

2011

State of Utah v. Roland McNeil : Amended Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

:

Plaintiff/Appellee

:

v.

:

ROLAND MCNEIL,

:

Case No. 20100695-CA

Defendant/Appellant.

:

Appellant is not incarcerated.

AMENDED BRIEF OF APPELLANT

Appeal from a judgment of conviction for one count of Aggravated Assault, a second degree felony, in violation of Utah Code section 76-5-103, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Mark Kouris, presiding.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code section 78A-4-103(2)(e). See Addendum A (Sentence, Judgment, Commitment).

ISSUES AND STANDARD OF REVIEW

Issue I: Whether admission of three separate hearsay statements, including a paraphrasing of phone records and other statements, violated the rules of evidence and Mr. McNeil's rights under the Confrontation Clause.

Standard of Review: "The determination of whether evidence constitutes hearsay is a question of law that [this Court] review[s] for correctness." Prosper, Inc. v. Dep't of Workforce Servs., 2007 UT App 281, ¶ 8, 168 P.3d 344. "If, in the absence of the evidentiary errors, there is a reasonable likelihood of a more favorable outcome for defendant, [this Court] must reverse the conviction." State v. Bujan, 2006 UT App 322, ¶ 15, 142 P.3d 581, aff'd 2008 UT 47 (quoting State v. Rimmasch, 775 P.2d 388, 407 (Utah 1989)). Whether

hearsay evidence is admissible under the Confrontation Clause is also reviewed for correctness. State v. Rhinehart, 2006 UT App 517, ¶ 8, 153 P.3d 830.

Sub-Issue IA: Whether the admission of a detective's hearsay paraphrasing of telephone records that were not in evidence was harmful error that prejudiced Mr. McNeil and violated his rights under the Confrontation Clause.

Preservation: This issue was preserved. R. 773:77–80. But even if not preserved, this issue can be reviewed for plain error, see State v. Holgate, 2000 UT 74, ¶ 13, 10 P.3d 346, or for ineffective assistance of counsel, see State v. Ott, 2010 UT 1, ¶ 22, 247 P.3d 344.

Sub-Issue IB: Whether the admission of the alleged victim's daughter's hearsay statement that she was not involved in drugs was harmful error.

Preservation: This issue was preserved. R. 772:99.

Sub-Issue IC: Whether the trial court erred when it allowed a prosecutor to testify as to what Mr. McNeil's alleged co-conspirator—who was unavailable to testify—had told her regarding his motivations for implicating Mr. McNeil in a statement to detectives; whether this hearsay statement violated Mr. McNeil's constitutional rights; and whether the prosecutor then improperly opined as to the truthfulness of the co-conspirator's refutation of the statement implicating Mr. McNeil.

Preservation: This issue was not preserved. It may be reviewed for plain error, see Holgate, 2000 UT 74, ¶ 13, or for ineffective assistance of counsel, see Ott, 2010 UT 1, ¶ 22.

Issue II: If this Court finds the errors discussed in Issue I do not merit reversal individually, whether the cumulative effect of those errors requires reversal.

Preservation/Standard of Review: “[T]he cumulative error doctrine . . . requires [this Court] to apply the standard of review applicable to each underlying claim of error” Radman v. Flanders Corp., 2007 UT App 351, ¶ 4, 172 P.3d 668. Preservation for each individual claim of error is discussed above. See supra Preservation for Sub-Issues IA–IC.

STATUTORY PROVISIONS AND RULES

The following provisions are relevant to the issues on appeal and are provided in Addendum B: U.S. Const. amend VI; Utah Code Ann. § 76-5-103 (2008); Utah R. Evid. 608, 801, 802, 803, 804, 805, 1002, 1003, 1102.

STATEMENT OF THE CASE

An information was filed on February 13, 2008, that charged Roland McNeil with being a party to each of the following offenses: Aggravated Burglary, in violation of Utah Code section 76-6-203; Aggravated Robbery, in violation of Utah Code section 76-6-302; Aggravated Kidnapping, in violation of Utah Code section 76-5-302; and Aggravated Assault, in violation of Utah Code section 76-5-103. R. 1–4. The charges were based on the following information: Allen Fossat’s statement that Quentin McNeil,¹ Mr. McNeil’s son, had forced his way into Mr. Fossat’s apartment, stabbed him, beat him, and robbed him and that the only link between Quentin and himself was Mr. McNeil, with whom he worked and had a relationship that ended badly; Detective Rick Dukatz’s statement that he had watched video surveillance of Mr. Fossat’s address that showed Quentin on the phone as he entered Mr. Fossat’s apartment complex, and phone records that indicated his phone was connected

¹ Because Roland and Quentin McNeil share the same last name, to avoid confusion, this brief will refer to Appellant Roland McNeil as “Mr. McNeil” and Quentin as “Quentin.”

with Mr. McNeil's phone at that time; and Quentin's statement to police implicating Mr. McNeil. R. 3–4.

On July 16, 2008, the district court held a preliminary hearing. See R. 770. At the hearing, Mr. Fossat and Detective Dukatz each testified to the facts alleged in the information. See R. 770:7–32, 50–77. But Quentin renounced his earlier statement to detectives that had implicated Mr. McNeil as the planner of the crime, saying instead that Quentin meant to confront Mr. Fossat about threats his father was receiving at work, and that the confrontation “turned ugly.” R. 770:33–34. Quentin denied planning the crime with Mr. McNeil and stated Mr. McNeil did not even know Quentin planned on confronting Mr. Fossat. R. 770:37–39. Quentin testified that he lied to police about his father's involvement because he thought it would get him a lighter sentence. R. 770:46. Following the witnesses' testimony, Mr. McNeil was bound over on each of the four charges. R. 770:93.

On January 12–14, 2010, the district court held a jury trial. See R. 772–74. Mr. Fossat testified, but Quentin and Detective Dukatz were unavailable. Detective Dukatz had passed away and Quentin refused to testify. R. 773:32, 84–85. Both of their preliminary hearing transcripts were read into the record. R. 773:35–53, 86–99. Portions of Detective Dukatz's preliminary hearing testimony that referred to his jailhouse interview with Quentin were redacted and were not presented to the jury, R. 773:74–76, but despite a hearsay objection by defense counsel, R. 773:77–80, the portions of Detective Dukatz's transcript containing the contents of phone records were read to the jury. R. 773:94–98.

After hearing the testimony of these and other witnesses, the jury acquitted Mr. McNeil of Aggravated Kidnaping, Aggravated Robbery, and Aggravated Burglary, but

convicted him of Aggravated Assault, finding “that a dangerous weapon was not used in the commission of [the Aggravated Assault] offense.” R. 774:80, 86 (emphasis added).

On March 16, 2010, the trial court sentenced Mr. McNeil to a term of one to fifteen years in prison, suspended that sentence, and ordered Mr. McNeil to serve 365 days at the county jail, to complete 200 hours community service, to be placed on probation for sixty months, and to pay \$45,769 in restitution. R. 552–53 (Addendum A: Sentence, Judgment, Commitment). On that same day, one of Mr. McNeil’s two trial attorneys, William B. Parsons III, withdrew as counsel. R. 555–56.

On March 30, 2010, Mr. McNeil moved for a new trial. R. 557. This motion was argued and denied on June 22, 2010. See R. 593, 776. Larry Long, Mr. McNeil’s other trial attorney, withdrew on July 12, 2010. R. 594–95. On that same day, Mr. McNeil filed a timely notice of appeal pro se. R. 637–38. On October 26, 2010, the trial court appointed LDA to represent Mr. McNeil on appeal. R. 688. Mr. McNeil filed a timely amended notice of appeal on December 15, 2010. R. 695–96. This appeal follows.

STATEMENT OF FACTS

Quentin McNeil, Roland McNeil’s son, pleaded guilty to the aggravated assault, aggravated robbery, and aggravated burglary of Allen Fossat. R. 773:67. As a result of a plea bargain, a remaining aggravated kidnaping charge was dismissed. R. 773:67. Roland McNeil was later charged by information with being a party to these crimes. R. 1–4. At Mr. McNeil’s trial on these charges, Quentin and Mr. Fossat gave different accounts of this event—Mr. Fossat through direct testimony, and Quentin through a transcript of Kimberley Crandall’s

examination of him at Mr. McNeil's preliminary hearing, which was read verbatim into the record because he refused to testify at the trial. See R. 772:69–131, 773:32–53.

Quentin McNeil's preliminary hearing testimony indicated that he had seen Mr. Fossat come and pick up his father to go to work at Kennecott a few times and that they had engaged in light conversation together. R. 773:35–36. But Quentin heard a tape at his father's house of Kennecott employees making threats against his father—one of whom was Mr. Fossat—indicating they were “going to cut his fingers off, bad things were going to happen, [and he would] end up in a ditch.” R. 773:38–40. His father told him he was having problems with a couple of people at work, including Mr. Fossat. R. 773:40. That name stuck out to Quentin because he had seen Mr. Fossat pick up his father from his house and thought Mr. Fossat and his father were friends. R. 773:39–40. He knew Magna police and the Kennecott HR Department had been contacted, but had done nothing. R. 773:44–45.

Quentin said he wanted to make sure his father “was okay” and that Mr. Fossat wasn't going to do anything, so he followed Mr. Fossat from Kennecott a couple of times to find out where he lived. R. 773:36–37. He was initially going to speak to Mr. Fossat at Kennecott, but ended up following him instead. R. 773:38. He never told his father he was following Mr. Fossat because his father would have told him not to. R. 773:41.

On March, 22, 2007, Quentin followed Mr. Fossat from Kennecott to a restaurant where Mr. Fossat ate. R. 773:44. Bothered by the lack of response by the police and Kennecott's HR department, he thought of speaking to Mr. Fossat there at the restaurant about the threats his father was receiving. R. 773:44–45. Instead, Quentin went to Mr. Fossat's residence and, when a car was exiting through the gate, he drove in before the gate

closed. R. 773:43. Quentin said he did not call anybody and nobody called him that morning. R. 773:43–44. Quentin went to Mr. Fossat’s residence to talk to him. R. 773:42. He did not bring a knife. R. 773:43. When Mr. Fossat arrived at his home, Quentin had a conversation with him on his way up to his apartment. R. 773:37. It was a hard conversation that eventually led to yelling because Quentin was confronting Mr. Fossat about the threats Mr. Fossat had made at work. R. 773:37. Quentin threatened Mr. Fossat—that if anything happened to his dad, Mr. Fossat would have to deal with him and the police. R. 773:37.

Now inside the apartment, Quentin testified that Mr. Fossat pulled out a knife. R. 773:37–38. Quentin hit it out of his hand and, when Mr. Fossat reached for it on the ground, Quentin kicked the knife and cut Mr. Fossat’s hand. R. 773:38. He punched him, started taking things, and hurt Mr. Fossat. R. 773:36, 38. While he beat Mr. Fossat, he told him “he better stay away from [his] dad or he was going to deal with [Quentin].” R. 773:45. Quentin pleaded guilty to aggravated robbery, aggravated burglary, and aggravated assault for “hurting Mr. Fossat, for taking his belongings, and being in his home.” R. 773:41–42. When asked if he had done all of this on his own, Quentin responded, “All by myself.” R. 773:45. He said that he did not talk to his father again until after he had been arrested. R. 773:46–47.

Carrie McNeil, Quentin’s wife, testified that she, Mr. McNeil, and Quentin were all at Mr. McNeil’s house the morning of March 22. R. 773: 6. She testified that she and Quentin were arrested on March 26. R. 773:6. Quentin acknowledged that, while in jail, he had called his father and his father had come to visit him. R. 773:47.

