidence that trial judges can strike a balance that preserves defendants' constitutional rights without undue hardship to the prosecution.").

III. Reopening the Case

[15] ¶ 23 Defendant has not succeeded in showing that the trial court abused its discretion in reopening the case to allow the State to present evidence of his identity with regard to his prior conviction. *See Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976) (stating that a trial court's decision to reopen a case is within "the sound discretion

of the [trial] court"). Even if defense counsel's statements at trial regarding Defendant's prior conviction did not technically amount to an admission of identity, and even if the documents the State submitted during the trial did not conclusively prove his identity, the trial court did not abuse its discretion in reopening the case. The trial court's actions were justified when defense counsel's statements during the relevant proceedings suggested that identity was not an issue; when during trial the State produced documents to establish Defendant's prior conviction and stated its belief that Defendant's name on ***912** the documents was sufficient to establish Defendant's prior conviction and Defendant neither objected nor argued that the evidence produced did not establish Defendant's identity; and when Defendant first disputed his identity through additional briefing the court allowed following the trial. Under these circumstances, where Defendant essentially misled the State and the court, or at least fostered the State's and the court's misperception that identity was not an issue, it was entirely fair, and in the interest of justice, for the trial court to exercise its discretion and reopen the case so the State could admit additional evidence conclusively establishing Defendant's identity.[12] *See id.* ("A court should consider a motion to reopen to take additional testimony in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice."); *Davis v. Riley*, 20 Utah 2d 325, 437 P.2d 453, 455 (1968) ("[W]hen a case has ... been submitted to the court[,] whether [it] will allow the presentation of further evidence is ordinarily a matter of discretion.... The word 'discretion' itself imports that the action should be taken with reason and in good conscience, and with an understanding of and consideration for the rights of the parties, for the purpose of serving the always desired objective of doing justice between them.").

IV. Consecutive Sentences

[16] ¶ 24 Defendant's argument that the trial court abused its discretion in sentencing him to "two terms of five years to life consecutively," without "adequately consider[ing]" his rehabilitative needs and that his convictions came from "one criminal episode," also fails.[13] "In determining whether state offenses are to run concurrently or consecutively, the court shall *consider* the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant." Utah Code Ann. § 76–3–401(2) (2008) (emphasis added). The statute specifically authorizes the court to "impose consecutive sentences for offenses arising out of a single criminal episode." *Id.* § 76–3–401(5).

¶ 25 In this case, the court clearly heard information regarding the likelihood of Defendant's rehabilitation, i.e., the State's evidence that Defendant's assault on the mother was preceded by Defendant serving time for killing his wife and for a parole violation related to another domestic violence incident. And at the sentencing hearing, Defendant's counsel pointed out that the convictions resulted from a single criminal episode. Defendant has not provided any detailed argument that the trial court's consideration of these facts was inadequate. *Cf. State v. Galli*, 967 P.2d 930, 938 (Utah 1998) (determining that the trial court abused its discretion in ordering consecutive sentences when the record showed that the defendant "did not inflict any physical injuries" and "was incapable ***913** of inflicting serious injury" given the fact he was using a pellet gun; "the amount of money taken ... was relatively small"; the defendant's "prior criminal history consisted of minor traffic offenses and one misdemeanor theft conviction"; "[the defendant] voluntarily confessed and admitted responsibility" and he "expressed a commitment and hope to improve himself"; and the defendant's actions during his flight from justice demonstrated "he ha[d] the ability to improve himself and become a productive, law-abiding citizen"); *State v. Strunk*, 846 P.2d 1297, 1302 (Utah 1993) ("[T]he trial court abused its discretion in failing to sufficiently consider defendant's rehabilitative needs in light of his extreme youth and the absence of prior violent crimes."). Therefore we cannot say that the trial court abused its discretion in ordering consecutive sentences based on inadequate consideration of Defendant's rehabilitative needs and the fact that a single criminal episode defines the nature of the criminal activity for which he was convicted. *See generally State v. Valdez*, 2008 UT App 329, ¶ 8, 194 P.3d 195 ("[A] trial court need not state to what extent it considered each of the statutory factors at the sentencing hearing.") (citation and internal quotation marks omitted), *cert. denied*, 200 P.3d 193 (Utah 2008).

¶ 26 Defendant's argument that the court "failed to consider that [the mother]'s injuries were relatively minor" is also without merit. The same judge presided over all relevant proceedings, i.e., the underlying jury trial, the proceedings regarding the aggravating circumstances, and

the sentencing hearing. Therefore, the court was fully cognizant of the details of the crime and the extent of the injuries inflicted. *Cf. State v. Helms,* 2002 UT 12, ¶¶ 12–13, 40 P.3d 626 (upholding sentence when the record showed the trial court reviewed a presentence report that had information regarding all the factors); *id.* ¶ 14 ("[T]he fact [the defendant] views his situation differently than did the trial court does not prove that the trial court neglected to consider the factors.... Indeed, ... sentencing reflects the personal judgment of the court, and consequently, a sentence imposed by the trial court should be overturned only when it is inherently unfair or clearly excessive."). In sum, the record shows that evidence bearing on all the statutory factors was before the trial court and considered by it, and the evidence readily supports the conclusion that the trial court did not abuse its discretion in ordering consecutive sentences.

V. *Batson* Challenge

[17] **[18]** ¶ 27 Finally, irrespective of whether Defendant waived his *Batson* challenge,[14] *see Batson v. Kentucky,* 476 U.S. 79, 88–99, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (determining Equal Protection Clause is implicated if counsel uses peremptory challenges solely on the basis of race), Defendant has not convinced us that the State violated the Equal Protection Clause in the course of jury selection. In general, during the jury selection process parties are "permitted to ***914** exercise their peremptory challenges for virtually any reason, or for no reason at all." *State v. Cannon,* 2002 UT App 18, ¶ 6, 41 P.3d 1153. *Accord* Utah R.Crim. P. 18(d) ("A peremptory challenge is an objection to a juror for which no reason need be given."). However, "parties in a criminal action may not discriminate against potential jurors by exercising peremptory challenges solely on the basis of race." *State v. Colwell,* 2000 UT 8, ¶ 14, 994 P.2d 177.

[19] **[20]** **[21]** **[22]** **[23]** ¶ 28 Courts employ a three-step analytical process to evaluate the merits of a *Batson* challenge. *See id.* ¶¶ 17–20; *Cannon,* 2002 UT App 18, ¶¶ 7–11, 41 P.3d 1153. The opponent of the strike, Defendant here, "must first make out the prima facie case by presenting facts adequate to raise an inference of improper discrimination." *Colwell,* 2000 UT 8, ¶ 18, 994 P.2d 177. Then, if the trial court determines that the opponent met his or her burden of proving a prima facie case, the burden shifts to the proponent of the strike, the State here, to provide a facially neutral reason for its use of the peremptory challenge. *See id.* ¶ 19; *Cannon,* 2002 UT App 18, ¶¶ 9–10, 41 P.3d 1153. "This [second] step 'does not demand an explanation that is persuasive, or even plausible,' " *Cannon,* 2002 UT App 18, ¶ 9, 41 P.3d 1153 (quoting *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam)), and " 'need not rise to the level justifying exercise of a challenge for cause,' " *Colwell,* 2000 UT 8, ¶ 22, 994 P.2d 177 (quoting *Batson,* 476 U.S. at 97, 106 S.Ct. 1712). A reason will be considered "facially valid," *Cannon,* 2002 UT App 18, ¶ 10, 41 P.3d 1153, if it is "(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate," *Colwell,* 2000 UT 8, ¶ 22, 994 P.2d 177 (citation and internal quotation marks omitted). The requirement that the explanation be legitimate does not mean "a reason that makes sense, but a reason that does not deny equal protection." *Purkett,* 514 U.S. at 769, 115 S.Ct. 1769. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 768, 115 S.Ct. 1769 (citation and internal quotation marks omitted). *Accord Colwell,* 2000 UT 8, ¶ 19, 994 P.2d 177.