Quentin was asked about an earlier statement he had made to detectives wherein he had implicated his father in the crime. R. 773:48. About that statement, Quentin said, “I told

them . . . that I did it, that . . . my dad told me to do it and all this, pretty much told him what I felt you guys wanted to hear to get a better sentence for myself. That was the advice I received from my counsel.” R. 773:49. Quentin felt that his counsel’s advice was not only to say that he had committed the crime, but that he had done so in exactly the manner the prosecution had alleged, which he gathered from the discovery his attorney had provided him. R. 773:51–52. When asked if he had to implicate his father to accept responsibility for the crime, Quentin responded, “No, that’s what I had to do for you guys to think I was taking responsibility.” R. 773:51. When asked if his statement to the detectives was a lie, he responded, “Yeah, it’s my testimony that I lied.” R. 773:51.

David Finlayson, Quentin’s counsel at the time of his interview with the detectives, verified he had told Quentin “if he provided some assistance and testified[,] . . . Ms. Crandall . . . had agreed to at least write a letter to the parole board based on that.” R. 773:59. Ms. Crandall, who prosecuted Quentin and who prosecuted Mr. McNeil and examined Quentin at Mr. McNeil’s preliminary hearing, also testified for the State at Mr. McNeil’s trial:

I indicated to Mr. Finlayson that I would write a letter to the Board of Pardons indicating that Quentin McNeil had cooperated. That was the only concession we ever did and I said that Allen Fossat might do the same if it ended up being the case but that was our only concession because ultimately it’s up to the Board of Pardons how long someone is in prison. It’s not up to us anyway.

R. 773:70 (emphasis added). But Ms. Crandall also contextualized this deal with an out-of-court statement by Quentin and by explaining the conditions of her deal with Quentin:

Quentin came forward and said he wanted to say what had happened, he wanted to tell the truth. I said that if he did do that in court and he said what really happened of how the whole incident occurred, if he told the complete truth then I would

write a letter to the Board of Pardons indicating that he had told the whole truth of what happened and taken responsibility for his role in it.

R. 773:70–71 (emphases added). When asked if she wrote the letter, she responded, “I did not because he did not do that.” R. 773:71.

During Mr. Finlayson’s testimony, the State attempted to bring in an audio recording of Quentin’s statement to detectives wherein he implicated Mr. McNeil. See R. 773:56–57. But the trial court ruled that the State could not impeach Quentin with the recording because Quentin was unavailable and defense counsel would not have the opportunity to cross-examine Quentin regarding the statements in the recording. R. 773:57–58.

Mr. Fossat told the story of the crime differently than Quentin. He said that after his shift at Kennecott, he went out for breakfast with some of his coworkers. R. 772:70. After he ate, he went home and parked in his carport across from his apartment at about 8:00. R. 772:71. As he walked to his apartment, he noticed a black man walking from Mr. Fossat’s Harley Davidson motorcycle to his apartment. R. 772:73–74. He thought he worked for the apartment complex because he had a trash bag in his hand. R. 772:74. The man asked Mr. Fossat for a cigarette and Mr. Fossat told him that he didn’t smoke. R. 772:75. Mr. Fossat then proceeded to the apartment and put his key in his door. R. 772:75–76. At this point, the man was right behind him and asked to use Mr. Fossat’s phone. R. 772:76. Mr. Fossat said that he didn’t have a phone and the man responded that “everybody’s got a blinking phone.” R. 772:76. Not wanting to argue, Mr. Fossat opened the door. R. 772:76.

The next thing he knew, the man shoved him on the floor, walked inside, and slammed the door behind him. R. 772:76–77. The man then turned around and pulled out a

knife. R. 772:77. Mr. Fossat described the knife as “a handheld knife. It was the kind you open up but the blade was about a 5-inch blade.” R. 772:77. When asked about its color, Mr. Fossat said, “It was brownish white, I remember”—it “could have been bone.” R. 772:90, 121. Mr. Fossat tried to get up and the man took a swing at him and cut his thumb. R. 772:78. The man asked him if anyone else was there. R. 772:79. When Mr. Fossat responded that there wasn’t, the man told him that if he was lying, he would kill him. R. 772:79.

The man then demanded that Mr. Fossat give him his money. R. 772:81. He grabbed Mr. Fossat and, taking him to the bedroom, threw Mr. Fossat into some wooden doors, shattering them. R. 772:80. The man closed the blinds in the bedroom and continued demanding Mr. Fossat’s money, saying, “I know you don’t trust banks,” when Mr. Fossat tried to convince him to go with him to a bank. R. 772:81–82. He repeatedly hit Mr. Fossat and knocked out eight teeth. R. 772:83. He knew that Mr. Fossat worked at Kennecott and had a Harley motorcycle. R. 772:84. He also said that Mr. Fossat’s daughter and son-in-law were into him for \$10,000 in drugs and told Mr. Fossat that since they couldn’t pay, he was going to. R. 772:84. He said that that he knew Mr. Fossat’s daughter worked at either St. Mark’s or St. Mary’s. R. 772:84. He also knew that Mr. Fossat did not care for his son-in-law. R. 772:85. When asked how he knew all of this, the man responded by saying, “We’ve been following you. We know where you go eat. We know where you do everything.” R. 772:85.

He eventually took all of the jewelry from Mr. Fossat’s girlfriend’s jewelry box. R. 772:87–88. The man acted as though he expected to find something of value in the box. R. 772:123. He picked out a piece and recognized it as Tiffany’s jewelry, which surprised Mr. Fossat, because he “wouldn’t know a piece of jewelry from Tiffany’s if [he’d] had to.” R.

772:88. Mr. Fossat had never told Mr. McNeil about his girlfriend's jewelry. R. 772:124. The man also went to his girlfriend's dresser and, finding jewelry there as well, accused Mr. Fossat of lying to him about where the jewelry was and beat him further. R. 772:89.

He then took Mr. Fossat into the bathroom and threw him into the shower door, breaking it. R. 772:91. Mr. Fossat testified that the man threw him into the shower and told him "big daddy is going to let you live." R. 772:91. Before leaving the apartment, the man told Mr. Fossat that if he tried to leave, he would kill him. R. 772:91. After the man had left, Mr. Fossat retrieved his gun and went outside for "payback," but he could not find the man. R. 772:92–93. Mr. Fossat has gone through several surgeries to repair his teeth. R. 772:98.

Mr. Fossat denied owning a pocketknife. R. 772:124–25. When questioned by the defense about an earlier statement he had made wherein he indicated that he did own a pocketknife, he admitted that he did own a knife he kept in his old Harley jacket. R. 773:145.

Mr. Fossat testified that, at first, he had no idea who had attacked him. R. 772:98–99. Since his assailant had told him that his daughter and son-in-law were "into him for \$10,000 in drugs," Mr. Fossat asked his daughter at the hospital what she was into. R. 772:99. He said that she responded "Dad, if you don't know me now, you never will." R. 772:99. This drew a hearsay objection from defense counsel, which was overruled. R. 772:99. The State relied on this statement during its closing argument. R. 774:26–27.

Police asked Mr. Fossat who he had been talking to and he thought there was only one person he had told all of the information his assailant had allegedly told him during the attack—Mr. McNeil. R. 772:100. Mr. Fossat testified that he and Mr. McNeil worked as drivers together at Kennecott and that they were initially friends, but there was a conflict

with another team of drivers who began to pick on members of Mr. Fossat and Mr. McNeil's team for their driving. R. 772:101, 104. Mr. Fossat testified that he and Mr. McNeil had a falling out over how Mr. McNeil dealt with members of the other team that culminated in Mr. McNeil yelling at him for their whole forty-minute drive home. R. 772:111–14. When he dropped Mr. McNeil off, Mr. Fossat said he told Mr. McNeil, “if you feel that way, . . . you go your way, I’ll go mine.” R. 772:115–16.

The State called other Kennecott employees, including an attorney, who testified that Mr. McNeil and Mr. Fossat had argued and that there had been a falling out between the two. John Ogden testified that Mr. McNeil and Mr. Fossat were initially friends, but that they got into a loud argument in the parking lot and that they were no longer friends thereafter. R. 773:62–65. Gregory Larsen testified that he saw this same argument. R. 773:100. Mr. Larsen also said Mr. McNeil had once showed him a knife—it was a folding knife about four inches in length when still folded that he thought was black. R. 773:102.

Finally, Kennecott's former attorney, Martha Amundsen, testified that, in a deposition in a civil case, Mr. McNeil testified that Kennecott had discriminated against him, that someone at work had called him a “black dog,” and that he felt threatened. R. 773: 108. She said that Mr. McNeil thought that his son and Mr. Fossat were involved in drug deals, that Mr. Fossat had called Mr. McNeil names, and that Mr. Fossat had threatened to cut Mr. McNeil's head off. R. 773:109–11. She also said Mr. McNeil stated Kennecott employees and Kennecott management were conspiring against him, he had never brought a knife to work, and that the only knife he owned had a one-inch blade and looked like a Swiss Army knife. R. 773:112, 114, 118–19. She said Mr. McNeil told her that on the morning of Mr.

Fossat's assault, he left work and went home, that he did not connect with Quentin, but that he had "played phone tag" with him, and that while he and Mr. Fossat did share information while carpooling, he did not know many personal details about Mr. Fossat—including details about Mr. Fossat's daughter, whether Mr. Fossat owned his car, whether there was jewelry in Mr. Fossat's house, and whether Mr. Fossat trusted banks. R. 773:116–18.

Two police officers testified and portions of Detective Rick Dukatz's preliminary hearing transcript were read into the record because he passed away before the trial. Officer Jeff Holdridge, the first to respond at the scene, testified that when he arrived at Mr. Fossat's apartment complex, he took a gun from Mr. Fossat, who had blood on his clothing and face. R. 772:64. Officer Holdridge said there was a key in the deadbolt of Mr. Fossat's apartment door. R. 772:65. Inside, there was blood and a couple of doors that had been knocked off a closet area. R. 772:66. Drawers had been pulled out and dumped on the floor. R. 772:66.

Detective Troy McComb, the lead detective in this case, testified that when he responded to the call, he found a canister of pepper spray inside Mr. Fossat's apartment. R. 772:133. There were obvious signs a struggle had taken place—a statue had been knocked over, closet doors had been knocked off the runners, and detectives found a dental bridge in the bedroom. R. 772:133–34. After Detective McComb had spoken to Mr. Fossat at the hospital once, Mr. Fossat called him with additional information. R. 772:135. Detectives also found a security video recording that showed Quentin driving into the complex in a green van and from that, they were able to get his license plate. R. 772:136–37, 140. This videotape was played for the jury. R. 773:1. The video showed Quentin with a cell phone to his ear entering the exit gate of the apartment as another car left. R. 767.

Lastly, because Detective Dukatz had died before Mr. McNeil's trial, portions of his preliminary hearing transcript were read into the record. R. 773:86–98. Before this happened, there was discussion between the State, defense counsel, and the court about which portions to read. R. 773:74–85. The State took the position that only hearsay statements by Quentin should be redacted. R. 773:74. But defense counsel objected to the portion of Detective Dukatz's testimony that referenced telephone records as being hearsay and worried that there would be no way to determine from the transcript which calls were voicemails and which were conversations. R. 773:77–80. The court disagreed with defense counsel's characterization of the phone records as hearsay and ruled them admissible. R. 773:80–81.

Detective Dukatz's testimony also mentioned the surveillance video. R. 773:87. He noted that the video showed that Quentin entered Mr. Fossat's apartment complex at 7:44 a.m. R. 773:89. Detective Dukatz also interviewed Mr. McNeil. R. 773:90–91. Mr. McNeil "seemed surprised that something had happened [to Mr. Fossat] and kind of shocked that the assault had occurred when . . . told . . . about it." R. 773:92. He mentioned he thought that Quentin and Mr. Fossat were involved in some kind of drug deal. R. 773:92. When asked if Mr. McNeil had made phone contact with his son on March 22, Mr. McNeil said he had not. R. 773:92. When told that it appeared on the surveillance video as though Quentin was on the phone and that Detective Dukatz was going to obtain phone records, Mr. McNeil recalled that he had left a message for Quentin to ask what was up. R. 773:92–94.

Detective Dukatz obtained both Quentin's and Mr. McNeil's phone records. R. 773:94–95. Reading from a document, he then listed all of the calls between Quentin's and Mr. McNeil's phones that occurred on March 22: The first call that morning came from Mr.

McNeil's phone to Quentin's phone, occurred at 6:07, and lasted nine seconds. R. 773:95–96. It “looked as though it was a voicemail.” R. 773:95. Then Quentin's phone called Mr. McNeil's phone also at 6:07 a.m. and remained connected for one minute and seven seconds. R. 773:95, 97. At 7:00, Mr. McNeil's phone called Quentin's phone and remained connected for two minutes and seven seconds. R. 773:96–97. At 7:12, Mr. McNeil's phone again called Quentin's phone and remained connected for thirty-six seconds. R. 773:96–97. At 7:42, Mr. McNeil's phone called Quentin's phone again. R. 773:97. This call lasted fourteen minutes and seven seconds. R. 773:97. Finally, Quentin's phone called Mr. McNeil's phone at 8:28 and this call lasted thirty-five seconds. R. 773:98.

The State relied heavily on Detective Dukatz's testimony regarding the phone records in its closing argument. R. 774:34–37. Speaking of the fourteen-minute phone call that allegedly happened moments before Quentin attacked Mr. Fossat, the prosecutor said,

That call lasts 14 minutes and 7 seconds. So, 7:42, it begins at that point. About 7:56, about the time that Allen Fossat is getting home. What else could the defendant and his son have been talking about for 14 minutes right before the defendant's son commits, does everything that he did to Allen Fossat?

Now what goes through the mind of somebody that's [about to do] that? Imagine if somebody, for example, has something going on major in their life, major event is about to happen [to] a person—maybe an operation. [S]everal months ago[,] my parents live out of state and my mother was going into an operation. It was a very serious thing that was going to last most of the day and I remember my dad calling me just before to give me an update and we were talking, we were focused specifically on what was going to happen to my mom.

Is it likely that the defendant's son [preparing for] an event . . . like this is going to be talking to his dad about borrowing the family car, about whether or not his dad or his mom can babysit the child? It just doesn't make sense that he is on the phone with his dad all the way up to the moment that

Allen Fossat, or close to it, gets home. But yet the defendant had no idea, no idea that Allen Fossat had been [assaulted].

R. 774:35–36 (emphases added). The State also acknowledged its case was based on “predominantly circumstantial evidence” but argued “that alone . . . can be used to prove a case beyond a reasonable doubt” and that in this case the “circumstantial evidence leaves you firmly convinced that the defendant assisted, aided, or encouraged his son to commit these crimes, he gave him that information to basically facilitate [Quentin] going to rob Allen Fossat, attempt to take his money, go into his home, burglarize him; to keep Allen Fossat there while he’s doing that against his will.” R. 774:39.

Defense counsel argued that Quentin could have had a connection to Mr. Fossat other than his father because, for instance, Quentin seemed to know that there was valuable jewelry at the house despite the fact that Mr. Fossat had never told Mr. McNeil about it. R. 774:59–60. Also, he argued that Quentin, as Mr. Fossat alleged Quentin yelled at him during the attack, might have had a drug connection to Mr. Fossat’s daughter and son-in-law. R. 774:54. He noted that although this was the attacker’s stated motive for the robbery, police never explored whether Mr. Fossat’s daughter and son-in-law were involved in drugs. R. 774:55. He explained that the other details Quentin knew about Mr. Fossat could have come through the taped conversations Quentin said he heard at his father’s house. R. 774:55–57.

After closing arguments, the jury acquitted Mr. McNeil of aggravated burglary, robbery, and kidnaping, but convicted him of aggravated assault. R. 774:80. The jury found that a dangerous weapon was not used in the offense. R. 774:86.

The trial court sentenced Mr. McNeil to a term of one to fifteen years in prison, suspended that sentence, and ordered Mr. McNeil to serve 365 days in the county jail, to

complete 200 hours community service, to be placed on probation for sixty months, and to pay \$45,769 in restitution. R. 552–53 (Addendum A: Sentence, Judgment, Commitment).

On March 30, 2010, Mr. McNeil moved for a new trial. R. 557. This motion was argued and denied on June 22, 2010. See R. 593, 776. Mr. McNeil filed a timely amended notice of appeal on December 15, 2010. R. 695–96. This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court admitted three separate hearsay statements in violation of the rules of evidence that prejudiced Mr. McNeil individually and cumulatively and violated his constitutional right to confrontation. First, the court admitted, over defense counsel’s objection, a reading of a detective’s preliminary hearing testimony wherein the detective paraphrased the contents of phone records. This paraphrasing suggested Mr. McNeil was in telephone contact with his son, Quentin, immediately before Quentin assaulted Mr. Fossat. The phone records themselves were never admitted and no rule of evidence allows for the admission of paraphrased records. Second, the trial court allowed Mr. Fossat, over objection, to repeat his daughter’s statement that implied that she was not involved in drug deals with Quentin, which was a defense theory of the case. Finally, the trial court allowed a prosecutor to testify that Quentin told her that his jailhouse confession implicating Mr. McNeil was motivated by his desire “to say what had happened, he wanted to tell the truth.” R. 773:70. In addition to this hearsay statement, the prosecutor also testified that she did not follow through with her deal with Quentin because he was not truthful in the proceedings against Roland, improperly offering an opinion of Quentin’s truthfulness at the preliminary hearing. Mr. McNeil could not confront Quentin at trial because Quentin refused to testify.

These errors prejudiced Mr. McNeil individually and cumulatively by connecting him to the perpetrator of Mr. Fossat's assault moments before the assault occurred, undermining a defense theory of the case, and suggesting that Quentin's implication of Mr. McNeil was motivated by a desire to tell the truth rather than a desire to get a deal from the State. Because the trial court's admission of this hearsay was harmful error and violated the right to Confrontation, this Court should reverse Mr. McNeil's conviction and remand.

ARGUMENT

I. THE TRIAL COURT COMMITTED HARMFUL ERROR WHEN IT ADMITTED SEVERAL HEARSAY STATEMENTS.

In violation of the Utah Rules of Evidence, the trial court admitted several hearsay statements that prejudiced Mr. McNeil. Because these errors were harmful and violated the right to confrontation, this Court should reverse and remand for a new trial.

"[T]he most fundamental rule of evidence is that testimony should be given under oath in open court." State v. Sanders, 496 P.2d 270, 273 (Utah 1972). This concern is codified in Utah Rule of Evidence 802, which mandates that hearsay evidence is inadmissible except as provided by the other rules of evidence. Utah R. Evid. 802. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801. "The hearsay rule has as its declared purpose the exclusion of evidence not subject to cross-examination concerning the truthfulness of the matters asserted." State v. Long, 721 P.2d 483, 486 (Utah 1986). Such evidence is generally considered unreliable because "(1) [t]he person who purports to know the facts is not stating them under oath" and "(2) he is not present for cross-examination." State v. Sibert, 310 P.2d 388, 390 (Utah 1957).

The erroneous admission of hearsay evidence is reversible if the error is harmful. See State v. King, 2010 UT App 396, ¶ 40, 248 P.3d 984. “An error is harmful if it is reasonably likely that the error affected the outcome of the proceedings. In other words, for an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict.” Id. (citation omitted) (quoting Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372, 1378–79 (Utah 1995)).

Further, certain hearsay statements may violate a criminal defendant’s constitutional right to confront his accuser. See U.S. Const. amend VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”). This occurs when the State seeks to introduce testimonial evidence against a defendant unless the witness is unavailable and there was a prior opportunity for cross-examination about the evidence. Crawford v. Washington, 541 U.S. 36, 68 (2004). “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” Id. at 68–69. The term “testimonial” “applies at a minimum to prior testimony at a preliminary hearing . . . and to police interrogations.” Id. at 68. It also applies to “a formal statement to government officers . . . , custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . , prior testimony, or confessions.” Id. at 51–52 (citation omitted) (internal quotation marks omitted). “[I]nterrogations by law enforcement officers fall squarely within [the class of testimonial hearsay].” Id. at 53.

At Mr. McNeil's trial, at least three hearsay statements were admitted that prejudiced Mr. McNeil and violated his constitutional right to confront his accusers. First, telephone records detailing calls between Mr. McNeil and Quentin were paraphrased during the reading of Detective Dukatz's preliminary hearing transcript despite the fact that those records were never admitted in evidence and despite the fact that no hearsay exception was invoked to justify their admission. R. 773:94–98. Second, during Mr. Fossat's testimony, he stated that when he asked his daughter whether she was, in fact, into drugs as his assailant claimed, she responded "Dad, if you don't know me now, you never will." R. 772:99. Mr. Fossat's daughter was never called as a witness. Finally, Ms. Crandall, Quentin's prosecutor and Mr. McNeil's prosecutor through the preliminary hearing, stated that Quentin told her his motivation to inculcate his father in an earlier confession stemmed from his desire "to say what happened" and "to tell the truth"—despite the fact that Quentin was an unavailable witness who could not be cross-examined regarding this statement. R. 773:70–71.

The remainder of Part I discusses each of these hearsay statements in turn—first explaining why each statement is hearsay and then explaining why each statement prejudices Mr. McNeil and requires reversal. Part II explains why the cumulative effect of these three errors is an additional reason to reverse.

A. The Admission of Paraphrased Portions of Hearsay Telephone Records Was Harmful Error That Prejudiced Mr. McNeil and Violated His Constitutional Rights

When the court admitted portions of Detective Dukatz's preliminary hearing testimony that referenced the contents of phone records he obtained, it admitted hearsay

that prejudiced Mr. McNeil, violated the best-evidence rule, committed harmful error, and violated Mr. McNeil's rights under the Confrontation Clause.

Detective Dukatz's paraphrasing of phone records plainly contains hearsay—that is, “statement[s], other than [those] made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Utah R. Evid. 801(c); see also United States v. Samaniego, 187 F.3d 1222, 1224 (10th Cir. 1999) (“[T]elephone records . . . are indubitably hearsay.”). The contents of the records were ostensibly compiled by the telephone company (although that foundation was never laid)—a declarant who never testified at trial or at the preliminary hearing. R. 773:94–95. They were offered to prove the truth of the matter they asserted—that Mr. McNeil and Quentin had spoken on the phone the morning of the assault. R. 773:95–98. Detective Dukatz never claimed to have any independent knowledge about whether Mr. McNeil and Quentin had spoken to each other on the morning of the assault and relied exclusively on the phone records to set forth Quentin's and Mr. McNeil's purported conversations, which were relayed to the jury in a confusing manner by reading Detective Dukatz's preliminary hearing transcript, verbatim:

Q Okay. Did you subsequently get the phone records?

A I did.

Q Whose phone records did you get?