[24] **[25]** **[26]** ¶ 29 Finally, under the third step, if the State has succeeded in providing a facially neutral explanation, the trial court then must evaluate all the evidence before it and determine whether the State's explanation for its peremptory challenge, although facially neutral, was actually just "a pretext to disguise a racial motive." *Cannon,* 2002 UT App 18, ¶ 11, 41 P.3d 1153. In doing so, "trial courts [need to] 'undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " *State v. Pharris,* 846 P.2d 454, 461 (Utah Ct.App.) (quoting *Batson,* 476 U.S. at 93, 106 S.Ct. 1712) (additional citation and internal quotation marks omitted), *cert. denied,* 857 P.2d 948 (Utah 1993).

> [T]he presence of one or more of [the following] factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror,

> (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.[15]

*915 *State v. Cantu*, 778 P.2d 517, 518–19 (Utah 1989) (citation and internal quotation marks omitted). As this determination rests largely on credibility, an appellate court will only set aside a trial court's factual determinations under step three if they are clearly erroneous. *See id.* at 518.

¶ 30 In this case, the trial court determined that Defendant had made a prima facie case of racial motivation. The State then explained that it used a peremptory challenge on the prospective juror due to his young age and deafness in his right ear.[16] In denying Defendant's *Batson* motion, the trial court apparently accepted these reasons as facially neutral and not given as a pretext.

[27] [28] ¶ 31 Our analysis of this case's specific facts, then, begins with *Batson*'s second step because, as the parties agree, once the State has "offered [an] explanation for the peremptory challenge[ ] and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing [as required under *Batson*'s first step] becomes moot." *State v. Chatwin*, 2002 UT App 363, ¶ 9, 58 P.3d 867 (first alteration in original) (citation and internal quotation marks omitted), *cert. denied*, 67 P.3d 495 (Utah 2003). The State satisfied *Batson*'s second step by providing reasons for its peremptory challenge, i.e., youth and a hearing impairment, that were facially neutral—not "peculiar to any race"—and related to the case at hand.[17] *See Colwell*, 2000 UT 8, ¶¶ 15, 19, 22, 994 P.2d 177 (stating the neutrality requirements and determining that the State's proffered reason for its peremptory strike of a potential juror who "was 'quite elderly [and] has difficulty hearing' " was "facially valid because 'discriminatory intent [wa]s [not] inherent' in the prosecutor's explanation") (first and third alterations in original) (citation omitted). *See generally Purkett*, 514 U.S. at 766, 769, 115 S.Ct. 1769 (discussing that the prosecution struck a potential juror because he had "long, ... curly, unkempt hair" and "a mustache and a goatee type beard," which characteristics made him *916 seem like he would "not be a good juror," and he was "suspicious to" the attorney, and determining that these reasons passed step two because such physical characteristics were not "peculiar to any race") (citations and internal quotation marks omitted); *Cannon*, 2002 UT App 18, ¶ 10, 41 P.3d 1153 (determining that although the prosecution's explanation that it struck a juror because "he had difficulty explaining himself, [and was] one of the more undereducated people" on the panel was somewhat "suspect," it passed the facial neutrality requirement of step two);[18] *State v. Harrison*, 805 P.2d 769, 777 (Utah Ct.App.) (indicating that one minority juror had been excused for cause due to hearing issues), *cert. denied*, 817 P.2d 327 (Utah 1991). The State's proffered reasons also satisfied *Batson*'s second step requirements that the reasons be specific and legitimate, i.e., no "discriminatory intent [wa]s inherent in the prosecutor's explanation." *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769. *See Colwell*, 2000 UT 8, ¶ 22, 994 P.2d 177. Therefore, we conclude that the State presented a racially neutral explanation that justified its peremptory challenge.

[29] ¶ 32 Under *Batson*'s third step, Defendant initially claims that the State's reasoning that the stricken juror was "to[o] young" was just a pretext and points to several potential jurors that the State did not strike who were about the same age. *See Cantu*, 778 P.2d at 518–19 (stating that one factor that "will tend to show that the state's reasons are ... an impermissible pretext [is] a challenge based on reasons equally applicable to juror[s] who were not challenged"). However, only one of those other potential jurors was also not married, had no children, and was not attending college. That other potential juror, however, rather than subscribing to "Car and Driver," subscribed to "Time" magazine and did not indicate that he had a hearing impairment. Accordingly, as the State points out, no other juror had all key characteristics in common with the stricken juror. *See United States v. Hughes*, 970 F.2d 227, 231–32 (7th Cir.1992). And based on a comparison of the stricken juror with the other potential jurors, the State legitimately could have concluded that his youth, limited life experience, and reading interests made him one of the less sophisticated potential jurors and, therefore, not a person it wanted on the jury, irrespective of his race. *See generally State v. Cosey*, 873 P.2d 1177, 1179 (Utah Ct.App.) ("[T]he selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own

insights and empathetic abilities.") (citation and internal quotation marks omitted), *cert. denied,* 883 P.2d 1359 (Utah 1994).