A I obtained those of both the phones of Quentin and Roland McNeil.

Q Okay, and what did those phone records show?

A Those phone records showed conversation between the two of them the night prior and early that morning.

Q And do you recall how long the conversation early that morning was?

A There was one at 7:10 that was for nine seconds which looked as though—

Mr. Parsons: I'm sorry, for what?

The Witness: Nine seconds.

Mr. Parsons: Thank you.

The Witness: It looked as though it was a voice mail. Then there was another call at 7:29 that lasted for one minute and seven seconds.

Q Okay. And after that was there any phone calls that lasted longer than that, that same morning?

A You know, I'm sorry. I have those items, I read those times wrong, if I may correct?

Q Okay.

A Those, the first call that morning was 6:07. These have seconds on there and that's what threw me off. I'm sorry. And—

The Court: And that was the 9-second call?

The Witness: That, yes, yes and the other one was at 6:07. This is the 22nd again.

The Court: I thought you said the 6:07 was the 22nd?

The Witness: It is. 6:07 and 10 seconds was a nine second call. Then there was another phone call that was 6:07 and 29 seconds.

Mr. Parsons: For 29 seconds?

The Witness: No. That was the time of the call and 29 seconds into the minute.

Mr. Parsons: 6:07 and 29 seconds was the time of the call. Thank you.

The Witness: Right. And that's why, I'm sorry, that's what I wanted to clarify too and that was one minute and seven seconds. Then there was another call at 7:00 for 2 minutes and seven seconds, 7:12 for 36 seconds; 7:42—

Mr. Parsons: Slow down, if you would be so kind.

The Witness: That should be in your report.

Mr. Parsons: I'm still making notes.

The Court: 7:00 a.m. was two minutes and how many seconds?

The Witness: Seven seconds.

The Court: And the 7:12, how long was that?

The Witness: 36 seconds.

The Court: And then the 7:42?

The Witness: Fourteen minutes and seven seconds.

The Court: I'm with him, are you Mr. Parsons?

Mr. Parsons: Yes sir, thank you.

Q Okay, if you can, those phone calls, was it Roland calling Quentin or Quentin calling Roland?

A They were both.

Q They were phone calls both ways?

A They were both. They were phone calls both ways. I do have that distinction.

Q The phone came in at 6:07. Who called who?

A That would be Roland calling Quentin, the nine second call.

Q Okay. The 6:07 call that lasted one minute, seven seconds, who called who?

A Quentin calling Roland.

Q The 7:00 call?

A Roland calling Quentin.

Q The 7:12 call?

A Roland calling Quentin.

Q The 7:42 call?

A That would be Roland calling Quentin again.

Q And that's the call that lasted 14 minutes 7 seconds?

A Correct. Then there was another at 8:28 for 35 seconds.

Q And who called who?

A Quentin called Roland.

R. 773:94–98 (emphases added).

In his preliminary hearing testimony, Detective Dukatz was plainly reading from some other source. R. 773:95 (“You know, I’m sorry. I have those times, I read those times wrong, if I may correct?”). And while Utah Rule of Evidence 804 (b)(1) does not generally bar reading at trial an unavailable witness’s testimony from another hearing with a similar opportunity for cross-examination, Detective Dukatz’s paraphrasing of phone records within his preliminary hearing testimony was hearsay within hearsay that needed a further exception to the hearsay rule to be admissible at trial.² See Utah R. Evid. 805 (“Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined

² Rule 802 would bar this hearsay even if the reading of phone records was admissible at the preliminary hearing. See Utah R. Evid. 802. Because the objective of preliminary hearings is to determine whether there is probable cause to bind a defendant over, preliminary hearings have a lower standard for the admission of hearsay evidence. See generally Utah R. Evid. 1102. That lower standard would not apply at trial where defense counsel’s objection was properly raised. R. 773:77–80.

statements conforms with an exception to the hearsay rule provided in these rules.”

(emphasis added)); InnoSys, Inc. v. Dep’t of Workforce Servs., Workforce Appeals Bd., 2011 UT App 169, ¶ 9, 683 Utah Adv. Rep. 33 (“To be admissible under the hearsay rule, then, both [statements] must either be non-hearsay or conform with an exception to the hearsay rule.” (internal quotation marks omitted)). Of course, if there were an exception to the hearsay rule that allowed for a reading of Detective Dukatz’s paraphrasing of phone records to the jury, the State would bear the burden of showing that the exception applied. See, e.g., State v. Tiliaia, 2006 UT App 474, ¶ 15, 153 P.3d 757 (“The burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence.” (internal quotation marks omitted)); Romero v. Chicherster, 2006 UT App 203U, para. 4, 2006 WL 1430198 (“And of course, . . . the proponent of the hearsay statement [bears] the burden of establishing admissibility”); see also Samaniego, 187 F.3d at 1224 (“The obligation of establishing the applicability of a hearsay exception for these [telephone] records falls upon the government as the proponent of the evidence.”).

But no exception exists for Detective Dukatz’s paraphrasing of phone records. The “business records” exception, which allows for admission of a “record . . . of acts, events, [or] conditions . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . record,” does not apply for several reasons. See Utah R. Evid. 803 (6) (emphases added).

To begin, actual phone records were never admitted at trial—only a reading of Detective Dukatz’s paraphrasing of some of the contents of these records. R. 773:94–98. As

this Court held in Tripp v. Vaughn, the plain language of the business records exception encompasses only written documents “and by its terms does not include oral statements.” 746 P.2d 794, 799 (Utah Ct. App. 1987). In that case, which involved the amount of interest due on a bank loan, “no written data compilation or record indicating the amount of interest due on the loan was submitted at trial.” Id. Instead, a bank executive testified as to what the total interest on the loan was based on his telephone conversations with several lenders, which he compiled into amounts. Id. But this Court held that the bank executive’s “testimony regarding each lender’s computations cannot qualify as a business records exception” and that “the trial court erred in allowing the oral testimony into evidence as a business records exception.” Id. Detective Dukatz’s paraphrasing of phone records is inadmissible for the same reason: it is not a written record but rather an oral statement. Both the bank executive and Detective Dukatz may have had access to the records that formed the basis of their testimony, but it was the records themselves and not the witnesses’ oral statements that, given the proper foundation, might have been admissible under the business records exception to the hearsay rule. Oral testimony regarding the contents of out-of-court documents is not admissible under the business records exception. Id.

And without proper foundation, the documents themselves are not admissible, either.

For evidence to be admissible as a business record, a proper foundation must be laid to establish the necessary indicia of reliability. That foundation should generally include the following: (1) the record must be made in the regular course of the business or entity which keeps the records; (2) the record must have been made at the time of, or in close proximity to, the occurrence of the act, condition or event recorded; (3) the evidence must support a conclusion that after recordation the document was kept under circumstances that would preserve its integrity; and (4) the sources of the information from which the

entry was made and the circumstances of the preparation of the document were such as to indicate its trustworthiness.

State v. Bertul, 664 P.2d 1181, 1184 (Utah 1983) (emphasis added). For instance, in a Tenth Circuit case applying Federal Rule of Evidence 803, which Utah Rule of Evidence 803 copies verbatim, the Government proffered summaries of telephone records making “[n]o effort whatsoever . . . to establish the foundational requirements of 803(6) for admissibility of the underlying telephone records.” Samaniego, 187 F.3d at 1224; see Utah R. Evid. 803 advisory committee’s note. Despite a hearsay objection, “the government failed to . . . ask a single question of any witness in order to lay a foundation for application of the business records exception.” Samaniego, 187 F.3d at 1224. The Tenth Circuit held that “[t]he district court made an error of law by not requiring the government to lay the requisite foundation or forgo the use of the summaries, and thus abused its discretion by admitting the summaries.” Id. The defendant’s convictions were reversed and the case was remanded. See id. at 1226.

In this case as in Samaniego, despite a hearsay objection, no foundation was laid that might suggest that the business records exception would apply to the paraphrasing of telephone records the State offered. R. 773:77–80. Detective Dukatz’s preliminary hearing testimony lays no foundation. R. 773:94–98; supra pp. 21–23. And while a prosecutor did mention during jury voir dire there was a possibility he would call a witness from Cricket Communications, the State never called that witness. R. Jury Voir Dire Transcript, Jan. 12, 2010, at 50 (Addendum C). Given the parallel between the Utah and federal versions of rule 803, this Court should follow the Tenth Circuit’s reasoning and hold it was error to admit a paraphrasing of phone records with no foundation to suggest a hearsay exception applies.

But even apart from the utter lack of foundation for Detective Dukatz's paraphrasing of phone records and the inapplicability of the business-records exception to oral statements—each independent grounds for reversal—another compelling reason exists for the court to have excluded the objected-to statements: it is not the best evidence. In State v. Ross, the Utah Supreme Court faced a fact pattern very similar to this one. 573 P.2d 1288, 1289 (Utah 1978). In that case, an informant witness testified that he and the defendant had stolen two trailers. Id. He had been granted immunity for these offenses in exchange for his testimony against the defendant. Id. A police officer testified that after the informant told him of the defendant's role in the crime, he obtained the defendant's phone records, which indicated calls to houses in Gunnison and Salina, Utah. Id. The officer testified that he went to those two houses and found the missing trailers. Id. Defense counsel objected to the officer's paraphrasing of the telephone records on the ground of violation of the best evidence rule—then rule 70 of the Utah Rules of Evidence, the content of which is now reflected in rules 1002, 1003, 1004, 1006, and 1008. Id. at 1290; see Utah R. Evid. 1002, 1003, 1004, 1006, 1008, advisory committee notes. But the trial court allowed the officer to testify about the contents of the phone records. Ross, 573 P.2d at 1289–90. The supreme court held that the officer's testimony “violated [the best evidence rule], and the Court erred in overruling the objection as there was no showing which would sustain one of the exceptions to that rule.” and remanded for a new trial. Id. at 1290.

The facts in this case are strikingly similar. Just as in Ross, rather than offering any actual phone records to the jury, the State asked an officer to testify about what he had read in the phone records. R. 773:94–98. Defense counsel objected to this portion of Detective

Dukatz's testimony. R. 773:77–81. Just as in Ross, the trial court allowed the testimony over defense counsel's objection. R. 773:81–82. And just as they did in 1978 when Ross was decided, the Utah Rules of Evidence forbid an officer from orally summarizing the contents of a written record to prove the contents of that record—the original record must be used unless an exception applies under the rules. See Utah R. Evid. 1002. But here again, as in Ross, “there was no showing which would sustain one of the exceptions to that rule, as set forth therein.” Ross, 573 P.2d at 1290. The facts in Mr. McNeil's case all point to the same conclusion the Ross court reached: if the State wants to use the contents of phone records as evidence against a defendant, the State needs to use the records themselves and not an officer's paraphrasing of what he read in the records. See id.