[30] ¶ 33 Second, Defendant suggests that the State's stated reason for striking the prospective juror, namely that he is deaf in one ear, was also pretextual because the State "could have questioned him further" after he responded affirmatively when the court asked if he was able to hear the judge. Although "failure to examine the juror or perfunctory examination" by the State is one factor the court considers when determining if the strike was a pretext for racial discrimination, "the prosecutor's failure to voir dire [the prospective juror] does not make his facially valid explanation for dismissing [him] pretextual as a matter of law." *State v. Bowman,* 945 P.2d 153, 155–56 (Utah Ct.App.1997). And, although the stricken juror indicated that he had thus far been able to hear the proceedings, from the cold record we have no way of knowing if his bearing or mannerisms indicated otherwise or at least suggested cause for concern. *Cf. Cosey,* 873 P.2d at 1179–80 ("This court has ... recognized the difficulty of trying to assess what counsel was thinking during jury selection, because of our inability, on appeal, to view the jurors and assess their potential bias. Only those present, the court and counsel, have that advantaged view.... [T]he transcript reveals nothing about [the juror's] demeanor or other intangible characteristics that constitute the collage of attributes attorneys assess in choosing jurors. For all we know [he] was ... the only one who glanced disparagingly at the prosecution or sympathetically ***917** toward the defendant. Our review of counsel's performance is inherently hampered by our necessary reliance on only the lifeless transcript to assess the dynamic and highly judgmental process of jury selection.") (second and third alterations in original) (citations and internal quotation marks omitted). In any event, the fact the stricken juror was deaf in one ear provided a specific and legitimate basis, irrespective of his race, that would warrant the prosecution in being concerned about whether he would, in actuality, be able to fully hear and understand the proceedings. *See State v. Colwell,* 2000 UT 8, ¶¶ 15–19, 994 P.2d 177

¶ 34 Given all the evidence and circumstances before the trial court, and with due deference to the trial court's ability to judge the credibility of the attorneys and to personally observe the prospective juror peremptorily stricken by the State, *see Cosey,* 873 P.2d at 1179–80, we affirm the court's determination that the evidence as a whole did not suggest racial motivation in striking him from the jury. [19]

CONCLUSION

¶ 35 Even if the trial court erred in admitting hearsay and photographs, Defendant has not demonstrated any prejudice caused by such evidence. Defendant has also failed to establish that, in light of balancing the relevant factors, fundamental fairness required dismissal of his case after evidence in the vehicle was destroyed. The trial court did not err in reopening the case to give the State an opportunity to conclusively prove Defendant's identity with regard to the aggravating circumstance. Defendant requested additional briefing on the aggravating circumstance and gave no indication that identity was an issue until the additional briefing. Defendant's counsel also made statements at trial fostering the court's and the State's misconception that identity was not at issue. The decision imposing consecutive sentences is sustainable because the record shows that the trial court had evidence on all the relevant sentencing factors before it and adequately considered those factors. Finally, the trial court's determination that Defendant's *Batson* challenge failed because the State was not racially motivated in peremptorily striking a prospective juror is supported by the evidence.

¶ 36 Affirmed.

¶ 37 WE CONCUR: CAROLYN B. McHUGH, Associate Presiding Judge and PAMELA T. GREENWOOD, Senior Judge.

All Citations

243 P.3d 902, 669 Utah Adv. Rep. 9, 2010 UT App 328

Footnotes

* Judge Pamela T. Greenwood participated in this case as a regular member of the Utah Court of Appeals. She retired from the court on January 1, 2010, before this decision issued. Hence, she is designated herein as a Senior Judge. *See* Utah Code Ann. § 78A–3–103(2) (2008); Sup.Ct. R. of Prof'l Practice 11–201(6).

1 This amended opinion replaces our opinion in this case issued on May 27, 2010. Having granted the State's petition for rehearing, we have revised footnote 16. The opinion is otherwise unchanged.

2 Our recitation of the facts is drawn from the testimony of the victims and eyewitnesses, presented in the light most consistent with the jury verdict. *See generally State v. Hales*, 2007 UT 14, ¶ 36, 152 P.3d 321 ("[W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury.") (citation and internal quotation marks omitted). Defendant did not testify at trial. In stating the facts, we have not drawn on testimony presented by the investigating officers to which Defendant objects.

3 In raising his self-defense theory, Defendant pointed to the son's size. The son weighed approximately 320 pounds and stood over six feet tall.

4 In support of his theory that the son and pit bull actually started the altercation when the son approached the car, and that Defendant was only defending himself, Defendant challenged the credibility of the victims' version of events as thus far outlined. In argument at trial, Defendant's counsel pointed to Defendant's history with the victims, including that he and the mother had been "on again, off again lover[s]," that he and the son had recently had a confrontation, and that the mother sustained relatively minor injuries for having been hit by a car. Defense counsel also suggested that it was unlikely the son would have given the mother the pit bull before approaching Defendant's car. Defense counsel posited that the victims concocted their version of events to avoid criminal liability for the son's having first attacked Defendant. As indicated in our discussion of the evidentiary issues, however, the evidence presented by the State sufficiently negated Defendant's self-defense theory beyond a reasonable doubt.

5 Defendant apparently had been helping the victims move and, according to the mother, was angry because she originally had refused to tell him where she was moving.

6 To avoid unnecessary repetition in detailing what each eyewitness observed or heard, we describe the eyewitnesses' testimony as a whole, while acknowledging that not every eyewitness saw or heard the entire incident as we have summarized it.

7 We cite to the current versions of the statutes as recent amendments have no bearing on our analysis. *See* Utah Code Ann. § 76–5–202 amendment notes (2008 & Supp.2009); *id.* §§ 76–4–101 amendment notes, –102 amendment notes (2008); *id.* § 76–9–301 amendment notes (2008); *id.* § 76–5–102 history (2008).

8 In *State v. Valdez*, 2006 UT 39, 140 P.3d 1219, the Utah Supreme Court explicitly declined to address the issue of whether this court applied the correct standard of review in *State v. Valdez*, 2004 UT App 214, 95 P.3d 291. *See* 2006 UT 39, ¶ 12, 140 P.3d 1219.

9 Under Utah's self-defense jurisprudence, it is true that "a person does not have a duty to retreat" when the incident occurs "in a place where" he has a lawful right to remain. Utah Code Ann. § 76–2–402(3) (2008). However, the fact that Defendant was in his car and could have simply driven away to safety after the son retreated from Defendant's car does bear on the issue of whether the perceived danger was imminent and whether Defendant reasonably feared death or serious injury so as to justify the force he used. *See id.* § 76–2–402(1); *State v. Duran*, 772 P.2d 982, 985 (Utah Ct.App.1989).

10 Witness testimony reflected that the pit bull "was bleeding profusely" and "continually," and that "the blood was just squirting out of his neck."

11 At oral argument, the State indicated for the first time that the blood evidence in the vehicle had been "destroyed" earlier than it had previously thought. Counsel for Defendant made a motion in open court for further briefing on the issue of bad faith in light of this new information. We deny counsel's motion because, as indicated, the facts here simply do not suggest bad faith when the evidence was only destroyed after numerous photographs and blood samples were obtained, especially when it appears that such photographs and samples could have been made available to Defendant upon request. Nor was the evidence destroyed for its own sake but, rather, as a result of delivering the car to the lienholder entitled to its possession.