The admission of Detective Dukatz's paraphrasing of telephone records is error for any and all of the reasons cited above. The phone records as paraphrased by Detective Dukatz are hearsay—that is, out-of-court statements made by the telephone company and offered by the State to prove the truth of the matter that they assert: that Mr. McNeil's and Quentin's phones made several calls to each other on the morning Quentin assaulted Mr. Fossat. See Utah R. Evid. 801 (c). It is the State's burden, as the party proffering the hearsay evidence, to show that an exception to the hearsay rule applies. See Tiliaia, 2006 UT App 474, ¶ 15; Romero, 2006 UT App 203U, para. 4, 2006 WL 1430198; Samaniego, 187 F.3d at 1224. But the State never offered any foundation to explain why Detective Dukatz's paraphrasing of the records should be allowed under a hearsay exception. And even if the telephone records themselves were made in the regular course of the phone company's business at the time of the alleged calls under circumstances that would preserve their

integrity and conditions that indicate their trustworthiness—such that the records themselves might be admissible under the business-records exception—the actual records were never offered at trial. This is problematic because the business-records exception only allows for the actual written record kept by the company—not a paraphrasing of that record by a law enforcement officer. See Utah R. Evid. 803 (6); Tripp, 746 P.2d at 799. Such testimony is likewise prohibited by the best evidence rule, which also requires the original telephone record be used. Utah R. Evid. 1002; Ross, 573 P.2d at 1290. In sum, the admission of Detective Dukatz’s paraphrasing of phone records violated several rules of evidence. And on the basis of any and all of these violations, this Court should find that the trial court erred when it admitted the testimony.

This error was also harmful. “Error is harmful if it is reasonably likely that the error affected the outcome of the proceedings.” King, 2010 UT App 396, ¶ 40 (internal quotation marks omitted). The admission of phone records showing disputed calls has been found to do exactly this. In Ross, despite testimony by two victims that their trailers had been stolen and detailed testimony from an informant about exactly how he and the defendant had stolen these trailers, the Utah Supreme Court found that an officer’s paraphrasing of phone records that led him to find the missing trailers was prejudicial. Ross, 573 P.2d at 1289–90. The court held that “[s]ince the only other corroborating evidence shown in the record [beside the informant’s testimony] is generalized opinion testimony . . . , it is probable that [the officer’s] testimony concerning the telephone records had a substantial influence on the jury in rendering its verdict, and its admission was therefore prejudicial to the defendant.” Id. at 1290 (emphasis added) (footnote omitted).

Similarly, in Flanagin v. State, the Mississippi Supreme Court found harmful error in the admission of an investigator's recollection of phone records in a murder case. 473 So. 2d 482, 485 (Miss. 1985). In that case, the defendant claimed that his ex-wife killed herself, but the State produced the testimony of a man who claimed that the ex-wife had called his office and told him her husband was going to kill her and that he then heard a gunshot and the phone hitting metal. Id. at 484. The State also produced the testimony of an investigator who claimed that he had checked out the phone records and that they indicated that a long distance call had been placed from the couple's residence, and that the office in question received a call around the time of the murder. Id. The Mississippi Supreme Court agreed with the defendant that the admission of the investigator's testimony about the phone records violated the best evidence rule. Id. at 485. It further found that the trial court's error was harmful: "While the State characterizes [the investigator's] testimony as merely cumulative, our opinion is it was prejudicially cumulative and independently damaging. The admission of the testimony was harmful error requiring reversal." Id. (emphasis added).

As in Ross and Flanagin, the admission of paraphrased phone records in this case was harmful error. But here, there is even less evidence apart from the phone records to support a conviction. In Ross, an accomplice gave detailed testimony about how he and the defendant had committed the crime together, 573 P.2d at 1289–90, and in Flanagin, there was an independent witness who could establish that the incriminating phone call took place, 473 So. 2d at 484. In this case, Quentin denied Mr. McNeil's involvement in the crime. R.

773:41. While he had made an earlier statement implicating his father,³ he testified he made the story up to get out of prison earlier. R. 773:49–51. Mr. Fossat did testify that Quentin knew things about him that Mr. McNeil knew, but it is not a crime to talk with family about coworkers, and many of the details Quentin was alleged to have known were unrelated to the crimes he was committing—including details about Mr. Fossat’s daughter and son-in-law. R. 772:84–85. And Quentin also appeared to know things Mr. Fossat had never told Mr. McNeil—like the fact that his girlfriend owned valuable jewelry. R. 772:123–24. While the State argued in closing that Mr. McNeil gave Quentin this “information to basically facilitate [Quentin] going . . . to rob Allen Fossat, . . . burglarize him; [and] keep Allen Fossat there . . . against his will,” R. 774:39, this argument was ultimately unpersuasive—the jury returned not guilty verdicts on each of those counts (kidnaping, robbery, and burglary). R. 774:80. And, on its own, this tenuous evidence does not show that Mr. McNeil assisted, aided, or encouraged his son in committing aggravated assault, either.

In a close case with three not guilty verdicts, the argument that very likely resulted in Mr. McNeil’s lone conviction was when the State implied in closing that Mr. McNeil and Quentin had discussed the crime Quentin was about to commit in the fourteen-minute phone conversation mentioned by Detective Dukatz—that Mr. McNeil and Quentin both

³ When Ross was decided, Utah law mandated that a defendant could not be convicted solely on the uncorroborated testimony of an accomplice. See Ross, 573 P.2d at 1289–90. While this law has changed, see Utah Code Ann. § 77-17-7 (2008), another important distinction exists between Ross and the present case. There the accomplice provided a detailed description of how he and the defendant committed the crime. Ross 573 P.2d at 1289. Here, Quentin denied Mr. McNeil’s involvement in the crime when he testified under oath. R. 773:44–45. And while the jury was entitled to disbelieve Quentin regarding Mr. McNeil’s involvement, Detective Dukatz’s testimony paraphrasing phone records gave the jury the strongest reason to do so—and that testimony should have been excluded.

denied having with each other—immediately before Quentin assaulted Mr. Fossat. R. 774:35–36. The hearsay phone records were the crux of the State’s case, and, unlike in Flanagin, no other testimony established that Quentin was on the phone with Mr. McNeil before the assault. See 473 So. 2d at 484–85. The State needed to prove that Mr. McNeil “assisted, aided, or encouraged his son to commit” assault. R. 774:39. The State argued that this is exactly what happened in the phone conversation implied by Detective Dukatz. R. 774:34–36. Quentin testified he did not speak with his father about the assault until later. R. 773:47. Mr. McNeil told Detective Dukatz he was unaware Mr. Fossat had been assaulted. R. 773:92. The hearsay phone records gave the jury reason to doubt Mr. McNeil and Quentin and believe Mr. McNeil encouraged Quentin to assault Mr. Fossat. Quentin denied his father’s involvement. R. 773:41. But because Quentin had also given an earlier statement inculping Mr. McNeil, the phone records undoubtedly swayed jurors to believe Quentin’s earlier story. And unlike in Flanagin, where the hearsay phone records were cumulative to other testimony establishing a phone call, here, the hearsay phone records are the only evidence Mr. McNeil’s and Quentin’s phones were connected before the assault. See 473 So. 2d at 484–85. Because it is even more likely that the admission of hearsay phone records affected the outcome of this case than in Ross and Flanagin, this Court should reverse.⁴

⁴ Mr. McNeil maintains that defense counsel’s objections preserved this issue for appeal. But even if this Court were to find the objections inadequate, this Court can reach this issue under either the plain error or ineffective assistance of counsel standards of review. “To prove ineffective assistance of counsel, [a] defendant must show: (1) that counsel’s performance was objectively deficient and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial.” Ott, 2010 UT 1, ¶ 22 (internal quotation marks omitted). A defendant must show that the challenged action cannot be considered “sound trial strategy.” Id. ¶ 34 (internal quotation marks omitted). In this case, if defense counsel did not preserve these issues, it was not

Additionally, the admission of this evidence violated Mr. McNeil's constitutional right to confront his accusers. See U.S. Const. amend VI. That is, the State introduced hearsay against Mr. McNeil without showing it was not testimonial or affording him an opportunity to cross-examine the declarant, which violates the Confrontation Clause. See Crawford, 541 U.S. at 68. Testimonial hearsay includes “statement[s] that a reasonable person in the position of the declarant would objectively foresee might be used in the investigation or prosecution of a crime.” United States v. Yeley-Davis, 632 F.3d 673, 679 (10th Cir. 2011) (quoting United States v. Pablo, 625 F.3d 1285, 1291 (10th Cir. 2010)).

because it was his trial strategy to let this evidence in. Defense counsel objected before Detective Dukatz's testimony was read to the jury and then again after the testimony was read. R. 773:77–81, 139–40. In other words, he wanted this evidence excluded because it prejudiced Mr. McNeil. And when defense counsel fails to properly object to harmful and inadmissible evidence, counsel has rendered objectively deficient performance. See Ott, 2010 UT 1, ¶ 33. “[O]n the basis of the law in effect at the time of the trial,” the phone evidence should have been excluded. See id. ¶ 25 (internal quotation marks omitted). The hearsay paraphrasing of phone records was plainly inadmissible under rule 802 and also violated the best evidence rule, with a Utah Supreme Court case directly on point. Utah R. Evid. 802, 1002; Ross, 573 P.2d at 1289–90. Thus, if counsel did not properly object to this evidence, his performance was objectively deficient. And for all the reasons argued above, there is a reasonable probability that without this evidence, Mr. McNeil would have obtained a more favorable outcome. See supra pp. 29–32.

For plain error review, plain error exists if there is an error that should have been obvious to the district court that is harmful to the defendant. State v. Larsen, 2005 UT App 201, ¶ 3, 113 P.3d 998. “An error is obvious if the law on the area was ‘sufficiently clear or plainly settled[.]’” Id. ¶ 5 (quoting State v. Dean, 2004 UT 63, ¶¶ 16-17, 95 P.3d 276). For all the reasons argued above, the law regarding Detective Dukatz's paraphrasing of phone records was “sufficiently clear” and “plainly settled.” Id. It is sufficiently clear that the paraphrasing of phone records is hearsay and plainly inadmissible under rule 802. Utah R. Evid. 802. There is a binding Utah Supreme Court case on point that excluded exactly this kind of evidence. Ross, 573 P.2d at 1289–90. To the degree an objection was raised, even assuming it was deficiently raised, it should have alerted the district court to the evidence's inadmissibility, making the error even more obvious. And as argued throughout this section, this evidence prejudiced Mr. McNeil. Thus, under any standard, this Court should reverse.

The Tenth Circuit recently decided whether telephone records created for business purposes were testimonial and if their admission thus violated the Confrontation Clause. Yeley-Davis, 632 F.3d at 677–81. Citing U.S. Supreme Court precedent, the court stated that “[b]usiness . . . records are generally admissible absent confrontation . . . because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” Id. at 679 (first and second alterations in original) (quoting Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2539–40 (2009)). Of critical importance to the court’s decision that the phone records were “not testimonial, and thus not subject to confrontation,” were a certification and an affidavit signed by the phone company records custodian that established that “the records were kept in the course of [the phone company’s] regularly conducted business.” Id. (emphasis added).

But this is exactly what is constitutionally problematic about the records Detective Dukatz cites; there is no foundation to suggest whether these records were kept in the regular course of business or if they instead contained statements made for use “in the investigation or prosecution of a crime”—and thus might be testimonial, implicating the Confrontation Clause. See id. (quoting Pablo, 625 F.3d at 1291). Mr. McNeil was never given an opportunity to cross-examine the phone company’s records custodian to determine if Detective Dukatz’s summary of the records was accurate, whether they were kept in the regular course of business, or whether they were prepared for “investigation or prosecution of” Mr. McNeil. Thus, when the trial court overruled defense counsel’s objection that the admission of the hearsay phone records violated Mr. McNeil’s rights under the Confrontation Clause, the ruling was not based on adequate evidence because there was no

foundation to suggest that the phone records were not testimonial. R. 773:80–81. The violation of Mr. McNeil’s rights under the Confrontation Clause presents another independent reason, in addition to harmful error, for this Court to reverse.