12 Defendant also has not persuaded us that the trial court abused its discretion in allowing the State time to gather evidence in light of the reason for reopening the case and the fact that the witness who could authenticate photographs from the 1982 case was on military leave. Contrary to what Defendant suggests through limited argument on the issue, we do not see that the Double Jeopardy Clause was implicated here, *see generally* U.S. Const. amend. V; Utah Const. art. I, § 12; *Tibbs v. Florida*, 457 U.S. 31, 41, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), because there was never an acquittal or dismissal for insufficient evidence, *see State v. Jackson*, 857 P.2d 267, 269 n. 1 (Utah Ct.App.1993). In this case, the trial court delayed ruling on the aggravating circumstance to allow additional argument and briefing by the parties

as Defendant requested. As the trial court indicated at the subsequent hearing, which hearing was contemplated at the conclusion of the trial, it questioned whether the proceedings had even been completely closed based on the additional briefing and argument it allowed. And although *State v. Gregorious*, 81 Utah 33, 16 P.2d 893 (1932), and *State v. Seel*, 827 P.2d 954 (Utah Ct.App.), *cert. denied*, 836 P.2d 1383 (Utah 1992), both mentioned, in affirming the trial courts' decisions to reopen in those cases, that no delay was entailed by reopening, it does not necessarily follow that if some delay will occur, the trial court abuses its discretion in reopening. *See Gregorious*, 16 P.2d at 895; *Seel*, 827 P.2d at 962.

13 In a single sentence, without legal argument beyond mere citation to authority, Defendant also claims that the trial court "improperly limited the [Parole] Board's discretion 'to release' [Defendant] when he is rehabilitated." We decline to address the issue further, especially given Defendant's failure to demonstrate preservation of this issue. *See* Utah R.App. P. 24(a)(9) (requiring briefs to contain legally supported arguments and record citations).

14 The State has raised the issue of whether Defendant's *Batson* challenge was timely or, more accurately, whether Defendant waived the *Batson* challenge in not pressing the trial court to rule on the issue prior to swearing in the jury and dismissing the venire. In light of our decision to address the merits of the challenge, we do not reach the interesting issue of whether prior case law clearly required defense counsel to insist upon a ruling prior to dismissal of the venire. *See State v. Valdez*, 2006 UT 39, 140 P.3d 1219 (decided before Defendant's trial); *State v. Rosa–Re*, 2008 UT 53, 190 P.3d 1259 (decided after Defendant's trial). *See generally Valdez*, 2006 UT 39, ¶ 19, 140 P.3d 1219 (discussing that the United States Supreme Court has declined to "set forth ... specific guidelines regarding [the] timeliness" of *Batson* challenges but that it has "held that 'only a firmly established and regularly followed state practice may be interposed by a State to prevent subsequent review ... of a federal constitutional claim' ") (second omission in original) (quoting *Ford v. Georgia*, 498 U.S. 411, 423–24, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)). *See also Rosa–Re*, 2008 UT 53, ¶ ¶ 13–14, 190 P.3d 1259 ("clarify[ing] that in the future ... trial courts have an obligation to resolve *Batson* objections before the jury is sworn and the venire dismissed," that "defense counsel also has an absolute obligation to notify the court that resolution is needed before the jury is sworn and the venire dismissed," and that defense counsel's "[f]ailure to do so ... will in the future constitute a waiver of the original objection"); *Valdez*, 2006 UT 39, ¶ 33 n. 19, 140 P.3d 1219 ("We note that this procedure, whereby an objection was made prior to the swearing of the jury but not addressed by the court until after the jury was sworn in and dismissed, will generally not meet the standard we set forth today.").

15 We recognize that Utah case law is not entirely clear on whether a trial court is supposed to consider these additional factors under step two of the analysis (as bearing on whether the proffered reason for the strike is facially neutral), or under step three (as bearing on whether the purportedly facially neutral reason is actually a pretext for discrimination). *Compare State v. Cantu*, 778 P.2d 517, 518–19 (Utah 1989) (listing and considering these factors as part of its analysis under step two and not identifying step three), *and State v. Pharris*, 846 P.2d 454, 463–64 (Utah Ct.App.) (listing and considering these factors as part of its analysis under step two), *cert. denied*, 857 P.2d 948 (Utah 1993), *with State v. Cannon*, 2002 UT App 18, ¶¶ 11–16, 41 P.3d 1153 (discussing these factors under step three of the analysis), *and State v. Bowman*, 945 P.2d 153, 155–56 (Utah Ct.App.1997) (same). Based on *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam), we conclude the best place to consider these factors is at step three of the analysis when the persuasiveness of the prosecution's reason is appropriately considered by the trial court.

In *Purkett*, the United States Supreme Court determined that the federal court of appeals had "erred by combining *Batson*'s second and third steps into one" and emphasized that the persuasiveness of the reason is only relevant at step three. *Id.* at 768, 115 S.Ct. 1769. It also recognized that the court of appeals was probably led astray by language in *Batson* indicating that to be race-neutral "the proponent of a strike must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Id.* (citation and internal quotation marks omitted). The *Purkett* court clarified that "legitimate" did not refer to whether the reason made sense, but whether it denied equal protection. *See id.* at 768–69, 115 S.Ct. 1769. Notably, the cases we cite that discuss the factors at the second step were decided before *Purkett*, *see Cantu*, 778 P.2d at 517; *Pharris*, 846 P.2d at 454, and the cases discussing the factors at the third step were decided after *Purkett*, *see Cannon*, 2002 UT App 18, 41 P.3d 1153; *Bowman*, 945 P.2d at 153. The decision in the later cases to adjust the analysis was likely in response to the clarification of the required analytic steps in *Purkett*. In any event, based on *Purkett*, we conclude that the factors bear on the persuasiveness of the reason and are appropriately considered at the third step.

We also clarify, however, to the extent the later cases indicate otherwise, *see Cannon*, 2002 UT App 18, ¶¶ 9, 12–13, 41 P.3d 1153; *Bowman*, 945 P.2d at 155–56, that whether the reason is "(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate," *State v. Colwell*, 2000 UT 8, ¶ 22, 994 P.2d 177 (citation and internal quotation marks omitted), is appropriately considered at step two under *Batson* and *Purkett*. *See Purkett*, 514 U.S. at 768–69, 115 S.Ct. 1769; *Batson v. Kentucky*, 476 U.S. 79, 98 & n. 20, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

16 As discussed in paragraphs 31–33, *infra*, case law supports that these reasons were racially neutral and that the trial court properly determined the reasons were not a pretext under step three.

17 Whether a juror can hear the proceedings is a relevant concern because a lack of hearing always could affect the outcome of the case if such a juror caught only a portion of the evidence and arguments. *See State v. Colwell*, 2000 UT 8, ¶ 22, 994 P.2d 177 (stating that a "juror's hearing capacity ... would have affected the case to be tried"). Although the State did not elaborate on why hearing was particularly relevant to its case when presenting its reasons to the trial court, whether jurors can hear does seem necessarily relevant. At certain times during the trial, the State asked witnesses to step away from the witness stand, and thus the microphone, to review and mark certain exhibits and continued to question those witnesses during those times.

18 This court, however, ultimately remanded in *Cannon* based on the trial court's failure to adequately explain its ruling regarding the prosecution's explanation and credibility. *See State v. Cannon*, 2002 UT App 18, ¶¶ 14–16, 41 P.3d 1153.

19 Although the trial court's ruling could have been more detailed, *see State v. Cannon*, 2002 UT App 18, ¶¶ 11–12, 14–16, 41 P.3d 1153 (discussing the necessity of a complete record and assessment of the relevant facts and law with regard to a *Batson* challenge), Defendant has not challenged the adequacy of the trial court's ruling, but only the sufficiency of the evidence to support it.

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APPENDIX E

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of

Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Utah Const. Art. 1, § 7

No person shall be deprived of life, liberty or property, without due process of law.

UTAH RULE OF CRIMINAL PROCEDURE 16

RULE 16. DISCOVERY

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places. The prosecutor or defense may impose reasonable limitations on the further dissemination of sensitive information otherwise subject to discovery to prevent improper use of the information or to protect victims and witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the further dissemination of videotaped interviews, photographs, or psychological or medical reports.

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) Subject to constitutional limitations, the accused may be required to:

(1) appear in a lineup;

(2) speak for identification;

(3) submit to fingerprinting or the making of other bodily impressions;

(4) pose for photographs not involving reenactment of the crime;

(5) try on articles of clothing or other items of disguise;

(6) permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion;

(7) provide specimens of handwriting;

(8) submit to reasonable physical or medical inspection of his body; and

(9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and his counsel. Failure of the accused to appear or to comply with the requirements of this rule, unless relieved by order of the court, without reasonable excuse shall be grounds for revocation of pre-trial release, may be offered as evidence in the prosecutor's