The admission of Detective Dukatz’s paraphrasing of phone records violated several rules of evidence and was error. The paraphrasing of the contents of phone records is hearsay because those records are out-of-court statements offered by the State to show the truth of the matter they assert—that Mr. McNeil’s and Quentin’s phones were connected mere moments before Quentin assaulted Mr. Fossat. They are inadmissible under the business records exception because that exception only allows for the records themselves and because no foundation was laid. Utah R. Evid. 803 (6). Further, an oral paraphrasing of the records violates the best evidence rule, which requires either the original records or duplicates. See Utah R. Evid. 1002–03. These errors were harmful. Where Mr. McNeil was on trial for encouraging and aiding Quentin’s assault on Mr. Fossat, the paraphrased phone records suggested Mr. McNeil and Quentin had a lengthy conversation immediately before the assault occurred—which both denied having. In an entirely circumstantial case, this was the State’s strongest evidence because it suggested that Mr. McNeil and Quentin conversed about the assault before it happened and it made each of them look like liars for denying it. The admitted hearsay is harmful error that prejudiced Mr. McNeil. An independent, constitutional ground for reversal exists because the State did not establish that the paraphrased phone records were not testimonial hearsay and did not provide Mr. McNeil with an opportunity to cross-examine the phone company’s records custodian in violation of the Confrontation Clause. Thus, because admission of the hearsay paraphrased phone

records was harmful error and violated Mr. McNeil's rights under the Sixth Amendment, this Court should reverse and remand for a new trial.

B. The Admission of Mr. Fossat's Daughter's Statement During Mr. Fossat's Testimony That She Was Not Involved in Quentin's Drug Deals Was Harmful Error That Prejudiced Mr. McNeil.

When the trial court overruled defense counsel's hearsay objection to Mr. Fossat's testimony that his daughter had told him, in essence, that she was not involved in any drug deals with Quentin, the Court committed harmful error that prejudiced Mr. McNeil. Again, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801. Hearsay is excluded under the Utah Rules of Evidence unless an exception applies. See Utah R. Evid. 802. The party offering the evidence—in this case, the State—bears the burden of showing that an exception applies. See, e.g., Tiliaia, 2006 UT App 474, ¶ 15.

In this instance, after Mr. Fossat had testified about how Quentin's assault had hospitalized him, the prosecutor asked, "Now, when you're at the hospital you say you talked to the detective. At this point when you're in the hospital, do you have any idea who this person was that had done this to you?" R. 772:98–99. Mr. Fossat responded,

No, I didn't have no idea and I didn't start thinking on that direction. I thought about what he said about my daughter and my son being into him for \$10,000 in drugs and I'm thinking, my daughter is pure as snow and she walked in and I asked her what are you into and she said, "Dad, if you don't know me now, you never will."

R. 772:99 (emphasis added). This drew an immediate objection from defense counsel on the grounds that it was nonresponsive and hearsay. R. 772:99. The prosecutor even offered to ask another question, but the trial court overruled the objection. R. 772:99.

But it was error for the trial court to overrule defense counsel's objection because Mr. Fossat's daughter's statement was hearsay. Mr. Fossat's daughter did not testify at Mr. McNeil's trial, so Mr. McNeil never had an opportunity to cross-examine her regarding her alleged statement. The matter asserted through Mr. Fossat's testimony, that his daughter was not involved in any drug deals with Quentin, was also highly relevant to the jury's determination of the case and the State relied on this statement to prove the truth of the matter it asserted during its closing argument. R. 774:26–27. Mr. Fossat testified that Quentin told him he was assaulting him because his daughter and son-in-law owed him drug money. R. 772:84. This was one of the alternative theories defense counsel offered during closing arguments to explain why Quentin might have assaulted Mr. Fossat. R. 774:54. Defense counsel noted that police had not explored the drug connection as a possible motive for the assault, fixating instead on Mr. McNeil. R. 774:54–55. By contrast, the State argued during closing that the jury should consider Mr. Fossat's daughter's out-of-court, hearsay statement as a reason to discount the theory that Quentin could have been motivated by a drug debt to assault, burglarize, and rob Mr. Fossat. R. 774:26–27. Offered and argued to prove the truth of the matter asserted, Mr. Fossat's daughter's purported out-of-court statement was hearsay. See Utah R. Evid. 801(c). Because the State offered no reason why this statement should have been allowed under a hearsay exception, its admission violated rule 802 and was error. See Utah R. Evid. 802.

It was also harmful error because it undermined and was inconsistent with a defense theory of the case. "Error is harmful if it is reasonably likely that the error affected the outcome of the proceedings." King, 2010 UT App 396, ¶ 40 (internal quotation marks

omitted). In State v. Reyes, this Court considered under a plain error standard of review whether there was a reasonable likelihood that, absent a trial court’s error—allowing an officer to testify that the defendant invoked his right to remain silent while he was in custody—“there [was] a reasonable likelihood of a more favorable outcome for the [defendant].” 861 P.2d 1055, 1057 (Utah Ct. App. 1993). In determining whether the error was prejudicial, this Court considered “whether there was overwhelming evidence of the defendant’s guilt,” whether a curative instruction had been given, and whether the comment was isolated. Id. The defendant’s theory was that the State’s principal witness (“a former drug addict, thief, and liar”) had planted cocaine to frame him. Id. at 1056–57. This Court held that “the elicited comment prejudiced [the defendant] because his refusal to talk to the police could be seen as inconsistent with his defense theory that [the State’s witness] planted the cocaine to frame him.” Id. at 1057 (emphasis added). This Court also noted that the evidence against the defendant, primarily the testimony of a liar, “was not overwhelming.” Id. The Court reached this holding even though the trial court gave a curative instruction and the State did not refer to the officer’s statement in closing. Id.

Similarly, in State v. Bujan, this Court considered whether the erroneous admission of hearsay evidence prejudiced a defendant accused of sexually abusing a child. 2006 UT App 322, ¶¶ 30–32, 142 P.3d 581, aff’d 2008 UT 47. In that case, where the defendant challenged the truthfulness of the alleged victim’s accusations, a detective and witness for the State offered a prior consistent statement by the alleged victim made after a motive for untruthfulness had already arisen. Id. ¶ 29. This Court concluded that without “physical evidence,” or “testimony directly supporting [the victim’s] account of the night in question,”

the detective's testimony provided "the only corroboration of [the victim's] alleged rape." Id.

¶ 32. This Court held "that there was a likelihood of prejudice because the likelihood of a different outcome [was] sufficiently high to undermine confidence in the verdict." Id. (internal quotation marks omitted).

For reasons similar to those cited by this Court in the cases above, admitting Mr. Fossat's daughter's hearsay statement was prejudicial error. As in Bujan, there was no physical evidence corroborating Mr. McNeil's participation in the crime—in fact, the State admitted its case was based on circumstantial evidence. R.774:38–39. And as in Reyes, the State's case relied heavily on the testimony of an untrustworthy witness and, in this case, that witness admitted he had lied in implicating Mr. McNeil to get a better sentence for the underlying crimes he admitted committing. R. 773:49. Thus, the State's evidence was, as in Reyes, "not overwhelming"—and even resulted in acquittals on three of the State's charges.

Moreover, like the detective's testimony in Bujan, Mr. Fossat's daughter's statement was the only evidence corroborating the State's claim that Mr. Fossat's daughter and son-in-law did not owe Quentin drug money. R. 774:26–27. And as in Reyes, the erroneously admitted statement was inconsistent with a defense theory—that Quentin's assault was motivated by a drug debt. R. 774:54. But unlike in Reyes, the State referred explicitly to the objectionable statement during closing, R. 774:26–27, and the trial court, having overruled defense counsel's objection, offered no curative instruction. This hearsay unfairly undermined a defense theory and bolstered the State's contention that Mr. McNeil must have motivated Quentin to assault Mr. Fossat. Given the especially close nature of this case, with only one conviction out of four charges, absent the hearsay evidence, "the likelihood of

a different outcome is sufficiently high to undermine confidence in the verdict” and this Court should reverse. See Bujan, 2006 UT App 322, ¶ 32 (internal quotation marks omitted).

C. Defense Counsel Was Ineffective for Failing to Object to Ms. Crandall’s Paraphrasing of Quentin’s Inconsistent Hearsay Statement and Her Inappropriate Opinion Regarding Quentin’s Truthfulness at the Preliminary Hearing and It Was Plain Error to Admit These Statements

When Ms. Crandall, the prosecutor who made a deal with Quentin for his testimony against his father, testified at Mr. McNeil’s trial that “Quentin came forward and said he wanted to say what had happened, he wanted to tell the truth,” R. 773:70, she offered hearsay testimony that prejudiced Mr. McNeil by bolstering the State’s version of events and violated Mr. McNeil’s constitutional right to confront Quentin. It was plain error to admit this testimony and defense counsel was ineffective for failing to object. Ms. Crandall’s statement that she did not follow through with her end of the bargain with Quentin because he had not told the truth violated rule 608(a) because it opined about Quentin’s truthfulness on a particular occasion. Utah R. Evid. 608 (a). This statement undercut the defense theory that Quentin was telling the truth at the preliminary hearing when he said Mr. McNeil was not involved. These two improper statements worked together to steer the jury toward believing Quentin’s earlier version of events—which prejudiced Mr. McNeil.

Once again, Quentin’s statement to Ms. Crandall was hearsay. It was a statement he made while not testifying in court and it was offered by the State to prove the truth of the matter he asserted—that his confession to Ms. Crandall implicating his father was what really happened, that it was the truth. See Utah R. Evid. 801.

The Utah Rules of Evidence allow for certain out-of-court statements to be admitted if a declarant is unavailable as a witness. Utah R. Evid. 804. For instance, when a witness is

unavailable to testify, rule 804 may allow testimony from an earlier hearing to be read into the record if there was an adequate opportunity for cross-examination at that hearing. R. 804(b)(1). The trial court allowed Quentin's preliminary hearing transcript under this rule. R. 773:32–33.

But this rule does not allow for all out-of-court statements made by an unavailable witness. Prior inconsistent statements are only admissible if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." Utah R. Evid. 801 (d)(1)(A). So for instance, in State v. Barker, when the State offered a prior inconsistent statement of a witness to impeach that witness, this Court ruled that the statement was inadmissible hearsay because the witness was not available for cross-examination concerning the statement. 797 P.2d 452, 455 (Utah Ct. App. 1990). This Court reasoned,

rule 801(d)(1) applies only if the declarant "is subject to cross-examination concerning the statement." Thus, if the declarant's out-of-court, inconsistent statement is introduced, the party adversely affected by it has a right to examine the declarant concerning the statement. In this case, the defense asked to recall [the declarant], but the request was denied. . . . The statement should therefore have been excluded, if the defense was not to be permitted to call [the declarant] in rebuttal.

Id. (emphasis added) (footnote omitted).

This case presents similar facts. Following the reading of Quentin's transcript, the State called Quentin's attorney, Mr. Finlayson, and Quentin's prosecutor, Ms. Crandall, to impeach Quentin's statement at the preliminary hearing that he had "told [the detective] what I felt you guys wanted to hear to get a better sentence for myself. That was the advice I received from my counsel." R. 773:49. Mr. Finlayson verified that he had told Quentin "if he provided some assistance and testified that . . . Ms. Crandall . . . had agreed to at least write a

letter to the parole board” R. 773:59. The State also attempted to bring in a recording of Quentin’s statement to the detectives, but the trial court would not allow it, reasoning,

You can’t impeach a person who didn’t testify. . . . You can’t impeach him if he didn’t appear, if the person is not available, they cannot be impeached. . . . He made himself unavailable That’s the problem. If he were here, so you could . . . [ask] “Did you say X,Y, and Z?” And he said, “No, I didn’t,” then you’d be able to say “Why?” And then [defense counsel] would have a chance to go after him on that and then you go in and impeach him.

R. 773:57–58. When the State argued that the opportunity for cross-examination was available at the preliminary hearing, the Court responded, “Right. So that’s . . . the reason the transcript came in. Otherwise it wouldn’t have.” R. 773:58.

After the trial court rejected the State’s attempt to use Quentin’s out-of-court inconsistent statement to impeach what he said in his transcript, the State called Ms. Crandall—who was Quentin’s prosecutor and who had been prosecuting Mr. McNeil through the preliminary hearing—to impeach Quentin’s statements in the transcript. R. 773:65; see R. 770:2 (appearing for the State at Mr. McNeil’s preliminary hearing). Ms. Crandall said she never agreed to try to lower Quentin’s sentence but acknowledged that she did agree to write a letter to the Board of Pardons if Quentin cooperated, since “it’s up to the Board of Pardons how long someone is in prison. It’s not up to us anyway.” R. 773:70. She characterized their deal using the following language:

Quentin came forward and said he wanted to say what had happened, he wanted to tell the truth. I said that if he did do that in court and he said what really happened of how the whole incident occurred, if he told the complete truth then I would write a letter to the Board of Pardons indicating that he had told the whole truth of what happened and taken responsibility for his role in it.

R. 773:70–71 (emphases added). When asked if she ever wrote “that letter,” Ms. Crandall said, “I did not because he did not do that,” which implied to the jury that Ms. Crandall believed that Quentin’s testimony at the preliminary hearing was not “what really happened” or “the complete truth.” R. 773:71. Ms. Crandall’s testimony was aimed at minimizing the benefit Quentin received by dealing with the State, but also at using Quentin’s own inconsistent statement to impeach his statements from the preliminary hearing. It also effectively allowed Ms. Crandall to testify under oath that it was her opinion that Quentin’s testimony at the preliminary hearing was a lie.

For the reasons discussed by this Court in Barker, and for the reasons the trial court gave when it excluded Quentin’s other inconsistent statements, Quentin’s inconsistent statement should have been excluded. Quentin was not available for cross-examination regarding this statement and thus it was not admissible under rule 801(d)(1)(A). Utah R. Evid. 801(d)(1)(A). Because this issue was not preserved, this Court may reach the issue either under the plain error or ineffective assistance of counsel standards. “To prove ineffective assistance of counsel, [a] defendant must show: (1) that counsel’s performance was objectively deficient and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial.” Ott, 2010 UT 1, ¶ 22 (internal quotation marks omitted). The defendant must show that the challenged action cannot be considered “sound trial strategy.” Id. ¶ 34 (internal quotation marks omitted).

It could not have been sound trial strategy to allow Ms. Crandall’s paraphrasing of Quentin’s alleged motive for implicating his father. Mr. McNeil’s entire defense required the jury not to believe the interview his son gave detectives that implicated him. Defense counsel

properly objected to the admission of this interview and the interview itself was not allowed.

R. 773:57–58. Indeed, that sustained objection indicates defense counsel’s strategy was to exclude Quentin’s earlier statements. Ms. Crandall’s testimony was designed to counter Quentin’s claim at the preliminary hearing that he implicated his father to get a better sentence for himself, which was the defense theory. The State used Quentin’s own words to establish the State’s theory of the case—that Quentin wanted to tell the truth to Ms. Crandall, but changed his story at trial out of fear of or respect for Mr. McNeil. Defense counsel could not allow inadmissible evidence that led the jury to believe the State’s theory because it would mean a certain guilty verdict. Since it could not have been sound strategy to allow the statement, the presence of a binding rule (801 (d)(1)(A)) and a court of appeals case directly on point (Barker) that would allow for the statement’s exclusion—and even a previous, favorable ruling from the trial court on the exact same issue excluding the exact same kind of evidence—means counsel performed deficiently in failing to object.

And for the same reasons it could not have been sound trial strategy to admit this evidence, there is also a reasonable probability it affected the outcome of the trial. In State v. Bujan, this Court found prejudicial error when a detective improperly bolstered a victim’s testimony with a prior consistent statement. 2006 UT App 322, ¶¶ 30–32. The detective’s testimony provided the only corroboration of the victim’s version of events—a sexual assault. Id. ¶ 32. Here as in Bujan, the State’s case rested on whether the jury believed a witness’s version of events; in this case, the State needed the jury to believe the incriminating remarks Quentin had told detectives about his father, even though he later withdrew those accusations. If the jury believed that Quentin made the earlier version of events up to get a

better deal for himself, as he claimed, and his father wasn't really involved, then the State's other evidence wouldn't matter because regardless of what else the State showed, the crime was Quentin's idea and, per Quentin's testimony, Mr. McNeil did not participate therein. Just as in Bujan, the State unfairly bolstered a witness's version of events with a prior statement, and just as in Bujan, the State needed the jury to believe that version of events to obtain a conviction. For these reasons, defense counsel's failure to object prejudiced Mr. McNeil and this Court should reverse.

It was also plain error for the trial court not to strike Ms. Crandall's repetition of Quentin's statement. Plain error exists if there is an error that should have been obvious to the district court that is harmful to the defendant. Larsen, 2005 UT App 201, ¶ 3. "An error is obvious if the law on the area was 'sufficiently clear or plainly settled[.]'" Id. ¶ 5 (quoting Dean, 2004 UT 63, ¶¶ 16-17). For all the reasons stated above, it is plainly settled that if a witness is unavailable for cross-examination, he may not be impeached by prior inconsistent statements. It violates Utah R. Evid. 801 (d)(1)(A) and it violates this Court's holding in Barker. See 797 P.2d at 455. But perhaps the reason this error should have been most obvious to the trial court is that it had, moments before, properly excluded the exact same kind of evidence (an earlier statement by Quentin) for the exact same reason (it was hearsay). R. 773:57-58. Therefore, admitting the hearsay statement was error, it was obvious that the statement was hearsay, and, for the reasons stated above, the statement prejudiced Mr. McNeil. Thus, this Court may reverse under the plain error standard.

For the reasons discussed in supra Part I.A., this hearsay statement also violated Mr. McNeil's constitutional right to confront Quentin. When the State seeks to introduce a

testimonial statement against a defendant and the witness is unavailable, there must be a prior opportunity for cross-examination about that statement. Crawford, 541 U.S. at 68; Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011) (“Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial.” (emphasis added)). The term “testimonial” applies to “a formal statement to government officers . . . , similar pretrial statements that declarants would reasonably expect to be used prosecutorially, [and] confessions.” See Crawford, 541 U.S. at 51–52 (internal quotation marks omitted). Interrogations by law enforcement officers are testimonial hearsay. Id. at 53.

Here, there is no question that Quentin’s statement to Ms. Crandall was testimonial. It was a formal confession to a government officer that Quentin expected to be used prosecutorially against his father. While Mr. McNeil did have an opportunity to cross-examine Quentin at the preliminary hearing, he never had an opportunity to cross-examine Quentin about the statement Ms. Crandall introduced because the State never asked Quentin about it at the preliminary hearing. Thus, the admission of this statement was testimonial hearsay without a prior opportunity for cross-examination that violated Mr. McNeil’s rights under the Sixth Amendment and Crawford. See id. at 68; Bryant, 131 S. Ct. at 1155.

But Ms. Crandall’s testimony was unfairly prejudicial for an additional reason. Not only did she offer Quentin’s statement that he was motivated to implicate his father because he wanted to tell the truth, she also offered her opinion that the testimony Quentin offered at the preliminary hearing was not the truth. Utah Rule of Evidence 608 “permits testimony

concerning a witness's general character or reputation for truthfulness or untruthfulness but prohibits any testimony as to a witness's truthfulness on a particular occasion." Rimmasch, 775 P.2d at 391; Utah R. Evid. 608. In Rimmasch, the Utah Supreme Court held that the admission of an expert witness's testimony opinion as to the truthfulness of the victim's allegations of sexual abuse was error. Rimmasch, 775 P.2d at 393; see also State v. Brown, No. 990874-CA, 2001 WL 495918, at *1 (Utah Ct. App. May 10, 2001) ("Rule 608(a) prohibits testimony, by either a lay or expert witness, as to the truthfulness of a witness on a particular occasion." (emphasis added) (internal quotation marks omitted)). And in a case that "hinged on a determination of credibility," the court held that "the [victim's] version of events was bolstered" by the testimony of that expert and other experts. Rimmasch, 775 P.2d at 407. Thus, the court found prejudicial error and reversed. Id. at 408.

This case is similar. Ms. Crandall's statement implying that Quentin was not truthful in the proceedings against Mr. McNeil, R. 773:70, was an opinion of Quentin's truthfulness at the preliminary hearing. This is plainly forbidden by rule 608 and Rimmasch. See Utah R. Evid. 608(a); 775 P.2d at 391. While this issue was not preserved, it was plain error to admit the statement and counsel was ineffective for not objecting. Mr. McNeil's defense depended on the jury disbelieving Quentin's statements to the detectives and Ms. Crandall and believing what he said at the preliminary hearing—that he had acted on his own without Mr. McNeil's input. It could not have been sound trial strategy to permit Ms. Crandall's opinion to go to the jury because she discredited Quentin's preliminary hearing statement and her opinion bore the imprimatur of a State prosecutor. The rule and case law forbidding such testimony are unambiguous and, as such, should have been obvious to the trial court and to

counsel, who should have objected. As in Rimmasch, the admission of this testimony was prejudicial because it bolstered the credibility of Quentin's statement implicating Mr. McNeil and attacked the statement that exonerated him. In a case that "hinged on a determination of credibility," Rimmasch, 775 P.2d at 407, Ms. Crandall—with all of the weight and respectability of a State prosecutor—destroyed the credibility of Quentin's preliminary hearing exoneration of Mr. McNeil, and this Court should reverse.

Ms. Crandall's statements that Quentin told her he wanted to tell the truth when he implicated his father in Mr. Fossat's assault and that she did not follow through with her deal because he wasn't truthful in the proceedings against Mr. McNeil worked together to decimate Mr. McNeil's defense by discrediting Mr. McNeil's version of events and bolstering the State's version. R. 773:70–71. In a case largely about credibility, it is reasonably likely that this attack had significant consequences as it bore the imprimatur of a State prosecutor. Because both of these statements are plainly forbidden under the Utah Rules of Evidence and Utah case law, it was plain error for the trial court not to exclude them and counsel was ineffective for not objecting. Therefore, this Court should reverse Mr. McNeil's conviction.

II. THE CUMULATIVE EFFECT OF THE ERRORS IN MR. MCNEIL'S TRIAL MERITS REVERSAL

The cumulative effect of the admission of three different pieces of hearsay evidence was to prejudice Mr. McNeil and undermine confidence that a fair trial was had. "Under the cumulative error doctrine," this Court may reverse "if 'the cumulative effect of . . . several errors undermines . . . confidence . . . that a fair trial was had.'" State v. King, 2010 UT App 396, ¶ 35, 248 P.3d 984 (second alteration in original) (quoting State v. Dunn, 850 P.2d 1201, 1229 (Utah 1993)). "In assessing a cumulative error claim," this Court "consider[s] all the

identified errors.” Id. (quoting Dunn, 850 P.2d at 1229). This Court is “more willing to reverse when a conviction is based on comparatively thin evidence.” Id.

For instance, in King, this Court reversed a defendant’s conviction of forcible sexual abuse when “the prosecutor made two statements during closing argument that were mischaracterizations of the evidence in the record.” Id. ¶ 36. In each instance, there was no evidence in the record to support the prosecutor’s statements. Id. ¶¶ 36–37. Defense counsel did not object and no curative instruction was given. Id. ¶ 38. Taken together, “especially considering that the State’s case against [the defendant] was not particularly strong,” these errors “shook” this Court’s confidence in the trial. Id. (internal quotation marks omitted).

This case warrants the same conclusion. The State admitted at closing that the case was based on circumstantial evidence. R. 774:39. In its argument, the State relied explicitly on two pieces of hearsay evidence that should not have been admitted. First, the State relied on Mr. Fossat’s daughter’s statement to rule out the defense theory that Quentin had robbed Mr. Fossat to collect a drug debt. R. 774:26–27. The State then relied extensively on the hearsay phone records to establish its theory that Mr. McNeil had spoken to Quentin about the crime immediately before Quentin committed it. R. 774:34–38. While not mentioning the hearsay statement Ms. Crandall made about Quentin wanting to tell the truth, nor her unfairly prejudicial opinion that Quentin had not been honest in the proceedings against Mr. McNeil, the State did reference Ms. Crandall to argue the deal she offered Quentin wasn’t good. R. 774:33–34. Taken together, the State relied on these three errors to 1) imply that Mr. McNeil and Quentin had spoken together immediately before the crime—even though both denied it; 2) rule out an alternative theory of the case—that Quentin had robbed Mr.

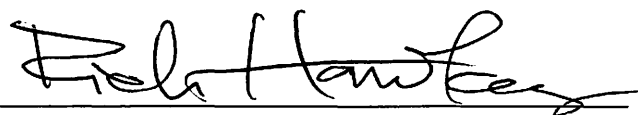
Fossat for drug money; and 3) bolster Quentin's incriminating statement to detectives while undermining his exculpatory testimony at the preliminary hearing. In a case based entirely on circumstantial evidence, this hearsay evidence bolstered the State's version of events and eliminated an explanation for the assault that did not involve Mr. McNeil.

And even with all of the prejudicial hearsay evidence, it was still a close case—the State failed to convince the jury beyond a reasonable doubt that Mr. McNeil aided or encouraged his son in robbing, burglarizing, or kidnaping Mr. Fossat. The only guilty verdict came on the assault charge after nearly five hours of deliberation. R. 479. In this close case, there is a reasonable likelihood that the State's reliance on several instances of improper hearsay affected the jury's verdict by bolstering the State's thin circumstantial evidence. As in King, this Court should “reverse [Mr. McNeil's] conviction based on the cumulative error doctrine” because the “[s]everal errors below . . . combined and considered with the weakness of the evidence against [Mr. McNeil], undermine . . . confidence that [Mr. McNeil] received a fair trial.” King, 2010 UT App, 396 ¶ 38 (internal quotation marks omitted).

CONCLUSION

Because three separate instances of admitted hearsay individually and cumulatively prejudiced Mr. McNeil and violated his constitutional right to confront witnesses, this Court should reverse Mr. McNeil's conviction for Aggravated Assault and remand for a new trial.

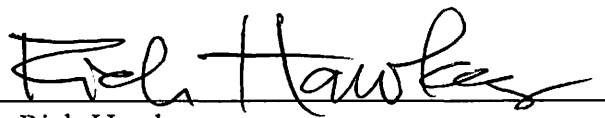
SUBMITTED this 7 day of September, 2011.



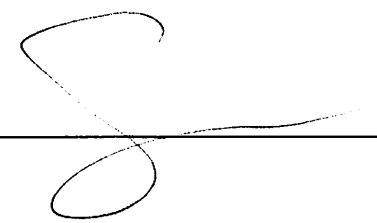
E. Rich Hawkes
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, E. Rich Hawkes, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 7 day of September, 2011.


E. Rich Hawkes

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this 7 day of Sept, 2011.



Tab A

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : ORDER/SENT COMMITMENT
 : SENTENCE, JUDGMENT, COMMITMENT
 :
vs. : Case No: 081400390 FS
ROLAND MCNEIL, : Judge: MARK KOURIS
Defendant. : Date: March 16, 2010
Custody: PTS - Bail

SO# 191011
PRESENT

Clerk: loriaw
Prosecutor: HILL, JOSEPH S
Defendant
Defendant's Attorney(s): PARSONS III, WILLIAM B

DEFENDANT INFORMATION

Date of birth: October 4, 1953
Audio
Tape Count: 1.47

CHARGES

4. AGGRAVATED ASSAULT - 2nd Degree Felony
Plea: Guilty - Disposition: 01/14/2010 Guilty

HEARING

Counsel argues motion to arrest judgment.
TIME: 1.52 Counsel argues motion to dismiss.
TIME: 1.55 The Court denies the motion.
TIME: 1.55 Counsel argues the motion to strike sentencing memorandum.
TIME: 2.04 The Court has not received the memorandum therefore it is not an issue.
TIME: 2.13 Alan Fossat addresses the Court.
TIME: 2.15 Mr. McNeil addresses the Court.
TIME: 2.18 THE COURT ORDERS THE DEFENDANT TO SERVE 365 DAYS IN THE SALT LAKE COUNTY JAIL FORTHWITH. NO SHED, NO ANKLE MONITOR, NO GOOD TIME, NO EARLY RELEASE, NO CREDIT FOR TIME SERVED.
TIME: 1.51 The Court denies the motion.

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ASSAULT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

COMMUNITY SERVICE

Complete 200 hour(s) of community service.
Community service to be completed through Adult Probation & Parole.

ORDER OF PROBATION

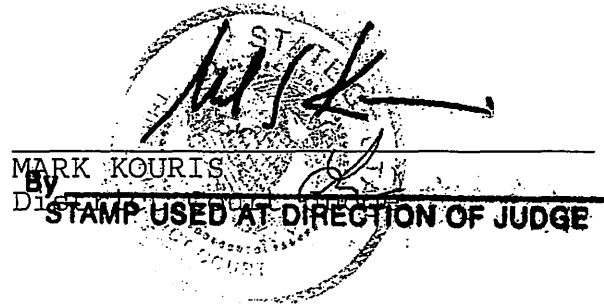
The defendant is placed on probation for 60 month(s).
Probation is to be supervised by Adult Probation & Parole.
The imposition of sentence is stayed and the defendant is placed on probation.

PROBATION CONDITIONS

No other violations.
Comply with Adult Probation and Parole.
Notify the court of any address change.
Timely payments of all fines, attorney fees and restitution.
No contact directly or indirectly with the victim.
Report to AP&P within 24 hours of release from jail.
THE COURT ORDERS DEFENDANT TO SERVE 365 DAYS IN THE SALT LAKE COUNTY JAIL FORTHWITH. NO SHED, NO GOOD TIME, NO EARLY RELEASE, NO ANKLE MONITOR, NO CREDIT FOR TIME SERVED.
Complete a mental health evaluation and all recommendations
Complete MRT training.
Complete 200 hours of community service at the rate of 10 hours per month starting 2 months after release.
Pay \$45,769 in restitution in full
The State has 90 days to submit a supplemental order for restitution. The Defense has 30 days to respond.
No contact with victims, witnesses

Courtroom 31 end time 2.20

Date: 3-16-10



Tab B

U.S. CONST. AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UTAH CODE ANN. 1953 § 76-5-103 (2008)

§ 76-5-103. Aggravated assault

(1) A person commits aggravated assault if the person commits assault as defined in Section 76-5-102 and uses:

(a) a dangerous weapon as defined in Section 76-1-601; or

(b) other means or force likely to produce death or serious bodily injury.

(2)(a) A violation of Subsection (1) is a third degree felony, except under Subsection (2)(b).

(b) A violation of Subsection (1) that results in serious bodily injury is a second degree felony.

UTAH R. EVID. 608

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(c) **Evidence of bias.** Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

UTAH R. EVID. 801

(a) **Statement.** A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A “declarant” is a person who makes a statement.

(c) **Hearsay.** “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

UTAH R. EVID. 802

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by law or by these rules.

UTAH R. EVID. 803

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.
- (2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
- (4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- (6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
- (7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data com-

pilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organization. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judg-

ment, if the same would be provable by evidence of reputation.

UTAH R. EVID. 804

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant:

(a)(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(a)(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(a)(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(a)(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(a)(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(b)(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(b)(2) *Statement under belief of impending death.* In a civil or criminal action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, if the judge finds it was made in good faith.

(b)(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(b)(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

UTAH R. EVID. 805

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

UTAH R. EVID. 1002

RULE 1002. REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by Statute.

UTAH R. EVID. 1003

RULE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

UTAH R. EVID. 1102

RULE 1102. RELIABLE HEARSAY IN CRIMINAL PRELIMINARY EXAMINATIONS

(a) **Statement of the Rule.** Reliable hearsay is admissible at criminal preliminary examinations.

(b) **Definition of Reliable Hearsay.** For purposes of criminal preliminary examinations only, reliable hearsay includes:

- (1) hearsay evidence admissible at trial under the Utah Rules of Evidence;
- (2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;
- (3) evidence establishing the foundation for or the authenticity of any exhibit;
- (4) scientific, laboratory, or forensic reports and records;
- (5) medical and autopsy reports and records;
- (6) a statement of a non-testifying peace officer to a testifying peace officer;
- (7) a statement made by a child victim of physical abuse or a sexual offense which is promptly reported by the child victim and recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure;
- (8) a statement of a declarant that is written, recorded, or transcribed verbatim which is:
 - (A) under oath or affirmation; or
 - (B) pursuant to a notification to the declarant that a false statement made therein is punishable.

(9) other hearsay evidence with similar indicia of reliability, regardless of admissibility at trial under Rules 803 and 804 of the Utah Rules of Evidence.

(c) Continuance for Production of Additional Evidence. If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

(1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or

(2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

Tab C

IN THE THIRD DISTRICT COURT - WEST JORDAN

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

: Case No. 081400390

Plaintiff,

: Appellate Case No. 20100695

v

ROLAND McNEIL,

Defendant.

: With Keyword Index

PARTIAL TRANSCRIPT - JURY SELECTION ONLY JANUARY 12, 2010

BEFORE

THE HONORABLE MARK KOURIS

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
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APPEARANCES

For the Plaintiff:

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* * *

1 witnesses might be called, so I'm going to read those names
2 out right now and see if anybody in the panel has any
3 knowledge of those folks. The first is Ralph Astorga,
4 A-S-T-O-R-G-A. The next person is Ronald Black, and the last
5 person is a person named Don Hanley, who is - apparently also
6 goes by Lucky. Is anybody aware of those folks? Okay.
7 There are - as far as finishing up here, there are three
8 people that what we're going to do is take them back here
9 into the jury room, so what I'm going to do - yes?

10 MR. HILL: Judge, I'm sorry to interrupt real
11 briefly. There's one other additional witness that I forgot,
12 I may or may not call, it's a representative from Cricket
13 Communications, and I actually don't know what their name is.
14 They're just a local -

15 THE COURT: Does anybody know that person? That was
16 a joke. All right. So what we'll do, then, is we will have
17 the attorneys right now adjourn back here, and then I'll have
18 my bailiff come, there's only three people we're going to ask
19 a couple extra questions to, and then I swear we're going to
20 have you out of here in no time, and thank you so much for
21 your indulgence.

22 (Off the record from 11:14:33 to 11:27:54.)

23 THE COURT: Okay. Okay. First of all, I've asked
24 that, with the one exception that Mr. Parsons will make on
25 the record later on, with that exception, do both sides